

**Martin #5**

**IN THE MATTER OF THE ARBITRATION**

Between

EMPLOYER

And

EMPLOYEE

EMPLOYEE DISCHARGE

**REPORT AND DECISION OF ARBITRATOR**

In these proceedings, a single Grievance was submitted for an Award to James P Martin, selected by the parties to serve as Impartial Arbitrator herein. A hearing was held in City A, State A on August 27, 1997, at which the parties were fully heard.

Briefs were filed and exchanged through the Arbitrator on November 1, 1997.

**ISSUE**

Was the discharge of the Grievant, Employee, for just cause? If not, what is the remedy?

**NATURE OF CASE**

The Grievant was hired by the Employer as a greeter in February 1996. He was discharged for an incident which occurred on December 23, 1996, involving a violation of the consumption policy. The Employer has a rule, published in its Guidelines and in its Team Handbook which forbids the consumption of food without first paying for it, and with a number of other restrictions. On December 23rd, the Grievant was observed by a store detective eating chocolate candy, followed by the consumption of an orange. The Grievant acknowledged that he

took the items in question and ate them, acknowledged that he did not pay for them prior to eating them, but stated that he intended to pay for them later. Evidence admitted through the testimony of a Employer witness, and not rebutted by the Grievant, was that he was in the back of the store when he ate the chocolate candy, exited the rear of the store through a closed cashier's line, picked up the orange on his way to the Hole-in-the-Wall, ate the orange there, returned past all of the cashier check-out stations to his position as a greeter, and made no attempt to pay for the food until he was called into a meeting with the store detective and his superior. At that meeting, the Grievant gave a statement acknowledging the consumption of the food and the non-payment of it, and initially stated to the interviewing store detective that he had paid for the food. When pressed as to the identity of the person to whom he had made payment, the Grievant acknowledged that he had not yet paid, but intended to. The Grievant was suspended pending investigation. The matter and the statements of the store detective and the Grievant were forwarded to a division of Human Resources, and the determination was made that further investigation was not necessary, and the Grievant was thereafter discharged. A grievance followed, concluding in this arbitration.

The Employer submitted evidence that the rule against consumption without prior payment has been in effect for an extensive period of time, that employees are notified through the Team Handbook and the Guidelines that a violation of this rule will result in immediate discharge, and employees are further informed of this policy in "Traditions," a ten hour indoctrination given to all employees. It was acknowledged that the Grievant somehow had not been given the Traditions training. The Employer further presented evidence that it had uniformly and without exception enforced this policy, that no employee had been discovered violating that policy who had not been discharged, and that the Grievant was treated exactly as

have been all employees at the Employer. Further evidence was submitted that customers are allowed to "graze," meaning eating of food on the premises without payment, and employees are directed to ignore this, inasmuch as hassling the customers would reduce sales more than the Employer would lose in consumption loss. However, there was no evidence that any lapses were allowed at all in relation to employees. The Grievant testified that he had observed other employees eating food on the clock and apparently without having previously paid for it, but he could not say that the Employer was aware of this happening. The Grievant's work record during his ten months employment was exceptionally good, with the Grievant being neither absent nor tardy on even one occasion during his ten months. The Grievant was once counseled about eating food on the clock, but the Grievant never repeated that action after the warning, and, in fact, testified that the incident was not even true, because he was punched out at the time it occurred. Finally, the Grievant claimed that he had suffered from depression for many years, and, being 68 years old, also suffered from a weak memory. He testified that he knew of the rule against eating food without first paying for it, but forgot. The food consumed had a retail value of 70 cents.

## **CONTENTIONS**

According to the Grievant, he did not receive adequate notice from the employer that a minor violation of the consumption policy would result in discharge for a first offense. While he had received the Team Handbook and the Guidelines, he did not remember that they specified that discharge would result, and he was never given the orientation "Traditions." The Employer's rule is not reasonably related to the orderly, efficient and safe operation of the Employer's business, because it is obvious that the many more customers grazing would have a more deleterious effect upon the Employer's business than the relatively few employees doing the

