

Daniel #9

TERMINATION APPEAL PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER,

and

EMPLOYEE

ARBITRATOR: WILLIAM P. DANIEL

FACTS

The grievant was hired September 12, 1989 as a store detective intern in the loss prevention department at store #63. She received on the job training for a six month period and then attended a 120 hour basic training class which was taught over a period of 15 consecutive days. Because certified plain clothes store detectives who have completed such training have the power to make apprehensions particular training emphasis is placed on criminal law, civil law and constitutional law referring to specific crime situations and the liabilities of the company related to loss prevention. It is also emphasized by the various teachers that there is a priority of responsibilities for store detectives. First, they are responsible to act in cases of life and safety matters. Second, they are responsible for minimizing civil liability of the company for negligence, false arrests, false imprisonment, and defamation. Third, and of the lowest priority, is their responsibility to protect the company assets by apprehending shoplifters.

Corporate Investigator Person 1, in explaining these priorities, noted that when having to choose between them, the need to avoid liability overrides the duty to make customer contacts for loss prevention. An improper contact with a customer is considered a violation of company policy and can result in discipline up to and including termination. Both Person 1 and Corporate

Investigator, Person 2, who were knowledgeable about the grievant's training sessions, testified that all trainees were clearly instructed as to the manner and occasion when they could make contacts with customers - to make a valid apprehension only after all the elements of a crime have been established by the detective, when there was a life or safety situation or when helping a customer unlock a vehicle. Person 2 testified further that detective interns were taught that the manager-in-charge of the store, rather than the detective, was the person to make contact with a customer if that person was disorderly; was to be banned from the store; or was attempting a suspicious refund of merchandise. In such cases, he advised the trainees that the store detective's role was to contact the manager-in-charge, advise him or her of the circumstances, and then, remaining undercover, observe the manager-in-charge deal with the customer - not to intervene unless asked to do so.

The grievant was promoted to a certified store detective on June 20, 1990 and received further on-the-job training after that. Person 2 testified that it was repeatedly emphasized that store detectives were not to use certain words such as "stolen" or "thief" when making contact with customers because that could lead to liability on the part of the company.

Over the term of her employment, the grievant had numerous incidents of counseling and disciplinary action. Of particular concern to the company were repeated instances of "customer contacts". The term "customer contact" in company parlance means an improper approaching of a customer for the purpose of apprehension either without sufficient proof or where the customer, in fact, is not guilty at all of the suspected activity. Because the company views these as very serious problems involving potential civil liability, it attempts to control such conduct by progressive discipline. The discipline is based upon the seriousness of the incident which is rated by the company and set forth in explanatory documents provided to the employees. Repetition of

even lower level customer contacts will, in a progressive sense, bring gradually increasing severity of penalty. Penalties range from written discipline and counseling through suspensions and ultimately to discharge. The most serious of all customer contacts occurs when the detective makes an illegal arrest, is involved in an illegal act during apprehension or shows a serious disregard for company loss prevention policies and procedures. Such an incident may result in termination even for the first offense.

The employer presented evidence of numerous violations of customer contact policy occurring from December 1990 through March 1993. There was a second degree contact in December 1990 followed by counseling; another in October 1991 that resulted in a one day suspension due to a second degree third offense contact and in December 1991, she was counseled for a first degree contact. When another occasion arose in January 1993, she received only a counseling report for a second degree first offense customer contact because her prior progression of discipline had been eased by a washout provision.

In April 1993 Person 3 became Loss Prevention Manager at the store and was involved in other violations by the grievant of customer contact policy. In June 1993, she received counseling on a second degree second offense situation and in July 1993 another suspension of one day for a second degree third offense contact. She was warned at that time that any further second degree customer contacts within a year would result in termination. When the customer contact policy was modified shortly thereafter, all detectives, including the grievant who had pending records of second degree customer contacts, were informed that they would be placed back at the first offense level.

