Fullmer #3

IN THE MATTER OF ARBITRATION

Between

EMPLOYER, INC

-and-

EMPLOYEE

OPINION AND AWARD

Employee Discharge Grievance

This case[1] concerns the discharge of the Grievant, Employee, for falsifying his employment application.

I. FACTS

A. Background Facts

The Employer operates retail stores in the Mid-West states. One of its stores, #135, is in City A, State A. The Store Director of the City A store is Person 1.

The Employer finds it necessary to engage in loss prevention operations to prevent thefts by customers and/or employees. The City A store's Loss Prevention Manager is Person 2. His staff consists of Store Detectives and Greeters. The Store Detectives watch, either through a

[1] Employer, Inc. (hereafter referred to as "the Employer") has established a Termination Appeal Procedure (Joint Ex. 1) which establishes an opportunity for all non-probationary full-time and regular part-time office, management and professional employees to take their terminations to binding arbitration. (These provisions are subsequently referred to as "the Procedure"). Employee (hereinafter referred to as "the Grievant").
The Grievant's termination appeal form (Joint Ex. 2) concerning this matter was dated August 28, 1995. It was submitted to arbitration before this arbitrator under the Procedure. A hearing was held on January 17, 1996 at the City A Inn in City A, State A. Both advocates made opening and closing statements and presented and cross-examined witnesses. A transcript was taken. It was stipulated by the parties that the grievance was both procedurally and substantively arbitrable; that the time limits in the grievance procedure had either been met or waived and that the arbitrator has been properly chosen and has jurisdiction to hear the case.

video surveillance system or personal observation, for customers and/or employees engaged in the theft of merchandise. When they see such a theft they confront the customer and go through a series of prescribed steps for dealing with the matter. The Greeters stand near the exits and greet entering customers and watch for concealed merchandise on the person of the departing customers.

For obvious reasons the Employer takes loss prevention seriously. Not only is the value of the merchandise involved, but liabilities which may accrue from unfounded detention of customers. These are known as "bad stops" in the industry and are referred to as "customer contacts" in the Employer nomenclature. Newly hired Store Detectives are given extensive on the job training and must pass a 120 hour formal class room training course.

The Grievant was hired as a Store Detective on February 2, 1995[2], at about the same time that the City A store opened. He had filled out the Employer's standard application form. (Co. Ex. 2) The form indicated that the Grievant was a high school graduate with a college prep diploma; had studied law enforcement at the SCHOOL A. in City B and had some college or university study in criminal justice at SCHOOL B/City B.

The application requested the applicant's:

"EMPLOYMENT HISTORY

List below past and present employment beginning with your most recent, including U.S. Military Experience."

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[2] All subsequent dates are 1995 unless otherwise stated.

Under this requirement the Grievant listed three employments, all involving work in loss prevention or security:

Store	Period
Store D	10/1/94 to Present
Store B	4/1/94 to 10/3/94
Store C	10/1/93 to 12/1/93

The entries showed the Grievant leaving Store B because the company went out of business and Store C because there were economic cutbacks.

After February 2 the Grievant began his on the job and classroom training. As of the start of July he was a full-fledged Store Detective. There were no apparent problems with his work during the first five months.

B. Facts Leading to the Grievance

On July 20 the Grievant was on duty along with a fellow Store Detective, Person 3. A female shopper came to their attention who appeared to be concealing a toy piano and trading cards. The Grievant and Person 3 closed in. According to Person 3 the Grievant at some point radioed that he could see one of the elements of concealment by the shopper. Mr. Person 3 was of the opinion that the Grievant could not have actually seen what he said he saw. This struck Mr. Person 3 as not only inaccurate but imprudent since it could result in a "customer contact"[3] under some circumstances. He was somewhat irritated because he felt as though under some circumstances he might be implicated in a "customer contact" triggered by the Grievant's rashness.

