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**MEMORANDUM**

**DATE:** January 28, 2013

**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

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**DECISIONS FROM THE OFFICE OF THE IMPARTIAL CHAIRPERSON - 2012**  
**REPORT NO. 2**

As always, we encourage you to carefully review these excerpts of recent I.C. Decisions as they will provide guidance in making your future determinations of employee discipline and contract interpretation.

The decisions reported herein highlight a few principles which we address at our Hotel Trainings:

- The critical element of any case is proof; do you have good evidence to establish what you contend the employee did or did not do;
- Have your rules and punishment been applied consistently and uniformly in past similar incidents involving other employees?
- Have you considered those factors which the Chairpersons refer to as mitigating factors: length of service and clean record?
- Have you taken into account the employee's rights under federal labor law and the IWA?

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Stephen Steinbrecher, Robert Sacks, Niki Franzitta, Lois M. Traub or Alexander Soric.

cc: Joseph E. Spinnato, Esq.  
Geoffrey Mills, Chairman

## **DISCIPLINE AND DISCHARGE**

### **Physical altercations**

Case No. 2012-51, September 4, 2012

Arbitrator: Ross

The Hotel terminated a 24-year Doorman for soliciting a gratuity from a taxi driver and assaulting the taxi driver. A guest testified during the arbitration that the Grievant hailed a cab to take him, his wife and his mother-in-law to the airport after they checked out of the Hotel. Once the three guests were in the backseat, they witnessed the Grievant and the taxi driver involved in a scuffle and saw the Grievant punch the taxi driver, who had remained seated in the taxi, in the face. The taxi driver drove away, bleeding from the mouth. The guests asked the taxi driver what had happened and he explained to them that Grievant had asked for \$5 as a kickback, and was upset when the taxi driver only gave him \$2. The guests immediately called the Hotel, once from the cab and once from the airport, to report the incident and to express their concern. The taxi driver testified that the Grievant approached the window and asked him for \$5, and he instead gave him only \$2. The Grievant asked for more money and the taxi driver told him he would not give him anymore, and asked for his name so that he could report him. The Grievant hid his nametag with one hand and punched the taxi driver with the other, causing a tooth to fall out. The taxi driver testified that he never tips doormen, and only did on this occasion because of a previous incident with the Grievant. The Grievant denied asking the taxi driver for money and claimed that he had experienced difficulties with the taxi driver in the past. The Grievant maintained that the taxi driver grabbed his arm and would not let go, forcing the Grievant to swing his arm in order to free himself. The Grievant testified that he notified a police officer immediately, a claim which was corroborated by surveillance video, and that he later reported the incident to his supervisor. Impartial Chairperson Ross determined that the taxi driver and Grievant were engaged in a scuffle, that the Grievant was extremely provoked and that he acted in self-defense. In light of Grievant's lengthy service and evidence of provocation, IC Ross converted the termination to a suspension without pay.

### **Threats of violence**

Case No. 2012-65, December 13, 2012

Arbitrator: Blyer

The Hotel discharged a 14-year Bellman for writing a profane comment regarding the Hotel on a wall in the luggage storage room. Specifically, the words "F\*\*\* the [Hotel's name]" were written on the wall. During the arbitration, the Hotel provided a video which showed the Grievant with an object in his hands next to the wall where the words were written. Though the video did not clearly show that the Grievant was writing on the wall, further evidence including witness testimony sufficiently substantiated the claim that the Grievant had written on the wall in the luggage room. The Union tried to mitigate the seriousness of the Grievant's actions by providing evidence that other words and pictures had been written and drawn in another baggage room, as well as the employee locker room and stairwells. The Union also argued that management neither warned its staff that such conduct would lead to discipline, nor promptly removed any of the other words or pictures. During her testimony, the Hotel's Director of Human Resources explained that the Hotel never investigated the other pictures and words because of the unlikelihood of determining who was responsible for the markings.