Subsequently, in December 1993, a serious third degree customer contact occurred. The grievant stopped a refunder whom she believed had stolen merchandise in the store and gone

directly to the refund counter with it. She relied upon video tape films of the entrance of the store to confirm this belief. She apprehended the woman and called police who took her into custody down to the police station. Upon reviewing the video-tape more closely, the grievant found that the refunder had come into the store, left and returned carrying the merchandise with her the second time. She realized that there were no elements of the crime as she had thought and informed the police who nevertheless continued to process the customer who they had arrested. The grievant was required to write a full statement and report explaining what had happened and also a statement explaining her understanding of the apprehension policy. She acknowledged then that she had lacked all of the elements of retail fraud as required by the policy. However, she indicated a misunderstanding of the level of proof necessary, which concerned Person 3 greatly. He contacted the OPM Relations Manager, Person 4, indicating that he believed the grievant had exhibited a "total disregard for what she had been taught" and that she previously had been counseled about all the elements of the crime necessary under the policy and yet had failed to follow that. He recommended that the grievant be either terminated or reassigned out of a detective position. Person 4 testified that she reviewed all the material from that investigation and concluded that it was a serious third degree customer contact for which the grievant could be terminated. She decided, however, to give the grievant one final chance to understand her work duties and to conform to policy. As a result, the grievant received an interview report and her arrest powers were suspended until she could complete a special on the job training program. She was clearly warned that any future third degree customer contacts or serious training violation would result in termination.

Because the employer's termination appeal procedure is operative only in cases of discharge, the arbitrator agreed with counsel for the grievant that she should not automatically be

assumed guilty or responsible in each and every case of past disciplinary action but that the employer should be required to produce adequate proofs of such allegations and the grievant should be given an opportunity to explain or deny such charges.

In her testimony, the grievant explained each of the instances of her past record and basically acknowledged the facts which the employer had relied upon. Where there were some differences in her recollection of events, she pointed them out. When asked why she did not deny or contest the employer's actions in these cases, she replied that she did not "want to make waves" and had some apprehension about loss of her job. She asserted that she felt she had been a conscientious and competent detective during her employment and introduced into evidence favorable comments from her superiors and from others in the community including law enforcement officers about her positive contributions. A local police officer called to testify in her behalf had, on numerous occasions, dealt with her in regard to apprehended shoplifters. In his opinion, she was thorough, conscientious and fully understood the elements of particular crimes and the legal proofs necessary. He acknowledged, on cross-examination, that he did not have regular opportunities to observe her in her day-to-day activities, was unaware of her past disciplinary problems, and could not expound upon her capabilities beyond his own personal contacts.

INCIDENT FEBRUARY 7, 1994

For the two months prior to this incident, the grievant had been in the demoted status of store detective intern while she was completing an in-store retraining process. Her arrest powers had been suspended.

She had finished work and was in the process of purchasing groceries when she was paged to a telephone by Store Detective Person 5. He informed her that he had a possible theft

problem with a customer attempting to get a refund at the service desk. He further explained the situation to the grievant when she met him in the area of the service desk. He had come to work and parked his car and observed a man and a woman in a car next to him. The man had returned from the store, taken something out of his coat, handed it to the woman who then put it in a Christmas box. Person 5 told her that he was not sure what the man had pulled from his jacket or that it was the article for which the woman was trying to get a refund - a blazer. Both detectives, who were in plain clothes, stayed in the background while the manager-in-charge, Person 6, was called to the service desk. In accordance with policy, this was the proper procedure and he was already informed that there was a problem with a suspicious refunder.

The grievant testified at length about what happened thereafter. Person 6 went behind the refund desk and began talking with the woman. He told her that she could not get a refund without a receipt and she replied that it was a gift and she did not have the receipt with her - that she just wanted to get her money back. At this point, the grievant had approached and was standing immediately to the right of the refunder. Again Person 6 explained that she could not get a refund without a receipt and at that point, the customer said that she wanted the blazer back and that she would ask her grandma for the receipt and come back later. Person 6 refused to return the merchandise to her without a receipt. The refunder became confused and excited indicating, according to the grievant:

"I don't understand what is going on here. What the hell is going on? You're keeping my merchandise that I came in with for a refund. I understand I can't have it back -- I can't have money without a receipt, but that's my merchandise."

According to the grievant, the refunder was becoming loud and insistent. Person 6 kept telling her over and over "I'm sorry, Ma'am, I can't give you your merchandise back without a receipt". This caused the refunder to become angry. She repeated that she did not understand.

