BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES LOCAL UNION NO. 122**

and

**PFISTER HOTEL CORPORATION**

Case 1
No. 57559
A-5765

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi Soldon**,
1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of HERE Local No. 122, joined by **Attorney William Ramsey**, on the brief.

Beck, Chaet, Molony & Bamberger, S.C., by **Attorney Barry L. Chaet**, Two Plaza East, Suite 1085, 330 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Pfister Hotel Corporation.

## ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Hotel Employees and Restaurant Employees Local Union No. 122 (hereinafter referred to as the Union) and the Pfister Hotel Corporation (hereinafter referred to as the Company or the Hotel) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff as arbitrator of a dispute over the termination of employe Richard Adams. The undersigned was so designated. Hearings were held on August 27 and October 4, 1999, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the undersigned on November 24, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUE

The parties agree that the issues before the arbitrator are:

1. Was the grievant discharged for just cause?

2. If not, what is the appropriate remedy?

## PERTINENT CONTRACT LANGUAGE

### ARTICLE II – UNION SECURITY, HIRING AND DISCHARGE

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Section 8. Employer may discharge an employee for just cause, subject to subsequent arbitration when demanded by the Union.

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### ARTICLE III – GRIEVANCE AND ARBITRATION PROCEDURE

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Section 4. In the case of any grievance seeking retroactive pay of any kind, retroactive pay shall not be granted for any period greater than seven (7) days prior to the date of the filing of the grievance. Any grievance not filed within thirty (30) days (seven (7) days in the case of a discharge) of the event giving rise to the grievance will not be accepted, processed or arbitrable.

## BACKGROUND

The Company operates a hotel in downtown Milwaukee. Its non-supervisory employes, including wait staff, are represented by the Union. In the hotel is a fine dining establishment called the English Room. Timothy Hampton is the Manager of the English Room. The grievant, Richard Adams, was employed as a server in the English Room for six years until his discharge in March of 1999 for failing to charge a guest for a drink.

On March 8th, the grievant served a party of four who dined between 7:30 p.m. and 10:00 p.m. After they were done eating, they ordered a glass of Muscat and a glass of Lagavullin, an expensive single malt Scotch. The diners were charged for the Muscat, but not for the Scotch. There is a considerable disagreement among the witnesses as to how this came about:

- According to **Tom Kelly**, the bartender on duty, the grievant came to the bar and asked for the drinks, which Kelly poured for him. He knew that they had Lagavullin on hand, because the bar makes it a point to always have at least two bottles of each Scotch they carry. When an order is brought up, the server is supposed to enter it into the computer, which causes the order to be placed with the kitchen or the bar, and automatically adds the item to the customer's bill. If the server is quite busy, he might ask the bartender to enter an order into the computer, and the bartender will do so as a matter of courtesy. When that happens, the server always asks the bartender to enter the entire order, not simply one item. In this case, the grievant did not ask Kelly to enter the order. After the grievant took the wine and the Scotch to the table, Kelly noticed that he had entered the wine, but not the Scotch. The restaurant charges $9.00 for a glass of Lagavullin. Kelly wasn't sure if the Scotch was supposed to be complimentary or if it was simply a mistake. Since the grievant wasn't in the immediate vicinity, Kelly told Tim Hampton that the grievant had neglected to enter the Scotch.

- According to **Tim Hampton**, when Kelly told him that the Scotch had not been rung up, he went to the kitchen and found the grievant. He told him to retrieve the bill from the table, explain the mistake to the guests, and add the drink. The grievant made no comment, and Hampton then left the kitchen to go upstairs. When he returned, the grievant told him he hadn't corrected the check. He had no explanation, other than to say he had simply forgotten to ring it up when it was served. Since one of the diners was staying at the Hotel and had charged the meal to his room, Hampton had the room charge adjusted to account for the Scotch.

- According to the **Grievant**, he went to the bar and entered the wine order into the computer system. As he did this, he asked the bartender, Tom Kelly, if they had Lagavullin since, in his experience, the bar sometimes had it in stock and sometimes

did not. Kelly said they did have it, and the grievant asked him to pour a glass and enter it into the computer. The grievant did not enter it himself, because if they had not had it on hand he didn't want to have to delete the order. Kelly said he would enter the order on the computer. He poured the drink and the grievant served it and the wine to the customers.

