Glendon #2

ARBITRATION

EMPLOYER, INC.

-and-

EMPLOYEE

Termination Appeal

SUBJECT

Termination for unauthorized consumption of a product that was not paid for.

ISSUE

Was Employee terminated for just cause?

CHRONOLOGY

Termination August 5, 1998

Termination Appeal filed: August, 1998

Arbitration hearing: March 19, 1999

Briefs received: May 10, 1999

Award issued: June 9, 1999

SUMMARY OF FINDINGS

Appellant was terminated for violating Employer rules for which termination is the established penalty, those rules have been consistently enforced, and there is clear and convincing evidence that he violated them, so the termination must be upheld.

BACKGROUND

Appellant Employee worked for the Employer from November 24, 1994 until August 5, 1998, when he was terminated. All his service was at Store No. 22 in City A in the Loss Prevention Department, first as a greeter, later and at time of termination as a store detective. The reason for his termination, as stated in the Employer's response to his termination appeal, was "consumption of a product that was not paid for "Senior OMP Relations Specialist Person 1, who reviewed the case and authorized the termination, gave a more elaborate, detailed explanation of the alleged rule violations which led him to authorize it Specifically, he cited the Rule in the Team Member Handbook covering Theft and Unauthorized Possession of Employer Property, which reads:

> Team members involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow team members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service. Team members involved in theft are subject to prosecution.

He also cited the following provisions, which he said are an "extension- of the foregoing rule, from a notice to all associates "Regarding In-store Food Consumption/Personal Purchases"

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> Drinking, eating or sampling of merchandise or products (even if damaged) is not allowed, unless approved in advance by a first assistant or, unless the associate has properly paid for the item and the associate is on non-work time (breaks, lunches, before or after a scheduled shift)
>
> Associates making purchases must pay for the merchandise or products in total at the time they receive the merchandise or products Associates may not extend credit to anyone without prior management approval
>
> We hope this review of your responsibility in this area will prevent any misunderstanding in the future which will result in immediate suspension and subsequent termination

Person 1 said the Employer has taken such a strict approach to unauthorized possession and consumption cases because with 80,000 employees, stiff competition and low profit margins, it cannot afford to make subjective determinations of intent in such cases. He testified that in every pros en case of unauthorized possession or consumption in which he was involved or of which he had knowledge in more than ten years in OMP Relations the result was termination. Person 1 also presented a chart, prepared from a review of Company records and summarizing the disposition of thirty -three unauthorized consumption cases in the Michigan Region as far back as 1984, all of which ended either in termination or resignation in lieu thereof.

The Employer contends this termination must be upheld based on appellant's clearly proven and admitted consumption of a cup of coffee he obtained but did not pay for at the Store 22 gas station convenience shop; uniform, consistent enforcement of rules saying the penalty for unauthorized consumption is termination; and Section L. of the Termination Appeal Procedure, which defines and limits the arbitrator's authority as follows.

> The arbitrator's authority shall be limited to deciding claims arising out of or relating to the team member'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 team member isolated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the team member was terminated for that violation, the team member's termination must be

upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action.

In his appeal form, appellant claimed he was "terminated without just cause because there was no intent or premeditation behind the consumption of the cup of coffee that I drank from the Employer gas station " As that statement suggests and as he freely admitted when questioned by another store detective and in his arbitration testimony, he took the coffee from the station and drank it without paying for it. When first questioned, he said he did pay for it But when told there was a videotape showing him getting the cup of coffee and taking it out of the station without pain` for it he said he must have forgotten to pay and attributed his forgetfulness to his sluggish mental state that morning, (he the coffee at about 5.45 a.m.), which he said was a side effect of medication for a seizure disorder exacerbated by insufficient sleep the night before.

In the appeal form appellant also mentioned another case in which "former Store Detective Person 2 was allowed to leave the gas station without paying for the gas he had pumped into his vehicle and not be terminated or even be written up for it." With reference to that case he wrote that he did not "understand how one person can be persecuted yet another be given the chance to correct an honest mistake which is what I believe I have done if I did not give the attendant the dollar bill I thought I had."

The Person 2 incident occurred approximately five years ago, when he pumped three dollars worth of gas into his vehicle and left the station without paying. The attendant on duty at the station called Loss Prevention Team Leader Person 3, who immediately paged Person 2 and told him what he had done, and Person 2 promptly returned to the station and paid for the gas. Person 3 took no disciplinary action against Person 2 and did not report the incident to OMP Relations or anybody else. Person 1 said he had never heard of the case until appellant brought it up and he then talked to Person 3, who told him he responded to the situation so quickly that he

did not think it through and merely gave Person 2 the same opportunity to rectify his mistake as he would have given to a customer who drove off without paying for gas Person 1 said he issued a counseling to Person 3 for poor judgment and included therein a statement that he should have at least written a report and another such lapse in judgment "could lead to discipline."