The grievant explained that she decided to intervene. Her explanation was that Person 6 was not giving the woman a reason why her merchandise was being kept and this was causing her to become agitated and angry. The grievant testified as follows:

"I then said to the refunder 'Ma'am', we have reason to believe the item you are returning is stolen, and I then told her what Detective Person 5 had told me. The guy you were with who's out in the car was seen leaving the store with something, giving you something, which you placed into the Christmas box and now you're in here for a refund."

According to the grievant, at this point, the refunder said that they did not know what they were talking about and that:

"The guy I'm with did steal something from this store. The blazer's not yours. He stole a bra in a box. I know its stolen, I know its wrong, you can have it back."

She then asked:

"If I give it back to you, am I going to get in trouble? Am I going to be arrested? Are you going to call the cops?"

To this, the grievant replied:

"No, you're not in any trouble. You're not going to be arrested. The police will not be involved."

At this point, the refunder pointed to the Christmas box in front of her and said that the bra was in the box, which she then turned over to the grievant. The grievant turned to Detective Person 5 and asked if that could have been what he saw the man pull out of his coat and Person 5 indicated that he did not know. He said that whatever it was that was given her, she had put in the Christmas box. Thereupon, according to the grievant, she realized that they could not prove that the merchandise that was being returned was stolen. She asked Person 6, "Can we keep the bra and give her back her blazer?" According to the grievant, Person 6 simply looked at her,

shrugged his shoulders and walked away. Thereupon, Person 5 filled out a receipt card for the - bra which was being kept and gave it to the refunder and she was permitted to leave the store with the blazer.

On cross-examination, the grievant acknowledged that she understood that there were five different codes that were to be used in the case of a suspicious refunder and that she had had the opportunity to review it on a number of occasions. She conceded that that card directed that contact with the refunder should be made only by the manager-in-charge and, that store detectives were not to get involved unless the manager-in-charge specifically requested it which Person 6 did not make. Again, she was asked on cross-examination regarding her involvement:

Q: "And the reason you waited is because you knew the policy called for the manager-in-charge to handle these situations and you were just to stand there and observe, is that correct?"

A: "That's correct."

She acknowledged that she knew she was not a certified detective at the time and had no arrest powers. When again asked why she challenged the refunder, she repeated that it was because Person 6 kept saying that she could not have a refund without a receipt and that the refunder kept indicating she did not understand. The grievant admitted that it was not a life or safety issue nor was there any reason to believe that the situation was getting out of control or that the refunder posed any sort of a threat. On redirect, she explained that Person 6 had not told her not to get involved either.

After obtaining all of the information and statements from the parties involved, Person 3 was of the opinion that both Person 5 and the grievant should be terminated and he so recommended to Person 4. Person 4 terminated the grievant but not Person 5. She explained that she looked at their past records and found that Person 5's was not nearly as bad as the grievant's.

He had been counseled for three minor incidents unrelated to customer contacts and had been disciplined for one previous third degree customer contact about two years before the incident in question. She said the grievant's record of six second degree customer contacts and a very serious third degree violation just a couple of months previously was not comparable at all. The grievant testified she believed Person 5 had been disciplined on other occasions because he had told her so. Person 4 denied that she was able to find any other such entries. She also disputed the grievant's claim that the decision to terminate the grievant and not Person 5 was gender motivated. She repeated that the past record of each of them was a primary consideration in determining the disciplinary penalty and that Person 5's five day suspension was proportional to his participation in the incident.

ASSOCIATE HANDBOOK REFERENCES

WORK RULES AND GUIDELINES

These work rules and guidelines are crucial to your success and the success of your company. Work rules are meant to guide your work, and they are stated here so that you know clearly what is expected of you. Some of these work rules are explained more fully elsewhere in this handbook or in the Policy and Procedures Manual.

Violation of these rules and policies may result in discipline, up to and including discharge. Of course, it would be impossible to list all the actions which a good worker is expected to avoid, but general guidelines and examples of unacceptable conduct are given here.

* * *

Violation of any other policy or procedure in this handbook, Company's Policy and Procedures Manual or elsewhere.

STANDARD OF CONDUCT

Management, professional and Loss Prevention associates have a direct responsibility for protecting company assets and upholding company policies and procedures. Because of their position, management, professional and Loss Prevention associates are held to a higher standard of conduct.