After the party of four left, Tim Hampton approached the grievant and told him he hadn't rung up the Scotch. The grievant reviewed the bill and said "You're right – what do you want me to do? Do you want me to go to the lobby and look for them?" Hampton told the grievant he would take care of it, and that he didn't need to do anything.

On March 9th, Hampton met with the staff of the Hotel's Human Resources office, and recommended to them that the grievant be terminated. On the evening of the 12th, the grievant's next scheduled shift, Hampton, Human Resources Director Paula Rauembuehler and Food and Beverage Manager Nabil Hammoud met with the grievant and advised him that he was being terminated. He was provided with a notice of termination spelling out the grounds:

> On 3/8/99 you had obtained two beverages from the bartender for a table. It is proper procedure that all food and beverages be correctly accounted for in the Micros system at the time of the order. One beverage (Lavagullin scotch up) was not accounted for. You were instructed to add the beverage to the guest check before the guest settled the bill. This drink was not accounted for according to the check the guest signed and no manager granted approval to provide this complimentary. This failure to follow proper procedure of accounting for all food and beverages will not be tolerated. This failure in accounting for a product, if not caught, would have resulted in a loss to the company. It is your responsibility to account for all products provided. You are hereby terminated for consistent failure to follow procedures including inappropriate handling of guest checks.

The instant grievance was filed, and it was not resolved in the lower steps of the grievance procedure. At the arbitration hearings, in addition to the testimony recited above, the following evidence was taken.

Paula Rauembuehler testified that there had been problems with the grievant since the Spring of 1998. At that time, there had been complaints from 6 or 7 other employes about the grievant threatening co-workers, claiming to have a gun, overloading trays so other staff could not carry them safely, and deliberately bumping staff members who were carrying trays and refusing to do side work. A meeting was held in May between Rauembuehler, Hammoud, Hampton, the grievant and two Union stewards to discuss the complaints, and the grievant

explained that this was all a case of others misunderstanding his sense of humor and his different style of working. A second meeting was held with the employes of the restaurant two days later to clear the air, and the grievant said that he would work to improve things, but that people would have to make allowances for his differences as well.

Rauembuehler testified that accounting for product is very important in the industry and recounted three prior instances in which employes had been terminated for a single incident of violating cash handling rules. One employe failed to properly account for a complimentary drink to a customer, another failed to ring up a breakfast for a regular customer and a third gave free coffee to a customer. All three employes were Union members and all three were terminated. Two had prior warning notices in their records, but the employe who gave away the coffee had a clean disciplinary record. Two of the employes filed grievances, but in all three cases the terminations stood.

The Hotel introduced evidence of prior discipline against the grievant. The grievant disputed the validity of this prior discipline, alleging in some instances that he was never made aware of it, or was told of it in an untimely fashion. He also testified that some of the incidents were not portrayed accurately in the warnings and that no discipline was warranted:

May 14, 1998 — Verbal warning for insubordination to Hampton. According to Hampton, the grievant was wasting time in the room service area, and he told him to get to work and help set-up the dining room. The grievant told him that he didn't have to, although he ultimately did help with the set-up. Hampton said he prepared the counseling notice at the end of the shift, but the grievant refused to sign for it. The grievant alleges that the first time he ever saw this notice was in late 1998 when he asked to see his file. The Union's Business Manager, Sam Gallo testified that there was no copy of this notice in the Union's files and that it would have been filed if it had ever been received. Human Resources Assistant Susan Pedderson testified that this notice, and all disciplinary notices, were sent to the Union once or twice per week, in the normal course of business.

May 15, 1998 — Written warning for punching in early and working unauthorized overtime. According to Hampton, he discovered that the grievant had punched in at 3:31 p.m. for his 4:00 p.m. shift. Hampton said he prepared the warning the following day and presented it to the grievant, who became very upset and refused to sign it. The grievant testified that he never saw this notice until three months later, and by that time he

could not even remember such an incident. The Union's Business Manager, Sam Gallo testified that there was no copy of this notice in the Union's files and that it would have been filed if it had ever been received.

September 21, 1998 — A suspension pending investigation for failing to complete his duties and lying about being ill. According to Hampton, the grievant wanted to work his area alone, but Hampton told him he had to work as part of a team. The grievant walked away, then returned five minutes later, claiming to be sick. He told the grievant he needed him, but the grievant insisted he'd become sick from eating in the cafeteria. Hampton told him to bring in a doctor's slip. The grievant alleges he received this notice a month after it was issued, and the Union alleges it never received a copy.