In arbitration, there was discussion about another purported unauthorized possession or consumption case in 1997, which did not result in termination. It involved a probationary store detective named Person 4, also at Store No. 22, who bought two granola bars at the same gas station convenience shop before beginning a stint in "Mobile One, a loss prevention surveillance \ an which patrols the store parking lot and grounds. When she got into the van she found that she had only one granola bar, so she went back into the shop and told the attendant that. He told her to take another one, which she did, but while riding in the van she discovered the original second bar, which she took back to the gas station when her patrol duty ended. Like appellant's coffee incident, those events were recorded on video surveillance cameras There was an investigation and Person 1 made determination that Person 4 had not violated the unauthorized consumption rules because she had paid for two granola bars and the attendant authorized her to take what turned out to be a third bar, and because she promptly and voluntarily returned the unopened third bar without management intervention. He said it was objectively clear from those facts that she did not intend to possess or consume store property without paying for it.

Appellant's counsel concedes that if the rule specifying termination for unauthorized possession or consumption had been uniformly and consistently enforced, the Employer would have had the legal right to terminate him without regard to his intent. But he contends the Person 2 and Person 4 cases are clear evidence that the rule has been selectively and inconsistently

enforced and enforcement or non-enforcement has been predicated on management determinations of intent.

Thus it is argued that appellant deserved the same consideration, and since he did not get it there is a further assertion that the arbitrator may (and should) make an independent just cause determination, find that he was terminated without just cause because there is no convincing evidence that he actually intended to take and/or consume the coffee without paying for it, and reinstate him with back pay.

DISCUSSION AND FINDINGS

The Employer disagrees, asserting that the Person 2 and Person 4 cases are not evidence of lack of uniformity or consistency in application and enforcement of the unauthorized possession and consumption rules because the department primarily responsible for their enforcement, OMP Relations, had no knowledge of or involvement in the Person 2 case and reasonably concluded that Person 4 did not violate those rules. Convinced as I am that appellant no more intended to violate them than Person 4 did, and even though their enforcement in his case might not unreasonably be considered draconian, I nevertheless am compelled to agree with the Employer and therefore to deny his appeal.

In his post-hearing brief, appellant's counsel asserts that contrary to its claim that the termination-for-unauthorized-consumption rules have been strictly, consistently and uniformly enforced, the Employer actually "has regularly inquired into the intent of employees accused of violating" it, so I should do so in this case But the evidence in this record does not substantiate that assertion.

Person 2 avoided termination not because management decided his drive-away from the gas station was unintentional, but because his first assistant impulsively gave him the same

courtesy as would have been afforded to a non-employee customer in such a situation. It is clear that Person 3 did not even think about that situation as being covered by the unauthorized consumption or possession rule, and did not report or refer the matter to OMP Relations, the department responsible for consistent Employer-wide enforcement of the rule. By the time that case became known to OMP Relations, Person 2 had left the Employer's employment and therefore was beyond reach of the rule, but Person 1 issued Person 3 counseling for not having reported the incident as he should have. Accordingly, the Person 2 case was not comparable to this one, and if it constituted an exception to strict enforcement of termination-for-unauthorized-consumption it was one of mistake and inadvertence, not deliberate non-enforcement of the rule As such, it is not proof of inconsistent enforcement or of any inquiry, much less of regular inquiry, by management into the intent of employees accused of violating the rules, therefore it does not open the door for such an inquiry by the arbitrator in this case.

In the Person 4 case, Person 1 acknowledged he did make a determination of intent, but not through subjective analysis of Person 4's motives or veracity; rather, he said it was clear from objectively determinable facts that she did not violate the unauthorized possession or consumption rules. Person 1's explanation was cogent and credible and there is no reason to doubt or quarrel with his conclusion. To the contrary, it is clear that Person 4 possessed the third granola bar (she did not consume it) with specific authority from the gas station attendant, thus her possession was not unauthorized. It also must be remembered that she paid for two granola bars, her mistake was not forgetting or neglecting to pay, but temporarily losing track of one of the granola bars and erroneously assuming she had left it in the station. Furthermore, she discovered her mistake and returned the third bar, unopened and unconsumed, before the incident came to the attention of anybody in the Employer other than the station attendant. Those

factors all serve to differentiate the Person 4 case significantly from this one, and to substantiate the Employer's position that it was not an exception to strict, consistent enforcement of the rules in question, because her conduct simply was not covered by them.

The same cannot be said for appellant. Despite the innocence of his intentions (and I do not doubt that he walked off with the coffee due to benign inadvertence, not larcenous intent), the following conclusions are inescapable. By taking and consuming the coffee without paying for it, he violated lawful Employer rules. The Employer had established those rules -as just cause for termination," and had consistently and uniformly enforced them, and appellant "was terminated for that violation." As Section L of the Termination Appeal Procedure mandates, therefore, his "termination must be upheld" and I have no authority to reduce it to some lesser disciplinary action.

AWARD

The termination appeal of Employee is denied.

Paul E Glendon,

Arbitrator

June 9, 1999