TERMINATION APPEAL PROCEDURE

The Termination Appeal Procedure has been established as a means to resolve all complaints about termination from employment. It is intended to ensure that no associate is terminated from employment without just cause or is terminated for a discriminatory or other unlawful reason. The procedure provides a method by which any non-probationary regular full-time or regular part-time associations who are classified as office, management and professional (OMP) and who are not covered by a collective bargaining agreement and all Store 33, Traverse City, associates shall have the right to use this procedure.

* * *

POSITIONS OF THE PARTES

Employer: The grievant had the benefit of extensive training both at the start of her employment and at various times thereafter and, at the time of this last incident, triggering her discharge, she was in the process of being retrained due to serious deficiencies. Her past record was-filled with instances of misconduct and the employer took these into consideration when she was finally discharged. The fact that the employer's system rolls back the progressive disciplinary process in no way constitutes a commitment to wash out past events or to disregard them altogether in the future. In all of the past cases which were considered, the evidence was quite clear that the grievant was guilty of misconduct and merited the disciplinary action taken. She did not object at the time or raise any defenses in any of those instances, though she was given that opportunity. At the time of hearing, she was given full opportunity to present any mitigating factors or circumstances and the arbitrator should find that there is no basis for rejecting her past disciplinary record.

That record clearly demonstrated a lack of judgment on the part of the grievant - she repeatedly had customer contacts contrary to clear guidelines which she acknowledges she knew and understood. The most recent incident in December 1993 was a third degree contact which proved to be the apprehension and ultimate arrest of a customer who was not guilty of, or could

not be proven guilty of, theft of any merchandise. This was so serious that the grievant not only was disciplined and had her arrest rights cancelled but she was put into a retraining program at an intern level. She was certainly warned at that time that she was in jeopardy of discharge if there was any further such misconduct.

The evidence is quite clear even from the grievant's own testimony that on February 7, 1994 she failed to follow the established and well-known policy of permitting the manager-in-charge to handle such suspicious refund cases. She, without cause or invitation, intervened and interfered and, in doing so, made allegations of illegal conduct which could not be proven. This resulted in totally excluding the manager-in-charge from the process and exposed the company to civil liability for her defamatory remarks. The result was that the decision of the manager in-charge to retain the blazer was effectively contradicted and he was left without any basis for further participation.

This last contact, being of an extremely aggravated nature, constituted a legitimate basis for termination of the grievant. Though the grievant contends that she was discharged and discriminated against in her treatment as opposed to that of Detective Person 5, the evidence does not support that claim; there was a legitimate basis for treating the grievant differently than Detective Person 5. The conclusion of the employer that the grievant is either unable or unwilling to perform at an acceptable level as a store detective is supported by substantial evidence and clearly proven. There was just cause for her discharge and the arbitrator should uphold that action.

Grievant: It must be noted that this termination appeal procedure is flawed because the arbitrator is not given any of the traditional options to reduce the penalty if it is found that there is some mitigating circumstance or lack of reasonableness or clarity as to rules or policies.

Furthermore, the remedy permitted under such procedure is not fair because the employer may reject reinstatement orders and alternatively seek from the arbitrator a monetary award even if the grievant is successful. This lack of any firm expectation of re-employment is unreasonable in cases where it is found that there is no just cause.

The fact is that the grievant successfully apprehended a person who was attempting to refund stolen merchandise on February 7, 1994 and, therefore, there could not be just cause for termination. The so-called guidelines are simply parts of lesson plans and even then are not clear and unambiguous. In fact, they suggest that such merchandise should be held and this is exactly what the grievant attempted to do here. Although it is indicated that the detective is to observe the manager in conversation with the refunder, that does not deny that the detective may also find it necessary in particular circumstances, as here, to engage in conversation with the refunder. At no time was the grievant told by the manager-in-charge that day that what she was doing was improper. She acted intelligently, reasonably and in accordance with her training. She had no alternative, in the presence of an ineffective manager-in-charge, but to protect the company's interest and to assume an active role.

