Daniel #5

TERMINATION APPEAL PROCEDURE

In the Matter of the Arbitration Between:

EMPLOYER, INC.

and

EMPLOYEE

ARBITRATOR: WILLIAM P. DANIEL

FACTS

The claimant had been employed in a management capacity for more than six years and was well-experienced in the food operation of a supermarket. He had worked as bakery manager, seafood manager, deli manager, and food services manager before being promoted to supermarket manager at store #48 in April, 1992. In this capacity, he supervised 6 department managers - grocery, meat, seafood, produce, deli, and bakery. The next higher position at the supermarket was occupied by Store Director Person 1. Due to the high level of responsibility of the position of supermarket manager, the claimant was regarded as second in command at the store and acted in the capacity of store director whenever he was not present.

On September 13, 1993, the claimant went to the break room with two other management associates, Person 2 and Person 3, at about 4:00 p.m. He purchased a Payday candy bar and the other two bought soft drinks from the vending machines. They were sitting at a table together when a non-managerial employee, Person 4, entered the room on his break and deposited $0.55 in the vending machine for a Payday candy bar. The machine dispensed two candy bars at that time. According to Person 4, he was uncertain exactly what to do but realized that by store policy he was not entitled to keep such excess merchandise. He immediately walked to the table where

the three managers were sitting and put the second candy bar on the table in front of the claimant indicating that the machine" had malfunctioned. The claimant picked up the candy bar and subsequently consumed it. Some discussion occurred between the three managers before he did so.

According to Person 2 and Person 3, and somewhat conceded by the claimant, as he picked it up he said "It's mine" and looking at Person 2 said "Should I?" Person 2's response was that he should take it to the front courtesy desk but according to Person 2 and Person 3 the claimant simply smiled and opened the candy wrapper. Person 2 testified that he was astounded that he was doing that and said, "What are you doing, are you crazy? You can't eat that, you could lose your job." To that the claimant replied "The machine owes me". Person 3 asked him "How do you plan on paying for the candy bar?" and the claimant replied that if it was a problem, he would pay the vendor the next time he saw him. At that point, Person 2 and Person 3 asked the claimant, "Is a 55 cent candy bar worth a $50,000 a year job?" He made no reply and took a bite of the candy bar. The claimant denied the question put to Person 2 of "Should I" or that the remark of whether the candy bar was worth his job was made until after he had opened the wrapper. All witnesses agree that the claimant responded to the cautions of the others by indicating that he had lost money in the vending machine previously trying to buy the same kind of candy bar.

Once the claimant commenced eating the candy bar, Person 2 and Person 3 got up from the table and moved to another one. The claimant recalled that it seemed to be in a jovial fashion and not indicating any serious problem. Person 2 and Person 3 emphatically denied that there was any joking about it; they moved because they were shocked by what he had done. Person 4 testified he had seen them move from the table and thought it was humorous at the time. Person

2 and Person 3 left the break room and returned to the managers' office waiting a few minutes to see if the claimant would be doing anything more. They were most upset about the situation because they realized, by Employer policy, they had the responsibility for reporting any such violations. They both agreed that they would have to do so and contacted Store Manager Person 5 about it. He asked them to write statements explaining what had happened and they did so. Person 5 reviewed the reports the next day and contacted Labor Relations Specialist Person 6 at Employer headquarters. Person 6 directed a corporate investigator, Person 7, to go to the store to interview the claimant. That same morning, the claimant had contacted the vending machine operator and paid him for the candy bar.

When Person 7 arrived at the store, she reviewed the written reports, interviewed the claimant, and confirmed that he had eaten the candy after he had been told by the other two managers that he should not do. He conceded to her that he knew the Employer policy required that he pay for any merchandise before he consumed it. When asked his reasons for not doing so, he told her that he had not thought about it, that the vending machine owed him money anyway and that he intended to pay for it later which he had done that morning. At the time of the interview by Person 7 and at the hearing, the claimant explained what he had meant by his remark that the machine "owes me". He related that a few days prior to the incident, he had put money in the machine for a Payday candy bar and it had malfunctioned giving him no merchandise at all. He had not reported this to the vendor nor sought to get reimbursement. He asserted that another manager, Person 8, had been present on that occasion. However, when asked, she testified that she did not recall the incident but that it might have happened sometime in the past. She did testify to another incident when the claimant observed an employee get two candy bars for the price of one and told him to keep the merchandise while other persons told

him that the correct procedure was to turn the extra candy bar in at the front courtesy desk. The claimant specifically denied any such incident ever occurred and notes of Person 8's interview did not include such reference.