same, and customers are not prohibited from doing this according to Employer policy. Further, the Employer failed to make a fair investigation of the matter, because the Grievant was effectively terminated immediately upon his meeting with the store detective and his Superior, and no further investigation was conducted after that point. The Grievant was also the victim of disparate treatment, because he had seen other employees violating the consumption policy and receiving no discipline at all. The Employer even acknowledged that it ignored some violations of the Policy, and to discharge the Grievant for a first offense of a minor amount of food is disparate. Finally, the penalty was grossly excessive and unfair, because there was no relationship of the penalty discharge to the seriousness of the offense. This is compounded by the fact that the Grievant's work record was exemplary, and that excellent record was not taken into consideration by the Employer whatsoever. The grievance is meritorious, and the Grievant should be reinstated to his position without loss of pay or benefits.

According to the Employer, the Grievant acknowledged violating the Employer policy on consumption. He ate chocolate candy without previously paying for it, and ate an orange without previously paying for it. Prior to his being called into a meeting, he had at least two occasions when he could easily have paid for it, one when he was proceeding to the front of the store and used a check-out counter which was closed, and a second when he returned from the Hole-in-the-Wall, and passed every cashier station in the store without making any attempt to stop and pay. It was obvious that he did not consume the food with the intention of subsequently paying for it. Further, at the meeting following his apprehension, he first claimed that he had paid for the food, and only when pressed, acknowledged that he had not. This indicates that the Grievant was well aware of the need to pay for the food prior to consuming it, and the Grievant's claim of a memory loss accounting for his violation of the consumption policy is obviously false. The

Grievant was suspended pending an investigation, and during the pendency of his suspension, a determination was made that no further facts needed to be gathered, because the interview with the Grievant on December 23rd fully covered all the necessary facts. This was not known to be the case when the Grievant was suspended, and the determination of further investigation might well have been made in favor of doing more required investigating. The fact that it was found to be unnecessary is not the same as the investigation not being made. The Employer has, and needs, a very firm and unyielding policy on consumption by employees. While it cannot control its customers without adversely affecting its business, it assuredly can and should control its own employees, who are paid to perform work, not to take advantage of the availability of product in the Employer store. The Employer has never, in any store nor at any time, allowed a violation of the consumption policy to be discovered without discharging the employee involved. The policy is firm, the policy is consistent, and the policy is without exception. The Grievant unfortunately violated the policy, and the Employer did not vary from its uniform and consistent application of the policy to all employees. The grievance is without merit and should be denied.

### **APPLICABLE CONTRACT PROVISIONS**

#### **EMPLOYER PEER REVIEW AND ARBITRATION PROCEDURE FOR HOURLY TEAM MEMBERS**

##### **B. ARBITRATION**

Arbitration is a process similar to a court proceeding except that the final decision is made by a neutral arbitrator instead of a judge or jury. At our Employer, you must use arbitration if you want to contest the recommendation of the peer review panel.

###### **Election To Arbitrate**

Either party may elect arbitration by notifying the other party in writing of an intent to do so. The notice must be postmarked no later than fourteen (14) calendar days after the date the party received the panel's recommendation. Failure to provide this notice within the fourteen (14) days will be considered an acceptance of the Peer Review Panel's decision.

## Selection of The Arbitrator

If either party elects arbitration, the Employer will promptly mail to you a list of names of five (5) arbitrators. The list will be comprised of arbitrators who (1) are not employed by or affiliated with the Employer or any parent or subsidiary, (2) are attorneys; (3) are generally recognized as neutral labor and employment arbitrators; and (4) are affiliated with or registered with the Federal Mediation and Conciliation Service (FMCS) and/or the American Arbitration Association (AAA).

No later than fourteen (14) calendar days after you receive the list of arbitrators, you or your 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 will be chosen from the names on the list by alternately striking names until only one name remains. You will strike the first name.

## Representation

Either party may be represented by an attorney or other representative at the arbitration hearing. However, the Employer will not be liable for the payment of expenses or fees charged to you by any attorney, other representative or witness, except as may be appropriately awarded by the arbitrator under applicable law.

## Discovery

After the arbitrator is selected, you and the Employer should attempt to agree on any pre-hearing discovery. If agreement cannot be reached, 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.