The employer has conceded that it relied not only on that incident but also on her prior record. In this regard, it is noted that there is no procedure for grieving discipline short of discharge and, therefore, many inaccurate and unfair actions may be entered against a person and then many months or years later used to support an unproven and unreasonable disciplinary action. Though the grievant has made mistakes in the past, it is clearly shown that that was because of her enthusiasm and interest in protecting the employer's property.

The employer has disregarded its own policy of washing out disciplinary action after a period of a year and, in this case, has gone back many years past that to build a case against the

grievant. The employer ignored the many laudatory items introduced in evidence both from her superiors and from persons in the community with whom she dealt. It should be noted that the grievant was treated far more severely in penalty than was her co-worker, Detective Person 5. He received only a five day suspension though he had had a number of past disciplinary actions also. There is no other explanation than that this disparate treatment was gender-driven.

For the reasons noted above, the arbitrator is requested to direct the grievant's reinstatement with full service credit, make her whole for all lost wages or benefits and to cause her reimbursement for all costs incurred due to loss of fringe benefits. All references to her termination should be expunged from her record and the arbitrator should retain jurisdiction to assure compliance with such award.

ISSUES

1. Was the grievant's discharge motivated by sexual discrimination contrary to policies of the employer and law?
2. Was there just cause otherwise for the termination of the grievant?

DISCUSSION

The grievant challenges the fairness of the termination appeal procedure and considerable time was spent in the hearing reviewing the weaknesses of that system, particularly as affected the grievant in this case. The arbitrator noted and commented on the point that only discharges are subject to the review and appeal procedures. This is significant because in cases such as this, where the employer has relied upon the past alleged misconduct of an individual, that may become a decisive factor when weighing the proofs. Employees are not given an opportunity to reverse prior disciplinary action though they may insert written comment on their personnel file to explain alleged misconduct. As the arbitrator noted at the time of hearing, it is necessary then

for the employer, when relying upon a past disciplinary record, to present such cases in sufficient detail so that the grievant may be fully informed of the basis for the discharge. At that point, under the appeals procedure, such may be challenged by the grievant. In other words, the grievant may, at the time of hearing of her discharge, attempt to prove that prior disciplinary action which was taken into consideration as a factor, in fact, was wrongfully assessed. To the extent that a grievant is successful in nullifying a basis upon which the employer relied in its decision, the discharge itself may be found to lack a sufficient just cause basis.

The grievant did present evidence and documentation regarding past disciplinary incidents and the employer produced evidence also to explain and to contradict her perception of those events. It was pointed out that she had had an opportunity to reply and put into her record any difference of opinion and that was not done. Her explanation that she felt intimidated or that she did not want to make waves is not a sufficient basis for disregarding the record in that respect.

A review of her disciplinary record reveals an early act of dishonesty and six previous incidents of substantial violations of customer contact policy. These past disciplinary actions should certainly have called to her attention a need to be conscious of all policies that pertained to her job and her obligations to act consistent with the employer's priorities, particularly to avoid civil liability for false arrest or defamation. Not only was the grievant certainly aware of her work responsibilities, but she had gone through extensive on-the-job training and formal class instruction in this regard. Though there is a difference of opinion between the grievant and company witnesses as to whether she was given specific written instructions or told about certain policies in the course of her training, she freely conceded such knowledge and was most candid in her testimony.

In light of her poor work record, despite training and experience, the company was rightfully outraged by her actions in the December 1993 case. There, by failure to determine all of the necessary proofs for retail fraud, she caused an apparently innocent customer to be apprehended, arrested and processed at the local police station for theft. The potential for civil liability was very great and clearly caused by disregard of the company's clear-cut directives. Her suspension, resultant demotion, loss of arrest powers, and imposition of an on-the-job retraining process was entirely justified and should have brought to her a realization that she would have to be extremely careful in the future, particularly during her intern period. The events of February 7, 1994 cannot be considered as an isolated matter but must be viewed, as the company did, in light of what had preceded it, and the events of December 1993 are very significant.

The grievant was quite candid about what happened on February 7, 1994. Though the woman was attempting to get a refund for a blazer, the grievant had no cause whatsoever from the information given her by Person 5 to believe that that was the article which he "thought" might be stolen. At the point that she and Person 5 came together near the service counter, neither she nor Person 5 had any reason to apprehend the woman seeking the refund because the elements of the crime were neither known to them nor provable. It was then simply a case of a suspicious refund which was to be handled in accordance with the very specific policy of the employer that the grievant was quite familiar with.