December 13, 1998 — A written warning for violating cash/credit handling procedure by accepting a discount coupon that should not have been accepted on a Saturday night, and not correctly submitting the check. According to Hampton, the restaurant stopped accepting the coupons two weeks earlier, and the staff had been advised of this several times. The grievant alleges he never received this notice, while the Union did receive a copy.

December 13, 1998 — A written warning for insubordination in threatening Hampton. According to Hampton, the grievant was upset about his guest count. Hampton told him the guest count was fair, and the grievant replied "I'll show you what's fair." Hampton took his tone and manner to be threatening, and wrote up a notice. The grievant refused to sign the notice. The grievant alleges he never received this notice, while the Union did receive a copy.

December 13, 1998 — Two counseling notices for violating cash/credit handling procedures, one for accepting a coupon that should not have been accepted on Saturday nights and one for voiding a transaction without Hampton's approval. The Human Resources office advised Hampton to withdraw these two warnings, and he did so. In the case of the discount coupon, they felt he would not have been able to respond to the prior warning on this subject, so it was not fair to issue another. In the case of the voided transaction, they felt the violation was technical and unintentional.

January 4, 1999 — A written warning for improperly calling in sick and failing to maintain regular attendance. According to Hampton, he received a phone message from the grievant saying he needed to know if he was needed at

work. He tried to reach the grievant, speaking twice with the grievant's daughter and then getting an answering machine. The grievant did not call back and did not give the required four-hour notice that he would not be into work. Thus he was written up for it. According to the grievant, he was in the early stages of pneumonia. He filed a grievance over this notice, and the grievance was resolved on the basis of leaving the notice in his file.

January 29, 1999 — A suspension for refusal to help other employes set up the dining room. According to Hampton, the grievant was chatting with another server in the Room Service area when he should have been working. He told him to get to work. Later, a customer asked Hampton who his server was supposed to be. Hampton went and again found the grievant chatting in the Room Service area. Hampton said the grievant became very agitated and he felt threatened so he took him up to the security desk and gave him a notice of suspension for the remainder of his shift. The grievant refused to sign the notice, so Hampton had the security guard witness the refusal. According to the grievant, he was in the Room Service area waiting for the cook to answer a question. When Hampton accosted him, he told Hampton the entire situation was ridiculous. Hampton told him that if he didn't like it he could go home. When he told Hampton it was up to him, Hampton told him to go home. Hampton never used the term "suspension" to describe this. The grievant and the Union both acknowledge receiving this notice.

The grievant testified that there had been some friction between other employes and him in the Spring of 1998. In part this was due to the fact that the other employes misinterpreted his comments as being directed at them, rather than being general comments. In part, he attributed this to the fact that he worked harder than most employes, and demanded that they work just as hard when they were teamed with him. He preferred to work alone, rather than in teams, because he could exercise greater control over the quality of the service.

The grievant denied that he had ever intentionally provided a complimentary beverage to anyone without authorization. He agreed that even an honest mistake with a guest check might lead to discipline, but stated that Hampton had deliberately delayed mentioning the check until after the guests left so he could not correct the error, and then invented his version of events in order to justify discharging him. Hampton was known to be a homosexual. In May of 1998, Hampton and the grievant were sitting at the bar at the end of a shift, and Hampton asked if he had ever been out with a man. The grievant said that was not his thing, and Hampton said that all men had a feminine side and that under the right circumstance he would bet that the grievant would go out with a man. The grievant replied that maybe some men would, but that he would not. Hampton repeated that under the right circumstances he bet the

grievant would go out with a man. After this conversation, the grievant noticed that Hampton was much more critical of him, and assigned him fewer guests and more undesirable work. It escalated to the point where Hampton was hyper-critical and began making unjust accusations against him. In February of 1999, the grievant filed a sexual harassment complaint with the Hotel, accusing Hampton of harassing him on the basis of the May 1999 discussion. At the end of March 1999, he also filed charges with the Equal Rights Division and the EEOC, alleging retaliatory discharge.

The grievant said that Kelly was a good bartender, but that he was not the regular bartender and was unfamiliar with the stocking of the bar, and thus the testimony that they always kept Lagavullin in stock should be discounted. He had not had any problems with Kelly before, but he speculated that Kelly was lying to support Hampton's version of events because the two were lovers. He had observed the two having lovers' quarrels and leaving work together from time to time, and their relationship was common knowledge.