## Rules Governing The Arbitration Hearing

The arbitration will be conducted in accordance with the then-current provisions of the Voluntary Labor Arbitration Rules of the American Arbitration Association, except as modified by this procedure and except that the American Arbitration Association shall not administer the arbitration.

At the end of the hearing, both you and the Employer will have the opportunity to file post-hearing briefs. The time for filing the brief will be set by the arbitrator.

Either party may, at the party's own expense, arrange for and pay the cost of a court reporter to provide a stenographic record of the proceedings.

### Arbitrator's Authority

The arbitrator's authority is limited to deciding discrimination and discharge complaints. 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 any authority to substitute his or her judgment for the Employer's business judgment.

The arbitrator shall have the authority to hear and rule on pre-hearing disputes and to hold pre-hearing conferences by telephone or in person as the arbitrator deems necessary. The arbitrator shall also have the authority to entertain a motion to dismiss and/or a motion for summary judgment or disposition by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedure.

### Relief

The arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant, subject to the following (1) the arbitrator shall not award relief greater than that sought by the team member, (2) the arbitrator may not reduce any penalty imposed by the Employer if the arbitrator finds the team member was disciplined or terminated in accordance with Employer policy and not for an unlawful reason; and (3) if the arbitrator awards back pay, the arbitrator shall deduct from the award all lawful setoffs, including but not limited to, the team member's interim earnings, unemployment compensation payments, any other sums paid in lieu of employment during the period after discharge and any amount attributable to the team member's failure to mitigate damages or for periods of unavailability for work.

In cases of discharge from employment, if the arbitrator orders reinstatement the Employer shall have the option, within fourteen (14) calendar days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

### Form of Arbitrator's Award

The arbitrator shall submit to the parties a written award signed by the arbitrator. The award shall specify the relief awarded, if any, and the elements and basis for any monetary award. The award shall be accompanied by a written opinion signed by the arbitrator which shall include findings of fact and, where appropriate, conclusions of law.

### Arbitrator 's Fees

The arbitrator's fees and expenses shall be borne fully by the Employer, except that fees incurred as a result of any postponement shall be borne by the party requesting or causing the postponement of the hearing.

### EXCLUSIVE REMEDY, EFFECT OF ARBITRATION, CONDITION PRECEDENT

The Fair Treatment Procedure is intended to be the sole and exclusive remedy and forum for all complaints within its scope. The use of the term "may" with respect to advancing a complaint from one step to another is not intended to mean or imply that this procedure or its various steps are optional.

All decisions made under this procedure, including arbitration decisions, are final and binding between the parties as to all complaints which were or could have been advanced to the step at which the decision was made. Judgment may be entered on any arbitration award by any court of competent jurisdiction.

In the event a court of competent jurisdiction should determine that this procedure is not the sole and exclusive remedy and forum and/or that the decision and award of the arbitrator, if any, is not final and binding between the parties as to some or all of the team member's complaints, it is intended that exhaustion of this procedure be a condition precedent to the institution or maintenance of any legal, equitable, administrative, or other formal proceeding by an eligible team member for all complaints within the scope of this procedure.

### GUIDELINES FOR PERSONAL PURCHASES

When making personal purchases we trust our team members to use good judgment to avoid placing themselves in a compromising position. Team members who choose to violate these rules will be disciplined or may have their employment terminated.

The following are some common-sense principles team members can use as a guide.

Drinking, eating, or sampling of merchandise or products (even if damaged) is not allowed, unless approved in advance by a team leader or unless the team member has properly paid for the item and the team member is on non-work time (breaks, lunches, before or after a scheduled shift). Violation of this guideline will result in termination of employment.

## TEAM HANDBOOK

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## DISCUSSION

Taking in order the Union's objections to the existence of just cause, the claim that the Employer did not give the Grievant adequate notice of the penalty which would be imposed for a violation of the consumption policy cannot be found to be supported. The Grievant acknowledgely did not receive the Traditions training, but did receive both the Guidelines and the Team Handbook. He acknowledged that he read them, but that his memory failed him as to what they contained In the Guidelines, it states that employees shall not drink, eat, etc., and it ends with this sentence: "Violation of this Guideline will result in termination of employment " In the Team Handbook, precisely the same language is contained as in the Guidelines. Of the three possible means of conveying to the Grievant the seriousness with which the Employer regarded the consumption policy, the Grievant had two, and admitted that he had read them, but claimed he forgot The evidence at the hearing suggests that this is not correct. The Grievant first attempted to tell the store detective that he had paid for the items. He later acknowledged that he hadn't paid, but that he intended to pay for them. If the Grievant truly thought that it was not necessary to pay in advance, why falsely claim that he had paid for them? While he claimed that his memory was faulty, there is a limit to how selective a memory he is allowed to take