[3] As indicated above, this is the Employer's term for what is known elsewhere in the industry as a "bad stop". In lay terms it is when a detective stops someone for shoplifting but they have no goods on their person.

Mr. Person 3, at the beginning of March, had heard a rumor that the Grievant had been previously employed at Store A and that he had been discharged because of a "bad stop". He now relayed this rumor to Person 2, the Loss Prevention Manager. Mr. Person 2 checked the Grievant's employment application to see whether this application had been disclosed and found that it had not. Mr. Person 2 then talked to the Grievant and asked him whether he had been previously employed at Store A. According to Mr. Person 2, the Grievant was initially reluctant, but eventually admitted that he had worked at Store A and that he had been discharged from that employment. Despite the admission, Mr. Person 2 decided to telephone Store A. He verified the employment and discharge. Store A would not furnish any details of the incident which led to the Grievant's discharge.

Eventually all this information was passed along to the Store Director, Person 1. He consulted with his assistant and with OMP Relations Specialist Person 4. The unanimous judgment of these three was that the Grievant should be discharged. Mr. Person 1 had a meeting with the Grievant on July 28 and communicated the decision to discharge.

On the same day the Grievant filed his "Termination Appeal Form - Part 1" (Joint Ex. 2). Attached was a two page single spaced sheet provided by the Grievant setting out his side of the controversy. Relevant portions include:

> "I, Employee, do hereby declare that I feel that my employment with Employer was Terminated without Just Cause.
>
> [the first page is largely concerned with the Grievant's version of the alleged `bad stop' at Store A]
>
> I told Person 2 the above and he then asked why I didn't put it on my application. I told Person 2 that I put down the jobs that showed my true work ethic, and that I knew that Kim would do everything in his power to keep me from becoming employed in Loss Prevention. Person 2 then asked why I didn't just put Store A on my application and marked that I do not wish Employer to contact Store A. I told Person 2 that it had

happened in the past and I wanted to keep it that way, because it really was mentally disturbing. Person 2 then said ok and I thought it was over with.

I appeal this termination because I do not feel I falsified my application. I filled every space on my application with my past employers and do not feel this is an integrity issue, as Person 1 stated that it was. I was treated unfairly and unprofessionally at Store A and it was a significant source of mental anguish for me and I was trying to forget about it. I appreciate your time and hope you came to a fair conclusion on this issue."

This appeal was processed through the Procedure to arbitration.

II. APPLICABLE PROCEDURES

A. Purpose and Scope

This 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.

D. Representation

Either party may be represented by an attorney or other 5 representative at any step in this procedure.
……..

G. Election to Arbitrate

If the associate is not satisfied with the answer of the Associate Services Department and desires to arbitrate his or her claims, the associate must elect arbitration in accordance with the procedures below.
…....

H. Selection of the Arbitrator

Upon receiving a notice of election to arbitrate from the associate, the Employer will deliver or mail a list of names of five impartial arbitrators to the associate. The arbitrators on the list shall all be attorneys.

Within fourteen (14) calendar days of the date the list was delivered or mailed, the associate or the associate's representative must meet or confer at a mutually convenient place and time with the Employer's designated representative to choose an arbitrator from the list.

The arbitrator shall be chosen from the arbitrators on the list by alternately striking names, the associate striking first, until only one name remains.

I. Discovery

After the associate elects arbitration and an arbitrator is selected, the parties shall attempt to agree on pre-hearing discovery. If the parties cannot agree on discovery, the arbitrator may authorize discovery consistent with both the need to provide a full and fair consideration of the relevant and material facts of the case and the need to provide a relatively inexpensive and expeditious method to resolve the parties' dispute.

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 was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by 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 any 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.

