BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 1

and

MODERN MAINTENANCE BUILDING SERVICES, INC.

Case 2
No. 63465
A-6112

(Minnie Hervey Termination)

Appearances:

Mr. Matthews Robbins, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of SEIU Local 1.

Ms. Jann Skowronski, Human Resources Manager, 2125 South 162nd Street, New Berlin, WI 53151-2201, appearing on behalf of Modern Maintenance Building Services, Inc.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, SEIU Local 1 (hereinafter referred to as the Union) and Modern Maintenance Building Services, Inc. (hereinafter referred to as either the Company or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the Company's decision to terminate Minnie Hervey from her position as janitor. The undersigned was so designated. An arbitration hearing was held on the matter on May 5, 2004, at which time the parties were afforded full opportunity to present such testimony, exhibits and other evidence as were relevant to the dispute. The parties submitted written arguments, which were exchanged through the undersigned on May 28, 2004, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The issue presented by this grievance is:

Did the Company have just cause to terminate the Grievant, Minnie Hervey? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 15 – MANAGEMENT RIGHTS

SECTION 15.1 – MANAGEMENT RIGHTS: The management, direction and control of the operations are and shall remain within the sole discretion of the Employer. This shall include, but not be limited to, the assignment of work, determination of the products to be used, the promulgation of reasonable work standards, work rules and other facilities, the hiring, promotion and termination of employees for just cause, the curtailment of all or part of the Employers operation and all other functions formally and the proper function of the Employer, except as limited by the specific clauses of this written Agreement.

The Employer will discuss with the Union the effects of any changes in hours of work and/or changes in work schedules. The Employer will not subcontract in any case where such action would result in job loss to current unit members.

. . .

ARTICLE 25 – DISCHARGE AND DISCIPLINE

SECTION 1. Except as otherwise provided by this Agreement, no employee may be discharged, suspended, disciplined or otherwise penalized without just cause. The Employer agrees that all discipline should be progressive, absent compelling circumstances warranting immediate termination or acceleration of disciplinary penalties.

. . .

BACKGROUND

There is no real dispute about the facts giving rise to this grievance. The Company provides janitorial services. Its janitors work under the Union's multi-employer agreement. The Grievant was employed as a janitor under the agreement for ten years, including the last year as an employee of the Company at the 100 East building in downtown Milwaukee. Her responsibilities included cleaning the 17th and 18th floors.

In mid-February of 2004, a tenant reported that the Grievant had taken a tray of luncheon meats from its refrigerator. Security tapes showed the Grievant carrying out the tray. She was terminated for theft, and the instant grievance was filed.

In the course of the grievance procedure, the Grievant took the position that she had been given permission to take the meat by a woman who told her it was left over from an event in the office, and that she was welcome to it. It is not unusual for janitors to receive such offers, and the Company does not have any rule against accepting food under those circumstances. The Company's manager, Jack Medlock, spoke with the property manager for 100 East. The property manager reported back to Medlock that he had spoken to the tenant, and the tenant told him that no one gave permission for the Grievant to take the meat.

Additional facts, as necessary, will be set forth below.

POSITIONS OF THE PARTIES

The Company

The Company takes the position that it had just cause to terminate the Grievant. It received a complaint about the theft of a platter of meat, and it promptly investigated. Pictures of the Grievant taking the meat were obtained from the security system. The Grievant was confronted, and she admitted taking the meat. There is no excuse for this conduct. The very survival of the Company, and the welfare of all of its employees, depends upon a relationship of trust between the Company and its clients. Employing a known thief would destroy that trust, and ultimately endanger the jobs of all of the Union represented employees.

The Union

The Union takes the position that the Company lacked just cause to discharge the Grievant, and that she should be reinstated and made whole for her losses. The Grievant is charged with theft, and a charge such as that requires proof beyond a reasonable doubt. In this case, the proof does not rise to even the level of a preponderance of the evidence.

There is no question the Grievant took the luncheon meats. She forthrightly admitted it. That is not theft. It is common practice for tenants to offer janitors left over food. The Grievant credibly testified that she was given permission to take the meat by an employee of the tenant. The sole evidence refuting her testimony is the double hearsay offered by the Employer, that the property manager told company manager that a woman who worked for the tenant told him that no permission was given. That is simply not sufficient grounds for the termination of long service janitor with a clean record.

DISCUSSION

The Grievant took a plate of luncheon meat from the office she was cleaning. The only issue in this case is whether she had permission. If not, she was properly discharged. No company in the business of having its employees work essentially unsupervised on the premises of its clients could tolerate a thief, even where the amount of theft is small. If she had been given permission to take the meat, on the other hand, there is no element of dishonesty, and there is no just cause for discipline.