With respect to the grievant's discrimination claim, Rauembuehler testified that she investigated the claim, but could find no one who had a similar experience or could provide any information to support the notion that Hampton was propositioning employes.

Additional facts, as necessary, are set forth below.

## ARGUMENTS OF THE PARTIES

### The Position of the Employer

The Employer takes the position that the grievant was discharged for just cause and that the grievance should be denied. The grievant was well aware of the Hotel's rules, yet could not bring himself to comply with them on any consistent basis. This is in keeping with his personal history of being disruptive, uncooperative and even physically threatening to his co-workers. The Hotel tried to deal informally with the grievant's problems, holding two meetings in May of 1998 for the purpose of clearing the air between him and his fellow employes. Notwithstanding his promises to improve, the grievant continued to engage in inappropriate behaviors, leading to progressive discipline. Between May of 1998 and his discharge in March of 1999, the grievant received ten disciplinary notices. Two were removed from his file, and are not in issue here, leaving eight acts of misconduct in the space of ten months. Clearly progressive discipline has not worked, and the Hotel is entitled to move on to the discharge step.

The Hotel disputes the Union's claim that progressive discipline has not been followed because some of this discipline was not known to the grievant. Hampton's testimony that he gave the grievant copies of each notice, but the grievant refused to sign them is inherently

more plausible. The grievant's story changed with each retelling, as he initially claimed he'd never seen the discipline, then saying he'd seen it only in December. Yet in December, he did not grieve the inclusion of any "secret" discipline in his file. Even if it had been unknown to him before that point, he could have challenged it when it became known and, having failed to do so, he cannot now attack the validity of the prior discipline. Moreover, he admits knowing of the two December disciplinary notices and the two January disciplinary notices. These should have sufficed to put him on warning that he had to improve, particularly since both January notices expressly advised him that future violations of work rules could lead to termination. Under any interpretation of the record, the Hotel repeatedly tried to modify the grievant's behavior through progressive discipline. Only when it became clear that he would not improve did the Hotel take the final step of terminating his employment.

Even if there had been no prior discipline in the grievant's record, the March incident is sufficiently serious to warrant termination on its own merits. The grievant failed to include a charge for an expensive drink on a customer's bill. When this was brought to his attention, he lied and claimed the bartender was supposed to do this. Even after being told to correct the bill, the grievant failed to do so. The failure to correctly bill the drink violates the policies on cash and credit handling, and the refusal to follow his Manager's order constitutes insubordination. The fundamental fact is that a restaurant cannot tolerate employes giving away its product, particularly items like expensive Scotch where the Hotel's profit margin is highest. In the only two similar cases in the past, the employes, who had clean disciplinary records, were immediately terminated, with no grievances filed. The precedent has been set for summary termination in cases of giving away the Hotel's food and beverage products, and the grievant is not entitled to special treatment.

It is well established that the cumulative weight of prior offenses can lead to discharge, even where no one offense, standing alone, is serious enough to justify termination. That is the essence of progressive discipline. In the grievant's case, his record shows numerous offenses, some quite serious, all within a relatively short period of time. He was clearly guilty of violating established procedures on March 8th, and of insubordination. The penalty imposed was consistent with that meted out in prior cases of the same type. Given all of this, the arbitrator should defer to the progressive discipline system, and should not substitute his judgment for that of the Employer.

Finally, the Employer argues that the grievant's claim that the discharge was in retaliation for his sexual harassment complaint is simply not credible. The complaint was filed in February of 1999, after the grievant had twice been warned that he was on the verge of discharge for his misconduct. This was nine months after Hampton allegedly "harassed" him. As described by the grievant, Hampton engaged in a discussion with him about whether any man, under the right circumstances, would consider a homosexual encounter. The grievant does not claim that Hampton asked him out, propositioned him or suggested any type of personal relationship. Hampton credibly denied the conversation ever took place, and the Hotel's investigation found nothing to corroborate the grievant's story. Even if it had taken

place as the grievant describes, the conversation is not harassment under any definition of the term. The arbitrator should see the sexual harassment compliant for what it is – a red herring from any employe who knew his misconduct was catching up to him. For all of these reasons, the Hotel asks that the grievance be denied.