III. STIPULATED ISSUE

Was the discharge of the Grievant, Employee, on July 28, 1995 for just cause? If not, what shall be the remedy? (Tr. 6- 7)

IV. POSITIONS OF THE PARTIES

The Employer Position

Arbitrators have established a four part test in handling falsification of employment application cases. Three cases are cited: Tiffany Metal Products Mfg. Co. 56 LA 135 (Raymond R. Roberts, Arb., 1971); Wine Cellar 81 LA 159 (Douglas E. Ray, Arb., 1983); and Peoples Gas System Inc. 91 LA 951 (Stanley H. Sergent Jr., Arb., 1988).

The first test is whether the omission was deliberate. The second is whether the omission was material. The third is whether it was of continuing materiality. The fourth is whether the employer acted promptly and in good faith. The Employer maintains that all the tests are met in the present case.

As to the first, the evidence shows that the omission was willful and deliberate. He did not lack understanding of the application. He is an educated young man and the directions are clear. He simply consciously disregarded the directions. Furthermore, the Grievant admitted to Mr. Person 2 that he left the Store A employment off the application because he was afraid he would get a bad recommendation. This is also borne out by the content of his Termination Appeal Form. The Employer was entitled to make its own evaluation of the incident at Store A. There is no way of knowing whether the Grievant's version is correct.

Turning to the second prong of the test, materiality. The key is that a listing of the Store A employment would have led to a further investigation of the Grievant's employment there. The Employer is quite concerned about the possibility of "bad stops" or "customer contacts" in its terminology. The Grievant virtually admitted the materiality when he decided deliberately to omit the information.

Third, the omission remains material. As put by Arbitrator Roberts, the question is whether time has healed the wounds or not. This is not a case involving a medical condition which has changed or a previous bad attendance record which has turned around on the new job. Here the period of employment was short and the information sought is still of continuing relevance to the Employer.

Fourth, the Employer acted promptly when it found out about the omission from the application and did so in good faith. Action began the day after the Employer discovered the omission and the information was verified. The matter was reported to the proper officials within the Employer and prompt action was taken, resulting in the termination of the Grievant. No one in management had any prior knowledge of the omission.

The application of the test results in only one conclusion. The discharge of the Grievant after slightly less than six months of employment was justified and was for just cause. (Tr. 91-102).

The Grievant Position

The Grievant emphasizes his good work performance while he was employed by the Employer and maintains that this work performance had nothing to do with his termination by the Employer. The past is the past and the present is the present. What he did with the application has nothing to do with his true work ethic.

When one looks at the application, the Grievant and his friends have all come to the same conclusion, i.e. that an applicant is not required to list all his former employers. The Grievant did list his most recent employer, but was not required to list all the other employers. The Grievant complied with the Employer's terminology.

The Grievant also raises the issue of why Mr. Person 3 was not disciplined for withholding the pertinent information for some five or six months. Instead he was allowed to sit on the information and then bring it out only when he became piqued at the Grievant.

When the Grievant talked about this matter with Mr. Person 2, it was never described as an interview and no witness was brought in as is required by Employer policy. In Loss Prevention a witness of the same sex is always brought in for the interviews.

The Grievant does not agree that he was dishonest. He maintains that he was fully honest within the parameters of his understanding of the policy. He was also fully honest with respect to what happened at Store A.

The Grievant asks that the matter be concluded to a fair compromise and that no grudges be held and that he be reinstated. (Tr.102-104)

V. DISCUSSION

A. Introduction

The present case is a discharge case involving a claimed falsification of application. Many of the facts are not in dispute. This is true of the prime fact, the Grievant's non-listing on his January 9, 1995 application (Co. Ex. 2) of his prior employment at Store A and of his discharge from that employment.

The discussion logically breaks down into two parts. The first concerns the applicable standard. The second concerns the disputed aspects of the application of that standard. We turn to these aspects in the order stated.

B. The Applicable Standard.

Falsification of employment applications is a recognized category of discharge arbitration cases. Yet, obviously, not all falsifications are sufficient to sustain an employer's burden of establishing the discharge.