Testimony developed by the employer indicated that the claimant had received a copy of the handbook and notices notebook and was acquainted with the policies and that furthermore, as a manager, he had reviewed such information with newly hired associates on a number of occasions. He conceded on cross-examination that he understood that he was not supposed to consume any product without paying for it first.

Upon conclusion of the investigation, the clamant was terminated for violation of the policy prohibiting consumption of food and beverage without prior payment. The Employer presented evidence that violators of that rule have always been terminated regardless of the circumstances or the value of the merchandise involved and presented detailed personnel records in support of that contention.

PERTINENT RULES AND PROCEDURES

TERMINATION APPEAL PROCEDURE

A. Purpose and Scope

> The procedure has been established to provide an exclusive, final and binding method for the Employer and any eligible associate to resolve all claims, controversies, disputes or complaints arising out of or relating to the associate's termination from employment, including any claims or complaints based on federal, state or local law. In the event an associate who is eligible to use this procedure has a complaint about his or her termination from employment, it will be resolved in accordance with this procedure.
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B. Definitions

> Termination from employment means an involuntary and permanent separation from employment by the Employer and includes any actual or constructive discharge, dismissal, firing or release.
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C. Eligibility

All non-probationary full-time and irregular part-time associates who are classified as office, management and professional (OMP) and who are not covered by a collective bargaining agreement 0,211 have the right to use this procedure. Officers of the Employer, seasonal, temporary and call-in associates are employed at will and may be discharged at any time for any reason at the sole discretion of the Employer.

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L. Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate's termination from employment. The arbitrator shall have the authority to determine whether the termination was lawful under applicable federal, state and local law and to determine whether the Employer had just cause for termination.

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination appeal Form or which was raised at the arbitration hearing and which is not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable federal, state, or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have authority to consider or decide matters which are the sole responsibility of the Employer in the management and conduct of its business.

If the arbitrator finds that the associate violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action.

M. Relief

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the awarded [sic] the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment

compensation payments, and any amount attributable to the associate's failure to mitigate damages.

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P. Attorney and Other Fees

Neither party shall be liable for the payment of expenses or fees charged to the other party by any attorney, other representative or witness, except as may be appropriately awarded under applicable law.

THEFT POLICY

Associates involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow associates, vendors, or suppliers, will be terminated, regardless of the amount of value of the merchandise, their work record or length of service.

POSITIONS OF THE PARTIES

EMPLOYER: The claimant is an experienced management associate well familiar with the employer's rules, regulations and policies who knew beforehand that consumption of merchandise without paying constituted a violation of the theft policy of the Employer which would automatically result in termination. He occupied a very responsible position at the store and was required to know and apply all the Employer's rules, regulations and policies to all of the employees under his direction and supervision.

By past incidents he also knew that the appropriate procedure in the case of extra merchandise coming from machines without payment was to take the merchandise to the front desk and report the matter. He had specifically witnessed incidents of this nature in the past. Nevertheless, on the day in question when he came into possession of a candy bar resulting from the malfunctioning of a vending machine, he did not follow the -well-known and specific procedure but instead ate it without having paid for it. He was warned a number of times by fellow management associates but nevertheless persisted in that action.

He has admitted he knew the policy and that he ate the candy bar and that he had not paid for it. His explanation that he did not think about, that the machine owed him money, and that he intended to pay for it later is immaterial and incredible. The fact that he subsequently paid the vendor after the act in no way mitigates the circumstances. There is no evidence but his own word that the machine "owed him" for some previous malfunction - in fact he had not attempted to contact the vendor for a refund in that circumstance but apparently decided to seek self-help. This, he was not entitled to do and he knew it.