**The Position of the Union**

The Union takes the position that there was not just cause for discharge, and asks that the grievant be reinstated and made whole for his losses. The Hotel utterly failed to prove any misconduct by the grievant. He is accused of intentionally refusing to correct a bill, leaving off charges for a rare and expensive Scotch after being told by his manager to include it. The only evidence that Mr. Hampton told him to change the bill is Mr. Hampton's testimony. Likewise, the only evidence of the grievant's alleged past performance problems is Mr. Hampton's testimony. Mr. Hampton, however, is not a disinterested party, and his uncorroborated charges cannot form the basis for a discharge. A fair reading of the record discloses a personality conflict between the two men, and perhaps a vendetta against the grievant because he spurned Hampton's romantic overtures. In any event, the discipline here comes down to one man's word against the other's, and that is a scant basis on which to discharge an otherwise competent employe.

Recognizing the weakness of its case for discharge, the Hotel attempted to bolster its arguments by introducing evidence of seven prior disciplines. However, the record shows that many of these "disciplinary notices" were never made known to the grievant and/or the Union:

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| May 14, 1998 | Insubordination – The grievant and the Union never received this notice. |
| May 15, 1998 | Punching in early – The grievant and the Union never received this notice. |
| September 21, 1998 | Lying about being ill – Grievant received the notice a month later, but the Union never received a copy. |
| December 13, 1998 | Four counseling notices – two for accepting a coupon that should not have been accepted on Saturday nights – one for voiding a transaction without Hampton's approval – one for threatening Hampton. The Human Resources office voided two of these warnings, and the other two were received by the Union, but not by the grievant. |
| January 4, 1999 | Improperly calling in sick – The grievant had pneumonia and called in, but Hampton felt his telephone message was unclear. The grievant was informed of this notice. |

January 29, 1999 Refused to help other employes set up the dining room – suspension – the grievant and the Union received this notice.

These alleged disciplines are fundamentally flawed under a just cause standard. Each of these disciplines was initiated by Hampton and he is the Hotel's sole witness to all seven incidents. The Human Resources Office did not interview any other person before accepting Hampton's version of events, even though in some cases there were other employes in the vicinity or involved in the incidents. Moreover, the grievant was not even informed of the majority of these "warnings." Hampton claimed that he gave the grievant a chance to sign the warning notices, but that the grievant refused. The grievant denies this, and the fact that the Union did not log in any grievances in at least three cases very strongly indicates that the warnings were never actually issued. They were merely placed in the grievant's file. Discipline without notice serves no valid purpose, and the arbitrator cannot give any weight to the secret warnings as proof of progressive discipline.

Even if there was some basis for believing that the grievant deliberately failed to include the charge for the Scotch on a patron's bill, discharge is clearly an excessive and inappropriate response. The progression of discipline claimed by the Hotel is flawed by their failure to advise the grievant that he was being disciplined. The March incident, standing alone, cannot sustain a discharge. There is no evidence that the grievant intended to let his customer have the Scotch without paying for it. At most, this is a case of inadvertence. The grievant believed the bartender had charged the drink to the patron's bill. Discharge for an isolated mistake is alien to a just cause standard. Given that the grievant never received any discipline before Mr. Hampton became his supervisor in the Fall of 1997, then rapidly accumulated eight offenses, all initiated by Hampton, including a discharge for what is plainly a minor matter, it should be clear to the arbitrator that this is a case of a supervisor abusing his authority to seize the upper hand in a personality clash. The grievant should be reinstated to his former position and made whole for his losses.

## DISCUSSION

The Employer proceeds on the basis of two theories. Its primary theory is that this is a case of progressive discipline and that the discharge decision is supported by the cumulative weight of the grievant's record. In the alternative, the Employer urges that, even if the arbitrator has doubts about the prior record, the March 8th incident justifies termination on its own merits. The threshold question is whether the grievant intentionally failed to charge his customers for a drink, as the Hotel believes, or whether this was a simple mix-up between him and the bartender as the Union suggests.

**The March 8th Incident**

In large part this determination is a credibility question. While Kelly and Hampton's stories are consistent with one another, it is not really possible to blend them with the grievant's story and have a coherent version of events. Hampton must be entirely fabricating his story if the grievant's testimony is accepted. As for Kelly, the Union suggests in its brief that he may simply have been confused or have forgotten about the grievant asking him to enter the Scotch in the computer system, or he may have been relying on his friend Hampton's version of events. On the contrary, it is very nearly impossible to conjure some innocent explanation for Kelly's role if the grievant is telling the truth. According to the grievant, Kelly said "Yes" when he asked him if he would enter the drink for him, so Kelly must have been aware of the request. There is no dispute that, a few minutes later, Kelly told Hampton that the grievant had failed to enter the drink. Thus Kelly must be consciously lying when he denies that the grievant asked him to enter the drink. Indeed, Kelly must be the moving party in attempting to cause trouble for the grievant, since he must first have decided not to enter the drink, and then to draw Hampton's attention to it.