The Employer maintains that the applicable standard is a four part test established in Tiffany Metal Products Mfg. Co. 56 LA 135 (Raymond R. Roberts, Arb., 1971) and continued by other arbitrators in Wine Cellar 81 LA 159 (Douglas E. Ray, Arb., 1983); and Peoples Gas System Inc. 91 LA 951 (Stanley H. Sergent Jr., Arb., 1988). That test is essentially four part, i.e. whether the omission was deliberate, whether the omission was material, whether it was of continuing materiality and whether the employer acted promptly and in good faith.

The Grievant did not challenge the applicability of the four part test urged by the Employer. In the absence of challenge, the arbitrator does not find it to be inherently unreasonable and will consider it to be the standard governing the decision of the case.

C. The Application of the Standard to the Facts of the Case.

The Grievant's main point with respect to the application of the four part test concerns the first test, i.e. whether his omission of the Store A employment/discharge was deliberate or not. The key to the argument lies in the Grievant's interpretation of the application form.

It will be recalled that the requirement of the form is as follows:

> "EMPLOYMENT HISTORY
>
> List below past and present employment beginning with your most recent, including U.S. Military Experience."

(Co. Ex. 2)

Below this there are spaces on the form for three different employments. In the first the Grievant listed his present employment as of January 9, 1995:

Store	Period
Store D	10/1/94 to Present

Under this notation the Grievant listed two employments which preceded his employment at Store D:

Store B	4/1/94 to 10/3/94
Store C	10/1/93 to 12/1/93

The problem is that he omitted his employment at Store A. This was part time and was virtually contemporaneous with his employment at Store D except that it ended in a termination at the end of December.

The Grievant interprets the application requirement as mandating only the inclusion of the "present employment". In the remaining two spaces, according to the Grievant, the applicant has the option of including any two past employments. According to the Grievant's position at the arbitration hearing, he simply exercised his option to include the Store B and Store C employments rather than the Store A.

The arbitrator holds that this interpretation is not in accord with the language of the form. The word "beginning" in the form indicates that the employments are to be listed in a particular order. That order is from the most recent one backwards through successively more remote employments. The only thing which might be considered ambiguous is whether the applicant is required to list any additional employments beyond the three spaces provided on the form. But,

that issue is not involved in this case. Under the language of the application form the Grievant should have listed Store D, Store A and Store B, in that order.

We need not rely on the arbitrator's interpretation of the requirements of the application form. It is fairly obvious that the Grievant himself knew that this was the proper interpretation of the application's language. When first interviewed by Mr. Person 2 he indicated that he did not include Store A, not because of any confusion about the application's language, but because he was afraid that he would get a bad reference from Store A. The Grievant said essentially the same thing on his Termination of Appeal form:

> "I told Person 2 the above and he then asked why I didn't put it on my application. I told Person 2 that I put down the jobs that showed my true work ethic, and that I knew that Kim would do everything in his power to keep me from becoming employed in Loss Prevention. Person 2 then asked why I didn't just put Store A on my application and marked that I do not wish Employer to contact Store A. I told Person 2 that it had happened in the past and I wanted to keep it that way, because it really was mentally disturbing."
>
> (Jt. Ex. 2)

All in all it appears that the Grievant knew exactly what he was doing when he filled out his application. Because of the near contemporaneity of the Store D and the Store A employment he was able to arrange the Store D-Store B-Store C employments in reverse chronological order and present the appearance of order and completeness.

As indicated above, there do not seem to be disputed issues with respect to the other three aspects of the four part test.

VI. CONCLUSION.

The Employer in the present case has met its burden of establishing the applicability of the four part test and of presenting evidence that each of the four parts has been satisfied. Under the circumstances the arbitrator has no choice but to hold that the discharge of the Grievant was for just cause.

VII. AWARD

Termination appeal denied.

Made and entered this

8th day of February, 1996

Jerry A. Fullmer

Arbitrator