Glendon #1

ARBITRATION

EMPLOYER

-and-

EMPLOYEE

Termination Appeal

SUBJECT

Termination for alleged dishonesty and negligence.

ISSUE

Was Employee terminated for just cause?

CHRONOLOGY

Termination: November 11, 1998 Termination Appeal filed: November 24, 1998

Arbitration hearings: June 29 and September 10, 1999

Briefs received: October 12 (Appellant) and November 1, 1999 Award issued: December 6, 1999.

SUMMARY OF FINDINGS

Appellant was terminated for violating a Employer rule regarding honesty, for which termination is the established penalty, and the evidence that she appropriated for herself rather than returning $1,000 in Employer funds that mistakenly came into her possession left no reasonable doubt that she violated the rule, so the termination must be upheld.

BACKGROUND

Appellant Employee worked for the Employer approximately thirteen years, the last four prior to her termination as service lines team leader at Store No. 145. In that position she supervised team leaders and team members in several departments, including the cash office. The Employer terminated her employment on November 11, 1998 for alleged dishonesty and negligence. She filed a termination appeal on November 24, 1998 claiming she had been terminated unjustly and that she had been discriminated against by being "replaced by someone 20 years my junior." The evidence presented in arbitration concerning the events giving rise to her termination may be summarized as follows.

On October 26, 1998 she had one of those team members, cashier Person 1, take a $1,000 check to the cash office to cash it for her. The check was written not on a bank account, but as a cash advance against appellant's credit card account with MBNA America. Person 1 presented the check to a fellow cashier in the cash office, Person 2, and the two of them decided to play a joke on appellant by giving her an envelope filled with $1,000 worth of five and ten dollar bills. When Person 2 gave appellant that envelope she quickly discovered the joke and sent Person 1 back to the cash office for larger bills. She also called Person 2 and jokingly called her a "witch from hell."

In the meantime Person 2, fully expecting appellant to send the small bills back, had obtained a stack of hundred dollar bills to replace them and put them on the counter with a check endorsement stamp resting on top of the stack. But she counted out not ten, but twenty, hundred dollar bills, as shown on videotapes made by the cash office surveillance cameras at the time. When Person 1 returned, Person 2 put all twenty bills in another envelope, stapled it shut and

gave it to Person 1, who in turn stapled it several more times across the top and one side (also as shown on the tape) and left the cash office.

Person 1 said she returned directly to appellant's office, going through the countdown room, then through a short hallway into the store and past the end of six checkout lines, a trip that she said took no more than a minute. (The time noted on the videotape when she left the cash office with the small bills and returned to the cash office with them indicates the trip was even shorter than that; so does the store floor plan, which shows the distance between the service and cash offices is less than one hundred feet.) Person 1 said she did not see appellant open the envelope and does not know what she did with it.

Person 1 also said she left the service office immediately after she gave the envelope to appellant, never saw it again, and did not tell anyone she had given appellant an envelope with $1,000 cash in it.

These events occurred shortly before 11 a.m. Early that afternoon, in a final count of cash received from the previous day's business, cash office team leader Person 3 discovered a shortage of $999.82. She and Person 2 recounted and verified the shortage and then, at Person 2's suggestion, Person 3 called appellant both to report the shortage, since appellant was Person 3's "first assistant" (direct supervisor), and to ask if she had received more than $1,000 for the cashed check. Person 3 said appellant responded "instantly" and said, "No, she didn't have too much in there."

After that, Person 3 called loss prevention team leader Person 4, told her about the shortage and about appellant's check, then had two afternoon shift team members recount the cash deposit, which totaled approximately $95,000, and again the shortage was verified. After that she called appellant twice more to ask, first, whether the deposit should be taken to the bank

(appellant said it could wait until the next day) and, second, whether the day's bookwork should be sent to corporate headquarters with the shortage unexplained (appellant said to hold it and keep looking for the shortage).

Person 4 interviewed appellant, Person 2 and Person 1 in the next few days. She said she first talked to appellant briefly on October 26 and appellant said the shortage "might be in the bookwork," as did Person 3. She interviewed appellant four days later. Person 4 said appellant then stated she opened the envelope and checked its contents when Person 3 first called about the shortage and asked if she had received more than $1,000, and there was only $1,000 in it at that time. In a later interview with investigator Person 5 (which Person 4 also attended), appellant said she first tore open the envelope while standing in a checkout line in the store before going home, saw that it contained $100 bills, and thumbed through them counting a total of ten.