advantage of. It must be found that the Grievant was properly informed of the consumption policy, and that he was aware of the need to prepay for any food at the time that he took the candy and orange on December 23<sup>rd</sup>.

The claim that the rule was not reasonably related to the orderly, efficient and safe operation of the Employer's business must be totally rejected. In fact, it is one of the most important rules for many companies to have in order to stay in business. With its thousands of employees capable of "grazing," if the Employer did not strictly enforce a rule prohibiting it, it would endanger its very existence. While euphemistically called its "consumption policy," the rule is basically one against theft. If all the employees were aware that they could steal until caught the first time, and only then be in jeopardy of serious penalty, the Employer's very survival would be in doubt. Thieves steal, and it is as likely in any case of an employee being apprehended for theft, that it was the first time he was caught, not the first time he stole.

Companies must have rules relating to their particular environment. Employees in a steel mill producing billets weighing tons each, would hardly require a strong rule against theft, because the employee stealing product would be unlikely beyond the need for such a policy. In an Employer such as this, the store is totally filled with objects which can be pilfered, and if employees are not convinced that the first theft is the last theft, product loss would be staggering. It was clear that minor pilfering by customers is to be disregarded, and that is a business decision by the Employer. It must decide where to draw the line between alienating customers and losing product to theft. However, the same choice can also be made by the Employer in relation to its employees, on an entirely separate basis. The Employer has made that choice, and it is to immediately terminate the employment of any employee who is apprehended for any theft, no matter how minor.

Next, the Grievant claims disparate treatment because, as he testified, other employees have been observed by him violating the rule for which he is terminated, and they have received no discipline whatsoever. The problem with this testimony as evidence of disparate treatment is that the Grievant was unable to state that management was aware of the rule violations of which the Grievant was aware. Had he testified that management was well aware of others consuming without paying and not penalizing them, a totally different situation would exist. However, so far as the evidence was concerned, only the Grievant was aware of these violations, and he did not report this to management as required. Evidence by the Employer establishes that this rule of discharge for violation of the consumption rule has been uniform and consistent, without any exceptions. That testimony is unrebutted, and is accepted.

Finally, the claim was made that the discharge of the Grievant was an excessive and unfair penalty not reasonably related to the seriousness of the offense, nor taking into consideration the Grievant's exemplary work record. The discussion above covers this claim as well. The penalty is related to a major problem that the Employer has, and is not excessive, as discussed earlier. The further claim that the Grievant's work record should be taken into consideration is rebutted by the Employer's claim of a need to have a totally consistent and absolutely unvaried enforcement of its policy, namely, the immediate discharge of anyone accused of any form of theft.

It is impossible to handle this case without sadness, and without a great deal of sympathy for the Grievant. It seems unquestioned that he wants the job, needs the job, and would probably be an excellent employee if he returned. There are two problems with making a finding of no just cause, which would be necessary to return the Grievant to work one is that mercy is not the prerogative of the arbitrator, but of the Employer. If the Employer decides to show great

compassion, and thereby dilute its policy, that is its business. The arbitrator is limited to finding the facts, and how they relate to just cause of the Employer's actions. The second problem is the effect that a finding of no just cause would have on the Employer's enforcement of its policy throughout the system. Not only would the Employer be faced with numberless challenges to its policy, hoping that in each case the selected arbitrator would also overrule the Employer's policy, but employees would be misinformed as to the result of a casual approach to taking Employer property. The Employer had in this instance just cause to terminate the employment of the Grievant, based upon a proven violation of its policy against unpaid consumption of food, and the grievance must therefore be denied.

## **AWARD**

That the Grievance shall be and hereby is denied.

James P Martin

Labor Arbitrator

December 5, 1997