Impartial Chairperson Blyer found that the Grievant's conduct was unacceptable and deserved discipline, especially since the evidence established that guests are regularly allowed into the baggage room. Nevertheless, discharge was too severe a penalty based on the Grievant's lengthy service and the fact that the Hotel had not taken the same measures for other, equally offensive markings in the same baggage room. Accordingly, IC Blyer determined that a warning for defacement of Hotel property and for engaging in profanity was the appropriate level of discipline. However, IC Blyer did not direct the Hotel to reinstate Grievant based on threatening remarks he made approximately two weeks after his discharge. The Grievant called a Bellman and told him to retract his statement about seeing the Grievant write on the wall. During this conversation, he told the Bellman that he was very angry, and that he knew where the Bellman lived. IC Blyer found the Bellman's testimony that he felt intimidated and was shaken to be credible. In light of this post-discharge conduct, IC Blyer determined that reinstatement was not appropriate. Accordingly, IC Blyer directed the Hotel to pay the Grievant for the two weeks between the discharge and the threatening comment but sustained the discharge.

### **Harassment**

Case No. 2012-49, August 22, 2012

Arbitrator: Ross

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The Hotel discharged a 27-year Banquet Captain for inappropriately touching an Event Planner. An Event Planning Company was responsible for managing an event in the Hotel's ballroom and performing essential pre and post-banquet functions. One of the Event Planning Company's employees was standing near a table with gift bags waiting to distribute them to departing guests when she felt someone approach her from behind, place his arms around her waist, squeeze and start to rub up and down. She turned around and saw that it was a man dressed in a Hotel uniform whom she did not know. She began to cry and noticed shocked looks on her colleagues' faces. One of her colleagues testified that she was standing five feet away when she noticed the Grievant approach her co-worker, put his arm around her, and walk away. She did not, however, see him touch her co-worker's private parts. The Event Planner reported the incident and a Security Officer immediately began conducting an investigation. He was unable to question the Grievant that evening because the Grievant had already left the Hotel. The Event Planner also filed a police report about the incident, which confirmed that there was no sexual touching, just unwanted contact. The Grievant initially denied touching the Event Planner, but later admitted that he had been drinking that night and could not recall his actions, even when confronted with a video tape. Impartial Chairperson Ross found the fact that the touching was not sexual in nature to be critical. IC Ross explained that termination was too severe a penalty in light of the lack of sexual contact, combined with the Grievant's unblemished 27-year record. Nonetheless, because IC Ross believed that the Grievant's conduct constituted harassment, he converted the discharge to a four-month suspension without pay.

## **Insubordination**

Case No. 2012-45, July 3, 2012

Arbitrator: Drogin

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The Hotel suspended a Guest Service Agent for three days for her insubordination during a disciplinary interview to discuss the Grievant's violation of the Hotel's No Smoking Policy. The Hotel has a policy that is posted throughout the employee areas which provides that "...any colleague who takes a smoking break during their allocated break must do so in the alley behind the hotel. Under no circumstances will any colleague be permitted to smoke on the side of the hotel or near the entrance. The alley is the only location to take a smoke break and is the only section designated as a smoking area." As the Hotel's Human Resources Director ("HRD") was leaving the building one afternoon, he saw the Grievant and another employee smoking alongside the Hotel in a prohibited area. The HRD asked them to move to the smoking area, which is approximately 12-15 feet away. The Grievant questioned this and the HRD explained the policy and that the Hotel does not want employees, in uniform, smoking in the view of guests and passerby. The Grievant claimed that she did not understand but moved to the designated smoking area and the HRD advised that he would need to speak with her further in his office.

Five days later, the HRD had prepared a verbal warning for the Grievant for her violation of the No Smoking Policy and he met with the Grievant, her supervisor, and a delegate. During the meeting, the Grievant said that she didn't understand and didn't agree with the policy. She added that she had been on her break and that the HRD had no right to disrespect her during her break. The Grievant maintained that if the HRD wished to speak with her during her break, he had to pay her. The Grievant also claimed that the designated smoking area is cold, windy, unprotected from the elements, and dangerous because there are cracks in the pavement which are a hazard, since she is required to wear heels while at work. The HRD subsequently issued a three-day suspension to the Grievant for stating that she would not comply with the No Smoking policy and for being insubordinate and disrespectful during the meeting.