Grievant wrote a statement to that same effect, and that was her testimony in arbitration as well. She said she did not open the envelope when Person 1 gave it to her, but put it in her purse which she left hanging on a coat hook on the wall of the service office and next thought about it when she reached in her purse in the checkout line and felt the stapled envelope. She said she always kept her purse on one of the coat hooks, which are visible from outside the office through a large window facing toward the checkout lines. Grievant also said she left the office at times that day and did not lock it when she left, as also was her habit. But Person 6, then also a cashier at Store No. 145, testified that appellant usually kept her purse in a locked drawer under her desk and until then the practice had been to turn off the lights and close the self-locking door to the service office when it was left unoccupied. She acknowledged, however, that she did not know where appellant's purse was on October 26.

Appellant was known to her co-workers as a frequent visitor to Casino A, and she acknowledged to the loss prevention interviewers and in her arbitration testimony that she gambled there on a regular basis. Person 4 recalled appellant saying she gambled there a few times a week; in arbitration she said she went once every week or two, or maybe twice a week if she was winning. Person 4 said appellant claimed she won more than she lost. That was her testimony in arbitration too; she said she won as much $3,000 per visit once a month on the average and when she lost she usually lost the casino's money (from previous winnings), not her own. She adamantly denied having "a gambling problem" or taking the extra $1,000 to cover losses sustained at the casino.

Appellant told Person 4 she cashed the $1,000 check on October 26 to have the money for holiday shopping at the Great Lakes Crossing mall when it opened a few weeks later. Appellant also acknowledged that, as Person 3 and Person 2 testified, she regularly cashed large checks in the cash office, sometimes for as much as $1,500. She said she sometimes got such cash for mortgage payments, other times to pay for landscaping projects. She testified she knew of no policy against cashing checks there without management approval, although the Employer placed in evidence a copy of a policy statement to that effect dated March 20, 1992 from the "Notices Notebook." It states that violation of the policy "will result in discipline up to and including termination."

Appellant testified that when Person 3 called and asked if there was more than $1,000 in the envelope Person 1 gave her she sarcastically replied, "Yeah, right." That also was what she wrote in a statement she gave to the Employer.

Appellant also said both Person 2 and Person 1 were and still are her friends and she does not suspect either of them, or Person 6, of taking an extra $1,000 out of her envelope. She also

said she told nobody about the cash in her purse and conceded it was unlikely anyone came into the service office, opened the multi-stapled envelope, removed $1,000 but put the other $1,000 back into another envelope and stapled it like the first one. Still, she insisted she did not find or keep the extra $1,000. She said she counted the bills, ten of them, when she got home and separated them into two groups of five.

Appellant testified that she was familiar with the Employer's rule regarding honesty and "absolutely" agreed that if an employee pocketed $1,000 of Employer funds in such circumstances it would be a violation of the rule and grounds for termination. That rule, which also is kept in the Notices Notebook, provides in pertinent part that:

> Just as you expect the Employer to be honest with you at all times, likewise we expect you to be totally honest at all times. This total commitment is a must.
>
> Based on this, we require you to be totally honest with customers, the Employer, fellow associates, vendors, suppliers, etc. Associates involved in theft or unauthorized possession of property from any of these sources will be terminated.

The Employer contends the evidence permits no other conclusion than that appellant received the envelope with $2,000 in it, nobody else removed $1,000 from it, but she did. It dismisses as unreasonable other possibilities such as Person 1 opening the envelope after stapling it numerous times, taking $1,000 for herself, putting the other $1,000 into another envelope, and stapling it in similar fashion during her short journey from the cash office back to the service office, or Person 2 or anyone else entering the service office in appellant's absence and going through a similar process.

It argues appellant's denial that she received and retained the extra $1,000 is not credible. In support of that argument, it points not only to the implausibility of any alternative explanation for its disappearance, but also to the inconsistencies in her statements about when she opened the envelope and counted the money and her equally implausible claim that she never lost any of her

own money gambling and routinely won up to $3,000 per visit to the casino but never reported any winnings to the IRS.