The Applicable Standard of Proof

The Union asserts that the Employer must prove its case to the same level of certainty as required in a criminal case — "Proof beyond a reasonable doubt" — because the basis for the discharge is behavior involving moral turpitude. The accusation leveled against the Grievant is a serious one, carrying with it grave implications for her future employment. Any termination has serious immediate effects on the discharged employee, but those effects are in many ways temporary, flowing from the loss of income, benefits and security. In securing a new job, the worker can recover from those losses. While the fact of having been discharged has some stigma attached to it, an employee fired for low productivity, sleeping on the job, tardiness or the like can generally distinguish the circumstances leading to her discharge from the conditions prevailing at the new work site. Even an employee fired for alcohol or drug abuse can show that treatment has been received, and so conditions have changed sufficiently to make her a good employment risk.

Unlike those fired for other types of unacceptable conduct, an employee fired for theft cannot as a practical matter show that her character has changed because of changing circumstances. Honesty is a personal attribute, highly prized by all employers. A finding that an employee is a thief is a strike against that person in seeking any other job, since no matter how simple the duties or how tightly supervised the work, an employer must always in some degree trust its employees. For this reason, I agree that a discharge for theft is distinguishable from other types of discipline cases where a simple preponderance of the evidence will suffice. The long-term consequences are far more severe, and both the parties and the Arbitrator should reasonably be expected to recognize this practical distinction in evaluating the evidence.

While having noted that a dishonesty case is distinguishable from other types of discharge cases, I am not willing to embrace the Union's proposed standard of "proof beyond a reasonable doubt." This burden is drawn from the criminal law, where completely different procedural safeguards and evidentiary standards are applied. Grafting it onto a relatively informal proceeding involving contractual rather than constitutional rights is an awkward and artificial exercise. In my view, the application of a "clear and convincing" standard of evidence appropriately balances the interests of the employee in protecting his reputation, and the interests of the employer in vindicating its right to terminate an unsatisfactory employee in a civil proceeding.

In arriving at the conclusion that a "clear and convincing" standard is appropriate in a dishonesty case, I have considered the fact that the employer's burden is already, as a practical matter, higher than it would be in a different type of case. As noted above, the distinction between a discharge for dishonesty and one of the more mundane offenses is the reflection of bad character it casts. This flows from the element of evil intent, which is part and parcel of the accusation and which must be proven as part of the employer's case. 1/ The need to prove this element adds significantly to the employer's burden of persuasion, no matter what standard is articulated.

1/ It is this element which renders it a flagrant offense and justifies summary discharge.

The Problem of Hearsay

The central issue here is whether permission was granted to take the food. The Grievant testified that she was given permission by a woman who was in the office while she cleaned. The Employer's Manager, Jack Medlock, testified that the property manager told him he'd spoken with a representative of the tenant, who said that the meat was going to be used for a meeting the next day, and that no one authorized the Grievant to take it.

Contrary to the argument of the Union at the arbitration hearing, hearsay evidence is by and large admissible in an arbitration hearing. That is not to say that it is entitled to the same weight as direct evidence, nor even that all hearsay evidence is weighed equally. As with any evidence, hearsay must be judged for its likely reliability and accuracy. Moreover, the Arbitrator must always be mindful of the basic unfairness of hearsay evidence, which denies the accused any chance to confront and question her accuser.

This case illustrates that unfairness quite vividly. I have no doubt that Medlock accurately related what he was told by the property manager, to the best of his recollection. It may well be that the property manager accurately told Medlock what he had been told, to the best of his recollection. It may well be that the representative of the tenant accurately told the property manager what her understanding was. However, even assuming that the two intermediaries accurately recalled and accurately related what they were told, there is no way in the absence of a witness with direct knowledge to know how reliable the underlying statement is. Did the representative of the tenant actually speak with the other persons who worked in the office to find out whether any of them might have mistakenly given permission to take the meat? Would there be some reason for an employee of the tenant to fear admitting that she had given permission? Was there even was a female employee of the tenant who was in the office that night? These are all pertinent questions, but cross-examining Medlock cannot shed light on any of this because he does not know.

I recognize that a business such as this is reluctant to inconvenience its clients by calling them as witnesses in an arbitration hearing. However, the Grievant has been accused of very serious misconduct and has been discharged. She is entitled to defend herself. Her defense is that she was given permission. That explanation is, on its face, reasonable, and the Company's basis for rejecting that explanation is the point on which the cases turns. While I have no doubt of the Company's belief in its position, the burden under the contract is to prove just cause and that requires the Company to provide a persuasive rebuttal to the Grievant's defense. The rebuttal of the Company takes the form of double hearsay, the reliability of which cannot be evaluated in any meaningful way.

No matter what standard of proof is required, the most reliable evidence in the record on the issue of permission is the direct testimony of the Grievant. Her story is plausible and no reliable evidence has been introduced that disproves it. I cannot conclude that she had the intent to steal from a tenant. It follows that she is not guilty of theft, and is entitled to be reinstated to her job.

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

AWARD

The Company did not have just cause to terminate the Grievant, Minnie Hervey. The appropriate remedy is to immediately reinstate her to her position, to remove all reference to this discipline from her record, and to make her whole for her losses.

The Arbitrator will retain jurisdiction over this matter for a period of 30 days following the date of this Award, for the sole purpose of resolving disputes over the remedy.

Dated at Racine, Wisconsin, this 8th day of June, 2004.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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