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CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: July 15, 2016

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

DECISIONS FROM THE OFFICE OF THE IMPARTIAL CHAIRPERSON - 2016 REPORT NO. 1

During the first six months of 2016, the Office of the Impartial Chairperson ("OIC") rendered a number of significant decisions. The following represents a summary of those decisions which, we hope, will be of assistance to you in making labor relations and personnel decisions.

During this period, 132 cases were heard at mediation, the vast majority - 86.4% - of which were settled prior to arbitration. If you have a case that will settle at mediation, we continue to encourage you to contact us in advance so that we can discuss with you the complete terms of any settlement which will be reduced to agreement form.

If you have any questions concerning a case reported in the summary or regarding issues that may arise, do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael C. Lydakis, Jaclyn Ruocco, or Jennifer Schmalz.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman

DISCIPLINE AND DISCHARGE

Threats/Workplace Violence[1]

Case No. 2016-02, January 21, 2016
Arbitrator: Blyer

IC sustained the proposed discharge of a fifteen (15) year employee-delegate for workplace violence. The grievant threatened to stab his coworker, called him a "fucking Mexican", and twice attempted to strike the coworker after the coworker criticized the grievant for eating fruit with his hands, including telling the grievant that "this is not fucking Africa". The coworker said something similar two days earlier. Despite noting that the grievant (who was African) was right to be offended by the coworker's words, the IC found that his reaction was extreme and worthy of discharge. Quoting a prior award, the IC noted "[i]t is beyond debate that in the Hotel Industry employees who engage in physical violence provide their employers just cause to discharge them unless their conduct was purely defensive in nature". Because no such viable defense existed in this case, the IC sustained the proposed discharge. The IC also rejected the Union's argument that the Hotel engaged in disparate treatment by not terminating the coworker. The IC noted that the grievant was clearly the aggressor and that the coworker received a written warning for his part in the altercation.

Case No. 2016-12, March 8, 2016
Arbitrator: Shriftman

The IC rejected the Hotel's proposed discharge of the grievant for engaging in a physical altercation with a coworker. The IC did, however, direct the imposition of a three (3) day suspension for contacting a witness and attempting to influence her. The Hotel proposed the grievant's discharge for allegedly inviting a coworker to take a dispute "outside" during a staff meeting, kicking a chair into another coworker after the staff meeting, and attempting to tamper with the testimony of the coworker who was injured as a result of his making contact with the chair. The IC held that the Hotel failed to show that a threat was made. The coworker to whom the alleged invitation to take the dispute "outside" was made testified that the grievant never made such a threat. The IC further held that the evidence showed that the grievant did not intend to harm the injured coworker. In so holding, the IC noted that the area in which the alleged incident took place was not easy to access or exit, thus inferring that the kick to the chair was an accident. Though the IC declined to find that the grievant engaged in violent conduct, the IC did hold that the Hotel proved that the grievant made inappropriate communications with a witness after he was terminated.

[1]While these decisions may seem inconsistent, there are certain factors that distinguish the cases in which the discharge was upheld (2016-02 and 2016-29) from the case in which the proposed discharge was rejected (2016-12). 2016-02 stands for the principle that when a threat of violence is accompanied by actual workplace violence, the IC will sustain the discharge unless a participant was acting solely in a defensive nature. In this case, the intent to engage in violent behavior was clear. Likewise, in 2016-29, the intent was also clear. The grievant threatened his coworker without provocation, exhibiting a dangerous mindset. By contrast, the IC found that the grievant in 2016-12 lacked intent as evidenced by the testimony of the alleged victim and the apparently accidental circumstances in which the alleged act of violence occurred.

Case No. 2016-29, June 3, 2016
Arbitrator: Drogin

The IC upheld the discharge of a ten (10) year banquet houseman for making a threat to his coworker. As the coworker was punching out and walking to the banquet office to say goodnight, the grievant got up from his chair and said "los indios nunca cambia" (which is offensive to individuals of Ecuadorian descent) and called the coworker "hijo de puta", which translates to son of a whore in Spanish. He also said "let's go outside and fix this". There appeared to be no reason for this behavior and the grievant's only justification was that he "had to confront" the coworker. The IC held that despite the grievant's length of service and clean record, his behavior exhibited a dangerous overreaction. Thus, the discharge was sustained.

Theft; theft of time; attempted theft

Case No. 2016-19, April 21, 2016
Arbitrator: Drogin

The IC sustained the discharge of an eight (8) year steward for theft of time on two consecutive days and falsification of Hotel records. The grievant was scheduled to work from 11:00pm to 7:00am on both shifts in question. Video evidence from each shift established that the grievant left the Hotel approximately five (5) hours early without management's authorization. His punch-edit forms, however, indicated that he worked the full shift each night. The grievant was paid according to his punch-edit forms. The Union argued that the Hotel had no written policy explaining what an employee who wishes to leave early should do. The Union further argued that even if an employee was required to obtain management approval, there was no manager on duty. The Union also claimed that a past practice existed whereby a coworker could sign a form evidencing that an employee left work early. Finally, the Union argued that the grievant was discriminated against because he is African. First, the IC found that although there was no written policy, witness testimony clearly established the procedure that Hotel employees were expected to follow, i.e., an employee wishing to leave must fill out a "leave early form" which must be signed by a manager. Second, the Hotel presented evidence that a manager was in fact scheduled for overnight duty on both shifts and that the grievant never sought the manager's approval to leave early. Third, the IC found that the grievant was aware of the Hotel's procedure because of two (2) prior Voluntary Settlement Agreements which indicated that he had been disciplined for similar behavior. Fourth, the grievant's non-management coworker testified that even if he filled out a time edit form with the grievant, he had no authority to give the grievant permission to leave. The witness further stated that all employees know that a manager must approve a request to leave early. Another union employee testified that she recalled assisting the grievant with the time edit form and that she recorded the times the grievant told her to write down, which reflected his scheduled hours rather than the time he actually worked. Lastly, the IC found no evidence of discrimination.