Impartial Chairperson Drogin found that the Grievant was not insubordinate during the initial conversation when she was in the non-designated smoking area since she complied with the HRD's directive after he asked her to move a second time. IC Drogin agreed with the Union's argument that when an employee is on break, he/she is entitled to be free from management interference, adding that to find otherwise would allow management to consume an employee's break with management issues. IC Drogin found that the discipline for insubordination was based on the events that occurred during the meeting in Human Resources, which IC Drogin considered to be protected concerted activity, considering that the Grievant's health and safety concerns about the smoking area were sufficiently linked to group action, and were thus protected under the NLRA. Accordingly, IC Drogin found that the Hotel did not have just cause to suspend the Grievant or to discipline her in any way, and ordered the Hotel to expunge the disciplinary notice and to pay her for the three days.

Case No. 2012-64, November 21, 2012

Arbitrator: Drogin

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The Hotel discharged a four-year Soda Person for insubordination and inappropriate behavior. Within the outlet in which the Grievant worked, there are three different positions that need to be covered during each shift: cashier, middle, and floor. These positions are selected on a

first-come-first-served basis, but employees cover the other positions throughout the shift when one of their co-workers needs to take a break. On the day of the incident, one of the three scheduled employees called out, so there were only two employees on that shift. The Grievant was working as a “middle” when her Supervisor asked her to sweep the floors and clean the tables (a task that is normally performed by the employee covering the floor, but would only take six minutes). The Grievant refused, stating that she would not “do two persons' jobs.” The Supervisor asked her if she was refusing the work, and Grievant ignored the question. The Supervisor summoned a delegate, but the Grievant declined to be represented by that delegate and insisted on a different delegate. The General Manager was notified of the situation and arrived with another delegate. The General Manager and the Supervisor each explained to the Grievant that she was being insubordinate by refusing to obey the order, and warned that the consequences for such refusal would be discipline. The Grievant testified that she did not refuse the task but had merely asked, “How can I do two things at once?” Impartial Chairperson Drogin found that Grievant was certainly familiar with the grievance procedure, since she had filed grievances in the past, and was involved in a Voluntary Settlement Agreement which had converted a prior discharge for time and attendance infractions and for inappropriate behavior to a time-served suspension with a final warning just three weeks prior to this incident. IC Drogin determined that the Grievant was clearly insubordinate and sustained the discharge.

### **Inappropriate and unprofessional behavior**

Case No. 2012-54, September 4, 2012

Arbitrator: Ross

The Hotel proposed the discharge of an eight-year Server/Delegate for attempting to serve caviar that had been removed from the garbage to a guest. The guest testified that she, her nine-year old daughter and a couple of friends dined in the Hotel’s restaurant. Her daughter did not finish a jar of caviar she had ordered and wanted to bring it home with her, but the jar had been removed by a Bus Attendant. The guest asked the Hostess about the caviar, and watched the Hostess confer with the Delegate as they walked across the dining room towards a back area and a garbage can. Although she was not positive which of the two did so, the guest believed that the Delegate removed the jar of caviar from the garbage and brushed it off. The Hostess then took the jar from the Delegate and the two walked back to the table. Believing that the employees intended to give her caviar which had been removed from the garbage, the guest became angry and complained to a Manager. The Manager gave the guest a new jar of caviar to take home. The Hostess testified that the Server removed the caviar from the garbage and wanted to give it to the guest. The Hostess did not agree with this and was seeking instruction from a Manager when she was stopped by the angry guest. The Hostess further testified that the Delegate called her the next morning to attempt to convince her that they should coordinate their versions of the events, a request which she declined. Upon questioning at the Hotel by the Manager and later by the Director of Human Resources, the Delegate’s story was inconsistent. She initially claimed that she did not remember who removed the caviar from the garbage, then maintained that she and the Hostess had removed the jar together. At the hearing, the Delegate testified that she and the Hostess both picked the jar up out of the garbage at the same time in order to see what brand of caviar it was. The Delegate claimed that she intended to get the guests a new jar, but when questioned as to why she did not verify the type of caviar by looking at the guest’s check, she averred that she was simply “too busy” that evening. Although Impartial Chairperson Ross found that grave misconduct took place, he nevertheless reduced the proposed discharge to a seven-day suspension without pay.