Everything proceeded initially in accordance with the policy. The manager in-charge was notified and came to the area. The grievant acknowledged that he was the person responsible for dealing with the problem and that she was not supposed to be involved. She was in an undercover mode and supposed to be unobtrusive and not noticed by customers, including the one at the refund stand. Any intervention on her part could only be at the request of the manager-

in-charge or if some safety problem arose due to the conduct of the customer. The grievant admitted that the customer, though agitated, was not a threat nor was she acting in a violent manner. There was, then, no excuse for the grievant's actions. She heard the manager in-charge dealing with the problem by indicating that the woman would not get a refund without a receipt and that he would not return the jacket without a receipt. Whether this was wise or even according to company policy is totally immaterial. That was not a decision which the grievant was entitled to make. Nevertheless, she engaged the refunder in conversation which, under the circumstances was itself improper, and thereupon told the refunder that the merchandise which she was attempting to refund was stolen, detailing why the employer believed that. The grievant's only explanation for doing this is that she did not believe that the manager-in-charge was effectively handling the dispute because he did not give an explanation to the refunder of why he was holding the jacket.

At that point, not only had the grievant interfered, but she essentially apprehended the customer by claiming she was in possession of stolen property. In fact, at the time, the grievant lacked the authority to make such an apprehension and she knew it. Because the employer could not prove that the blazer was, in fact, stolen, her remarks constituted apparent defamation which could bring about substantial civil liability for the employer. The grievant took charge of the situation from the manager-in-charge, giving a receipt to the customer for the admitted stolen bra which the customer was willing to relinquish and returning to her the blazer which the manager-in-charge had intended to keep because of the suspicious circumstances.

This incident alone might well have been sufficient justification for the termination of employment of any store detective. When combined with her past record and, particularly, the most recent discipline in December 1993, certainly there were sufficient grounds for disciplinary

action. The employer has established a very specific disciplinary system with progression and penalty to force compliance by employees with work responsibilities and rules. It is evident from her work history that her disciplinary progression did not bring about the expected improvement and the employer fairly concluded that she would not, in the future, be able to satisfactorily perform as a store detective.

The grievant claims that her discharge was gender based and discriminatory and that she was treated in a disparate fashion as compared to the male store detective, Person 5, who was also involved in the incident. The arbitrator has carefully considered the claim by the grievant in light of statutory obligations imposed upon an employer and finds no proof of discrimination based upon gender in the decision to terminate her. Indeed, Detective Person 5 was treated differently than the grievant; his penalty was a five day suspension versus her discharge. The grievant contends that they had substantially equal disciplinary records and that her treatment was unfair in that light. Though given the opportunity to present proofs of that and to review employer records pertaining to Person 5, which were received in evidence, the grievant has not proven any similarity of disciplinary record. Person 5, in fact, had but three or four minor disciplinary problems, not related to the serious matter of customer contacts, and his involvement in the February 7 incident was substantially less serious. Person 5 only communicated information to the grievant and to the manager-in-charge. He did not interfere directly with the refund process nor did he attempt to make an apprehension. In light of the entire record and the events of that day, the arbitrator concludes that he was treated appropriately and that there was no disparate or unfair treatment of the grievant in that regard.

The grievant seems to be a sincere person and interested in her work. However, though she may be well intentioned, she has had some real problems in the past that significantly impact

upon her employability in this industry. Indeed, she has had some highlights in her career and the company has made note of them as have other persons who have written laudatory comments about her ability. But these high spots are insufficient to overcome the very significant low spots of her work record.

Her past violations have been very serious and potentially very detrimental to the employer. Perhaps, she simply lacks the commitment or capacity to fulfill the expected standards of a store detective which the employer is entitled to promulgate by policy and by training. Her judgment seems to be flawed. She is the proverbial "loose cannon" which the employer has been unable to secure and the potential for future damage would be great. The decision to remove her from employment is reasonable and consistent with the disciplinary program.

AWARD

The grievance is denied. Based upon the grievant's past disciplinary record and the incident of February 7, 1994, it is found that there was just cause for termination of her employment.