Case No. 2016-33, June 22, 2016
Arbitrator: Drogin

The IC upheld the discharge of a three (3) year bellman for theft of property and theft of time. Video evidence established that the grievant took a camera stand from the top of another employee's locker and removed it from the Hotel. Further, witness testimony established that while the grievant returned the camera stand, he only did so after when he learned that the Hotel

was investigating its disappearance. Video evidence also established that when the grievant returned from his break that evening, he never returned to his work station (the bell desk) until he clocked out for the day. Grievant was well aware of the Hotel's requirement that he remain stationed at the bell desk at all times. In fact, the IC noted that the Hotel reiterated this rule when the grievant was previously terminated for theft of time and reinstated by this very Chairperson in a prior award. Thus, the IC sustained the discharge.

Intoxication

Case No. 2016-06, January 22, 2016
Arbitrator: Shriftman

The IC sustained the discharge of a two (2) year Bellperson for repeatedly threatening to "kill" a manager, sexually harassing another manager, and being under the influence of drugs or alcohol. The IC did, however, direct that the Hotel provide only neutral information to prospective employers. During the middle of his overnight shift, the grievant approached the assistant front office manager and began stating that he wanted to "kill" another manager. He then commented on the assistant manager's body to which he was physically attracted and stated that he had an "erection". During the hearing, the grievant did not deny the allegations. Instead, he attributed his actions to alcoholism. The IC held that the grievant's threatening conduct warranted discharge.

Improper Call-Out

Case No. 2016-03, January 13, 2016
Arbitrator: Shriftman

IC upheld the discharge of a 12-year Tournant for a late call out. The grievant called out at 10:30am for a shift that began at 8:30am. Hotel policy required two (2) hours' prior notice for a call out. The grievant explained that the reason for her late call out was that her husband intentionally smashed her cellphone, which she was using as an alarm. The IC found that this was a bald and latent assertion, holding that because she was on the precipice of discharge stemming from a prior three (3) day suspension, the grievant should have purchased an alarm clock to protect her job.

CONTRACT

Subcontracting

Case No. 2016-05, February 19, 2016
Arbitrator: Shriftman

The IC held that the Hotel violated Article 45(B) of the IWA by subcontracting audio-visual ("AV") services where such subcontracting adversely effected Hotel employees. In 2009, the parties entered into an agreement whereby, consistent with OIC precedent, the Hotel would not have to pay gratuities to banquet servers on AV services provided by a third party. In 2013, the Hotel subcontracted PSAV to perform AV work and PSAV hired all of the Hotel's AV technicians. The Union argued that as a result of the transfer: 1) the technicians were no longer entitled to non-IWA Marriott fringe benefits; and 2) banquet staff no longer received 15% gratuity on AV charges. The IC held that these adverse effects were impermissible under the IWA. The IC ordered the parties to continue negotiating any outstanding issues relating to the Hotel's violation consistent with his award.

Tip Distribution[2]

Case No. 2016-10, February 24, 2016
Arbitrator: Shriftman

After the parties failed to reach an agreement on the cocktail server tip distribution system, Chairman Shriftman held that the following arrangement was appropriate: 15% of all gratuities on all alcoholic beverages shall be shared by the cocktail servers with bartenders; 3% of all gratuities on all alcoholic beverages to be shared by the cocktail servers with barbacks; and 15% of all gratuities on all alcoholic beverages to be shared by the cocktail servers with bussers/runners.

Case No. 2016-11, February 24, 2016
Case No. 2016-20, April 29, 2016
Arbitrator: Shriftman

The grievance concerned a dispute between two groups of employees (servers and server assistants) over tip sharing. After hearing testimony from representatives from each classification, Chairman Shriftman held that the tips must be split equally going forward.

The Hotel sought clarification of the award. The IC explained that all tips from any source must be shared equally amongst the servers and server assistants working each shift. One representative from each classification must count the cash tips in the presence of a manager at the end of each shift. The IC further noted that failure to place cash tips in a lockbox would constitute theft.

[2] We understand that these cases may seem incongruent. It is important to understand that the IC issued these awards based on the unique facts presented in each case.

Past Practice

Case No. 2016-21, May 3, 2016
Arbitrator: Shriftman

The IC sustained the Union's grievance that the Hotel violated a past practice of offering the grievant, a front desk agent, open in-room dining server ("IRD") shifts when the IRD call-around list was exhausted. The IC found that here and there, but not consistently, the Hotel bypassed the grievant and gave open IRD shifts to a more qualified, but less senior employee. The IC directed the Hotel to pay grievant $2,000 and further directed the Hotel to honor seniority when seeking to cover future IRD shifts.