In addition to the problems with Kelly's role, there are problems with the grievant's explanation of events, two of them notable. He explained that he entered the wine but asked Kelly to enter the Scotch because he did not know if they had Lagavullin in stock and he didn't want to enter the drink and then have to engage in the time-consuming process of deleting the entry from the system if they were out. Kelly and Hampton both testified that they always kept Lagavullin in stock, calling into question the grievant's claim that sometimes they were out of the brand. More significant, however, is the grievant's own testimony. He said that he went to the bar, asked if they had the Scotch, and Kelly looked and replied "yes." He then asked if he would pour one and enter it into the system. At the point he asked Kelly to enter the drink in the computer, he knew it was in stock, and thus there was no possibility that he would have to delete an entry, which was his rationale for asking Kelly to make the entry in the first place. He waited for the drinks and then served them, so he wasn't drawn away from the computer system at any point, and he does not claim that someone else was using the station. In short, there was no reason for him to ask Kelly to make the entry. 1/ The other troubling aspect of the grievant's version is that when Hampton approached him, he never mentioned that Kelly had promised to enter the drink. This is not as troubling as the rather illogical explanation he gave for asking Kelly to make the entry for him, but it would make sense to tell the Manager why the drink wasn't entered, particularly since he felt Hampton was out to get him.

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***1/ The grievant did explain that the guests wanted to take the drinks to their room, so he was in a hurry to get the bill, but having Kelly make the entry while the grievant waited for the drinks would not speed up the process of generating the bill.***

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The grievant did speculate that Kelly and Hampton were colluding with one another because Hampton had a vendetta against him and Kelly was Hampton's lover. Kelly testified that he was on friendly terms with Hampton, but that the two of them had never socialized together. Even assuming that Kelly perjured himself on that point, he must be incredibly quick-witted, since as noted above the entire scenario depends upon him deciding on the spur of the moment not to make the computer entry so as to lay blame on the grievant. This conspiracy theory is simply too elegant to be plausible. The more reasonable conclusion, and the one that I draw, is that the grievant did not ask Kelly to enter the drink into the computer system.

The conclusion that the grievant did not ask Kelly to enter the drink necessarily leads to a number of other conclusions. The first and most obvious is that it is more likely than not that the grievant is lying about the other events of the evening, including whether Hampton spoke to him in the kitchen before the guests left. Since he was at the computer station entering a drink order, and only entered one of the two drinks, it might be fairly concluded that he intentionally left off the second drink in order to curry favor with a table that had a fairly large bill and could be expected to leave a large tip. The alternative is to conclude that he somehow forgot one of the two drinks while he was standing at the computer, an explanation that he does not offer and that does not make a great deal of sense. If he intentionally left the Scotch off the bill and represented to the customer that the Scotch was on the house, it would explain why he would not have gone back to the table to correct the bill when Hampton told him to do so. Going back to the table would require alienating the customer and admitting that the drink had not been authorized. Not going back to the table at least left open the possibility that the incident could be passed off as a mistake.

Whatever the grievant's initial subjective intentions were, I conclude that he did fail to enter the drink, and thereby violated the established procedures for cash and credit handling. I also conclude that the preponderance of the evidence establishes that he failed to follow Hampton's order to correct the bill, which ultimately makes this an intentional failure to bill for the drink. Contrary to the Union's claim that this conclusion requires clear and convincing evidence, this is not an offense that constitutes a criminal offense or involves some appreciable degree of moral turpitude. Even if it were, the conclusion that the grievant's testimony cannot be credited leaves me with the testimony of Kelly and Hampton. Their testimony is not inherently implausible – instead it holds together well on close review. If I credit them, as I do, the evidence is clear and convincing.

For the foregoing reasons, I have concluded that the Hotel had just cause to discipline the grievant on March 8, 1999. The question then is whether it had just cause to discharge him. I conclude that it did have just cause for discharge, both because of the seriousness of the offense and because of his prior disciplinary history.