The Employer suggests a fair inference from all the evidence is that appellant had financial problems related to gambling and seized upon the extra $1,000 in the envelope as an opportunity to alleviate them, taking a calculated risk that the loss could not be traced to her but would be attributed to a computer changeover to "paperless" accounting for store sales that was in process that day.

The Employer contends there also was just cause to discharge her for negligence in cashing checks at the cash office in violation of Employer policy and in her response to discovery of the cash shortage. Finally, it asserts that because discharge is the specified penalty for violation of the honesty policy and a possible penalty listed for violation of the negligence policy, that penalty must be upheld in arbitration in compliance with Section L of the Termination Appeal Procedure, which provides that:

> 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.

Appellant contends, correctly, that the Employer has the burden of proving she violated the policies in question, and asserts that because she is accused of misconduct of a criminal nature it must be proven beyond a reasonable doubt. In her view, the evidence in this record falls far short of that, not only because she credibly and consistently denied wrongdoing, but also because several other possible explanations for the missing $1,000 cannot be ruled out, among them: that Person 1 took the money before delivering the second envelope to appellant; that somebody else entered the service office and removed $1,000 from that envelope after Person 1

delivered it to her; or that the shortage had a different cause, such as a computer glitch during the transition to a "paperless" sales accounting system which took place that day. Appellant argues these alternative possibilities give rise to reasonable doubts which make it impossible to conclude that the $1,000 cash shortage was directly due to the cashing of her check, that she actually received an extra $1,000 in cash, or that she intentionally kept such a sum of money knowing it did not belong to her. As for the charge of negligence, appellant contends it is baseless because she had been cashing checks of similar denomination in the cash office on a regular basis for a long time, without previous accusation of impropriety, and also because the two others involved in this check-cashing episode and solely responsible for the initial small bills prank received discipline much less severe than hers.

DISCUSSION AND FINDINGS

Ordinarily, a standard of proof more stringent than "clear and convincing" will not be required in arbitration. Also differentiating between the "clear and convincing" and "beyond a reasonable doubt" standards can be more a semantic exercise than a matter of real substance, especially if one bears in mind that it is not a jury but an arbitrator, experienced in such matters, who must be convinced that just cause for discipline exists. As a practical matter, the two standards may even be the same, as reflected in an often-quoted passage from a decision by arbitrator Russell A. Smith in another case, Kroger Co , 25LA906 (1955), that involved alleged misconduct "of a kind recognized and punished by the criminal law":

> [I]t seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused.

Without unduly extending this discussion, as a generality it may be said that the most serious charges should be subjected to the highest standard of proof, and this arbitrator will not be convinced there was just cause to discharge a person accused of criminal misconduct if after carefully considering all the evidence he still has a reasonable doubt about the person's guilt. The charges and evidence in this case have been analyzed accordingly.

The primary charge against appellant – violation of the Employer's policy regarding honesty by converting Employer funds to her own uses without authority – certainly is of a criminal nature. Furthermore, the case against her is entirely circumstantial. It is not inherently weak because of that. But because it depends on inferences about rather than eyewitness observation of her actions, it is all the more appropriate that any reasonable doubt(s) that she committed the misconduct alleged be resolved in her favor.

Even viewed in a light most favorable to appellant, however, the evidence leaves no reasonable doubt that she received and kept $2,000 in exchange for her check to the Employer for $1,000. It was established beyond any doubt that Person 2 placed twenty $100 bills into the second envelope. Twenty bills certainly went into the stack and thence into the envelope, as shown on videotape, and it is equally clear that they were $100 bills: not only because Person 2 said so, but because wrappers for two ten-bill packs of $100 bills were found in the trash receptacle and, most important, because appellant herself testified that the second envelope she got from Person 1 contained $100 bills, albeit only ten of them, not twenty.

Person 3 also testified credibly that the extra $1,000 exchanged for appellant's check was the cause of the cash shortage that day, which was established by carefully counting and recounting the money and systematically examining and ruling out all other possible causes for the discrepancy. She explained it was traced with certainty to the cash going into the safe. She

also explained that the eighteen-cent discrepancy between the shortage and the extra cash placed in the envelope reasonably could be attributed to the incidental misplacement of small change during the counting process, which routinely occurs.