The Employer's policy is fair and reasonable particularly in this industry and is well published and well known to every employee including the claimant. The consumption of the candy bar under these circumstances constitutes a form of theft. The Employer has consistently over the years always discharged for violation of this policy and the evidence supports that practice. The claimant violated the intentional taking part of the theft policy and also the unauthorized possession/consumption aspect. He has absolutely no defense for his actions and which constituted an intentional, calculated and flagrant disregard of policy in the presence of other employees and managers.

The arbitrator, by this procedure, is obliged to uphold the termination for just cause. It is the Employer's right to establish such rules and procedures and to terminate for violation and that has been recognized and upheld by the Michigan Supreme Court. For these reasons, the grievance should be dismissed.

CLAIMANT: The employer's case has many deficiencies which should result in the arbitrator returning the claimant to work with full remedy. First, the employer has failed to prove that the candy bar was not the claimant's. The claimant regarded it simply as a return to him by the machine of merchandise for which he had previously paid. Under these circumstances, it is

entirely reasonable that he would say "It's mine" and consume it. He had a reasonable basis for this perception and, therefore, he did not act with wrongful intent and should not be held to have violated the policy. The casual and spontaneous events which occurred clearly show that there was no calculation or deception involved.

There is good reason to believe that the claimant did not know how the Employer policies applied to the specific circumstance with which he was confronted. Testimony of another manager that the claimant had witnessed similar acts previously has no support in the record at all, was not part of her original written statement and is denied specifically by the claimant. Though fellow store managers Person 2 and Person 3 testified that they warned him beforehand, the fact is that they did not, rather waiting until he had already taken a bite out of the candy bar. That would be entirely consistent with the claimant's perception and observer Person 4's interpretation that the matter was simply a joke between the three people. When Person 2 and Person 3 got up to leave the table, it was only part of a humorous interlude and in no way disapproving of what the claimant had done. Once the claimant had opened the candy bar without any warning, it was too late for any such "warnings" to have any meaning and Person 2 and Person 3 did not so intend.

Any admissions the claimant made in the course of his interview were the result of misunderstanding questions put to him by Person 7 and her presumption that the candy bar was not his to start rather than simply a return of something that he had previously paid for. It is clear from the evidence in this case that the claimant did nothing to come into possession of the candy bar and was not involved in any "theft". Secondly, this is not a situation where he had done anything more than receive a candy bar from another person. He had no responsibilities at that time once he perceived that he was getting back that which he had previously paid for.

He was concerned with appearances and the perception of his fellow managers and so immediately the next morning, before he was ever notified of any report or interview over the matter, he paid the vendor the appropriate amount. This clearly shows that he did not intend to take something improperly. Regardless of the fact that the employer's policy alludes to value being immaterial, the fact is that there is a wide range of "misconduct" between this case involving a 55 cent candy bar and others that might involve significantly greater sums of money and value. It could not be reasonable for the employer to apply the same policy equally in every case and the claimant rightfully believed that in this instance the policy took such into consideration and he was free to act. The fact is that the claimant simply did not think there was any problem at the time he was confronted with the candy bar and immediately jumped to the recollection of his previous loss and acted automatically. He was not warned by anyone beforehand and afterwards, mulling the situation over, decided to make payment to the vendor even though he did not feel he was obliged to.

For all these reasons, the arbitrator should find that there has been no violation of the policy and that there is not just cause for the claimant's termination. He should be given full remedy of return to work and back pay and also should receive whatever other relief would be available in civil proceedings had the matter been brought before the courts.

ISSUE

By the form of grievance filed in this and stipulations of counsel, the issue is: Did the Employer have just cause to discharge the claimant?

DISCUSSION

The claimant has been a management associate for long enough that he may be assumed to be fully aware of all of the Employer's policies and procedures. Among these, of course, are

those which pertain to dishonesty and theft. Even if the Employer did not have written policies promulgated in this fashion, a management associate would understand that the consumption of merchandise without payment is a very serious matter. The manager must consistently apply such policies to those employees he supervises. Moreover, a manager does not have some special license to violate such policies but rather has even greater responsibility to observe such rules "to the letter" and, like "Caesar's wife" to be above all reproach in that respect.