**The Appropriate Penalty**

While the choice of a penalty is the Employer's in the first instance, it is subject to review and modification in the grievance procedure and in arbitration if circumstances warrant and the contract does not forbid such modification. Such a modification is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. Proportionality is a matter of context. Some offenses are treated differently in different industries. Giving away product in the food and beverage service industry is generally considered a fairly serious offense, since employes whose income is driven largely by tips have an incentive to seek the customer's favor, and the potential for loss by the Employer is large. The evidence here indicates that the Hotel has treated this as a very serious matter. There is unrefuted testimony in the record from Rauembuehler that the Hotel has discharged three bargaining unit employes in the past three years for a first offense of intentionally failing to charge for food and beverages. At least one of the discharges -- involving a free cup of coffee to a former employe -- was challenged in the grievance procedure. In all three cases, the discharge decisions were sustained. The Union distinguishes those cases because the employes there initially decided to give the product away, while here the failure to bill was at least arguably the result of inadvertence. This distinction is not persuasive, because the facts do not bear it out. As discussed above, if the grievant did not ask Kelly to enter the drink, it is far more likely than not that he intentionally failed to ring it up. Even if he didn't, his failure to follow Hampton's order to change the bill was an intentional decision, and amounted to the same thing. Thus the penalty here is in line with the treatment accorded other, similarly situated employes.

Even if the grievant's failure to enter the drink and to correct the bill were somehow unintentional, rendering discharge inappropriate for a first offense, the grievant's prior discipline record supports the imposition of a harsher penalty than would be called for in the case of another employe. In the ten months preceding the discharge, the grievant received one verbal warning, four written warnings and two suspensions. The second suspension was imposed five weeks before this incident, together with a warning that another infraction could lead to termination. The Union characterizes this mass of discipline as the result of a personality conflict between Hampton and the grievant, and argues that the grievant was unaware of much of the discipline because Hampton did not give him copies of the notices. Discipline based solely on personality conflicts with a supervisor is plainly improper, and that is one reason that parties negotiate just cause provisions and grievance procedures. The grievant did not avail himself of the protections of the contract, and it is axiomatic that discipline which is not grieved is thereafter presumed to have been imposed for just cause. An important caveat to this rule is the basic notion that someone cannot be held responsible for filing a grievance over a disciplinary warning that he is not aware of. Timelines for filing grievances are commonly understood to run from the date of the incident, or the date on which the grievant knew or should have known that he had cause to grieve. The grievant contends that he was not aware of many of these notices when they were supposedly issued, but he

admits that he saw all of the 1998 warnings when he reviewed his file in late December. At that point, he should have known that he had cause to file a grievance. Still he did not grieve the 1998 warnings, challenge them in any way, or even notify his Union. As for the January discipline, he did file a grievance over the January 4th warning and the grievance was resolved on the basis of leaving the warning notice in his file. At the hearing, he questioned whether the January 29th discipline could properly be considered a suspension because, even though Hampton ordered him to go home and miss over half of his shift with no pay, he didn't think Hampton used the word "suspension." This is simply a frivolous argument.

The contents of the grievant's personnel file were known to him by December of 1998, at the latest. He failed to challenge any of the discipline other than the January 4th warning, and his challenge to that warning did not result in any change in the file. Thus the grievant's disciplinary record for the purpose of assessing progressive discipline consists of a verbal warning, four written warnings and two suspensions, all of which were relatively recent and all of which were imposed for just cause. There is no precise formula for judging when an employer has satisfied the need to give an employe ample warning that his job is in jeopardy, and ample opportunity to change his behavior. The arbitrator does not purport to provide any formula here, other than to observe that the grievant had ample warning and ample opportunity. 2/

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***2/ The conclusion that the grievant was discharged for just cause makes it unnecessary to discuss his retaliation theory of the case. I would note, however, that the primary support for this theory comes from the coincidence of timing between the alleged discussion with Hampton and the increased tension between the grievant and his Manager in May of 1998. May of 1998 was also when complaints by approximately 50% of the other servers about the grievant prompted two meetings to attempt to correct his behavior. It is entirely possible that this, rather than some spurned romantic advances, triggered the deterioration in their relationship.***

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On the basis of the foregoing, and the record as a whole, I have made the following

## AWARD

The grievant was discharged for just cause. The grievance is denied.

Dated at Racine, Wisconsin, this 24th day of February, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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