The number of bills in that envelope could have been reduced from twenty to ten before appellant received it only if Person 1 tore open the envelope, put ten bills in her pocket and the other ten into another envelope, and stapled the new envelope in the same manner as the first one before she returned to the service office. But such a possibility is totally unreasonable, for three reasons. First, Person 1 did not know there were twenty $100 bills in the envelope, She merely saw Person 2 put a stack of bills into the envelope, close it and staple it. She was not in the cash office when Person 2 counted and stacked the bills. Second, if she somehow got an idea that there were more than ten bills and quickly hatched a nefarious plan to take the extra ones for herself, it is highly doubtful she would have put so many additional staples in the envelope, making her plan more difficult and time-consuming to carry out. Third, appellant herself said Person 1 was a trusted friend whom she did not suspect of taking the extra money.

The only remaining possibility is that somebody entered the service office and took the $1,000 after appellant received the second envelope and put it in her purse without examining its contents and left her purse hanging on a coat hook on the office wall. This possibility hardly seems worth considering, because it seems most unlikely that appellant, after the small bills prank Person 2 and Person 1 had just played on her, would not have opened the envelope as soon as she got it and examined its contents. But even if given the most careful consideration, it must be considered totally unreasonable.

The only person who might have taken the $1,000 in this manner seemingly would have to have been Person 2, because only she could have known there was not $1,000 but $2,000 in

the envelope. It is perhaps remotely conceivable that a person without such knowledge could have entered the service office and stolen a purse or money from a purse, but not that he or she would have taken only half the money and carefully left the envelope from which it was taken in the same condition in which it was found. Person 2 denies having had such knowledge; her actions that day as shown on videotape and described by other witnesses are consistent with that denial; and if she did not know $2,000 was in the envelope she would have had no more reason than anybody else to carry out such an unusual theft.

If Person 2 did know, however, that necessarily would mean she placed twenty bills in the envelope intentionally, with a plan to steal $1,000 from the Employer, which is implausible in the extreme for the following reasons. She knew her actions were under continuous video surveillance, so the missing cash could be traced to her easily on the videotape showing her counting out twenty bills, stacking them on the counter and putting them in the envelope. Knowing that, she would have had to plan to shift blame to appellant, but to do so she would have had to possess not only remarkable nerve but also knowledge that appellant would not open the envelope and count the money before the end of her shift. To actually get the extra $1,000 she also would have had to go into the service office when nobody else was there, find the cash, take only that much money, put the rest in another envelope stapled just like the first one, put it where she found the first one, and do all that without being seen, which she hardly could count on, given the clear line of sight through a large window into the service office from the checkout lines.

That Person 2 even would have contemplated, much less carried out, such a complicated, unlikely-to-succeed scheme against the Employer and a person who was both her friend and her

boss is so improbable as to be preposterous, and appellant herself freely stated she did not suspect Person 2 of taking the money. Therefore this scenario is completely implausible.

Having ruled out these unreasonable alternative possibilities, one is left with no reasonable doubt that appellant not only received but also kept the extra $1,000, which was, as she conceded it would be, a violation of the Employer's rule regarding honesty. The notice of that rule, as it appears in the Notices Notebook, specifies that termination is the penalty for "associates involved in theft or unauthorized possession of property" belonging to the Employer, and appellant agreed that was a reasonable policy. Her agreement aside, Section L of the Termination Appeal Procedure requires the arbitrator to uphold termination of an associate found to have "violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination" and to have been "terminated for that violation."

Appellant violated the Employer's rule regarding honesty and was terminated for that violation. Therefore her termination was for just cause and is upheld and her request to set aside the termination as unjust must be denied. This finding makes it unnecessary to decide whether appellant also violated the negligence policy.

As for the discrimination claim alluded to on her termination appeal form, appellant presented no evidence that the person who succeeded her as service lines team leader at Store No. 145 in fact was "twenty years [her] junior" nor any proof of intent by the Employer to discriminate against her on the basis of age. For its part, the Employer presented evidence that the person who succeeded her got the position through the usual posting and bidding process, took it as a lateral move, and had a higher salary than appellant did. Most important, it presented clear and convincing evidence that the real and entirely valid basis for termination was

appellant's dishonesty. For these reasons, the discrimination claim has not been proven and is denied.

AWARD

The termination appeal of Employee is denied in its entirety.

Paul E. Glendon,

Arbitrator

December 6, 1999