While in some industries the pilfering of product or scrap may not be regarded as a serious matter in a first offense, in the food industry, it is a significant event and universally treated with very severe penalties - usually termination. Arbitrators have consistently upheld terminations in this industry for theft even of items of very small value. It is for this reason that the arbitrator concludes that the employer has full authority to promulgate such rules and procedures, to establish whatever penalty it believes is appropriate and to assess that penalty if the circumstances are proven. It is not within the jurisdiction of the arbitrator to modify such penalty if it is found that the employee was guilty of the act of dishonesty.

The evidence here is quite clear in several respects - that the claimant was presented with the merchandise and understood that it came from a malfunction of the machine and thereupon consumed it. There are aspects of the case about which the testimony of Person 2, Person 3 and Person 8 conflict with the claimant's recollection and also parts of the claimant's testimony which are not otherwise supported. It is apparent then, that certain credibility findings must be made both to determine which of the witnesses are telling the truth and whether the claimant's contentions are generally credible. Arbitrators, confronted with questions of credibility, have traditionally recognized the motivation of a grievant to testify in his own self interest contrary to the facts so as to avoid the disciplinary penalty. Of course, it must also be asked of all of the

other witnesses whether they have some motive for testifying falsely such as animosity or ill-will toward the grievant, or friendship. Applying these standards and analyzing the evidence in this case, the arbitrator has arrived at the following conclusions:

1. The claimant was well aware of the Employer's policy regarding dishonesty and that violators would be terminated.
2. He knew that malfunctioning of vending machines giving additional merchandise did not entitle anyone to retain or consume such items without payment.
3. He was given the candy bar and told by the employee what had happened so that it would be properly handled.
4. The claimant prepared to open and consume the candy bar and beforehand was warned and counseled by fellow managers not to do so.
5. He consumed the product without first having paid for it.

His testimony that the machine "owed him" might be true or it might not. There is no evidence in support of it. Person 8 indicates only that it could have happened. The arbitrator takes notice that vending machines occasionally malfunction returning neither money nor merchandise. But that is immaterial to this case; even if the claimant was owed money by the machine, the proper procedure was to get a refund from the vendor. Obviously, if the claimant was able to find the vendor after this event to pay him for a candy bar, he could have found the vendor previously to obtain a refund. Moreover, as the employer has pointed out, the defense of a malfunctioning machine, if recognized, would become commonplace in every such case with no way that the Employer could ever check the credibility of such a claim. The arbitrator agrees that the defense of "the machine owed me" is unavailable under these circumstances. The rule makes no allowance for self-help and it must be read and applied strictly according to its terms.

For that reason, the arbitrator rejects the claimant's contention that the candy bar belonged to him or that any such misperception was excusable. The claimant had full knowledge of the policy and was warned beforehand and nevertheless, acted in a calculated and intentional fashion. It may be that he acted impulsively and foolishly but that does not mitigate his misconduct.

The argument advanced by the claimant that there must be a greater range of penalties than discharge because of the variation of offenses ranging from very serious to very small amounts involved is rejected. The arbitrator's responsibility is to follow the policy and not to modify it. The policy clearly indicates that discharge will be the result of such violation and clearly the claimant was guilty of the misconduct as charged. He had numerous opportunities to avoid or mitigate responsibility: First by doing with the candy bar exactly what is required - turning it in at the courtesy desk; secondly, upon being warned, he could have stopped; and thirdly, even after having commenced in consuming it, he could have reported it immediately himself as an act of impulsiveness and misperception. He did none of these things and, therefore, he cannot now avoid the outcome.

AWARD

The employer is entitled by law to establish rules and regulations of employment and penalties for violation of such. Here, the employer has properly established a rule prohibiting the conduct involved and has established the penalty of discharge. The arbitrator finds that the claimant was guilty of the offense charged and, therefore, must uphold the penalty of discharge as being for just cause. The grievance is denied.

William P. Daniel,

Arbitrator

Dated: July 19, 1994