The Hotel imposed a five-day suspension on a Front Desk Agent for being under the influence of alcohol while on Hotel property and in Hotel uniform. At around 3:40am one morning, a House Officer saw the Grievant stumbling across the street in front of the Hotel in his Hotel uniform. The House Officer informed a co-worker of his concern for the Grievant's safety, and they both agreed that they should get permission to bring the Grievant into the Hotel. After receiving permission from a Manager, the Officers half-carried the Grievant, who reeked of alcohol and could barely stand, into the Hotel's lower lobby and gave him coffee. A Bellman secured a cab and the Grievant left the Hotel at approximately 5:00am. After conducting an investigation, the Hotel's Director of Human Resources decided that, although the Grievant was not on duty at the time of the incident, his actions warranted discipline. The Grievant explained that he wore his uniform out of the Hotel because he had stayed in the hotel overnight after having been forced to work a double shift. Additionally, the uniform that he was wearing was simply a suit and was not identifiable as the Hotel's uniform, especially since the Grievant was not wearing his nametag. In reviewing past IC awards, Impartial Chairperson Ross found that the applicable test for whether off-duty conduct is subject to discipline is "work relatedness." IC Ross found that the Grievant's conduct was not work related since the decision to bring him inside was made solely for Grievant's health and safety, sustained the Union's grievance and instructed the Hotel to make the Grievant whole.

### **Sleeping while on duty**

The Hotel discharged a 13-year Security Officer for sleeping while on duty. The Grievant's shift was from 10:45pm to 8:45am. He was scheduled to take his meal break from 1:00am to 2:00am, and was then supposed to relieve the Timekeeper at 2:00am. The Grievant did not show up to relieve the Timekeeper and he did not respond to the Timekeeper's calls on his radio. After several unsuccessful attempts to contact the Grievant, the Timekeeper contacted the Front Desk. At 2:22am, the Front Desk Manager found the Grievant sleeping on an upholstered chair in a dark and unoccupied banquet room. The Grievant apologized and pleaded with the Front Desk Manager, then with the Director of Security (by phone) to simply give him a warning, but the Grievant was suspended pending investigation. The Grievant testified that he had recently injured his back and had taken medication which caused him to fall asleep. The Director of Human Resources testified that her decision to terminate the Grievant was based upon the fact that Security Officers must be held to a higher standard, and because the Grievant's actions compromised the safety of the Hotel's guests and employees. In addition, the Director of Human Resources considered the fact that the path which the Grievant used to get to the banquet room was unmonitored by cameras, which showed that the Grievant deliberately went to the banquet room to sleep. Impartial Chairperson Drogin determined that the evidence clearly established that Grievant deliberately went to the banquet area to rest. IC Drogin found the Grievant's explanation neither honest nor plausible, and due to the severity of the misconduct, found that the Hotel had just cause to terminate the Grievant.

## **CONTRACT**

### **Seniority/Layoffs/Overtime**

Case No. 2012-10, January 24, 2012

Arbitrator: Shriftman

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The Union filed a grievance against a non-Association Hotel based on its March 2008, promotion of its most senior Watch Engineer to a new bargaining unit position of Engineering Supervisor. After that promotion, an extra work shift was being given to the Engineering Supervisor instead of the now most senior Watch Engineer. The Union argued that the Engineering Supervisor should be treated as if he were in a separate classification with no rights to work as a Watch Engineer. IC Shriftman ordered that the Engineering Supervisor should retain his seniority with respect to layoffs, and shall participate, on a rotating basis with all other qualified employees in the assignment of overtime in the Engineering classification.

### **Economic Action**

Case No. 2012-12, February 6, 2012

Arbitrator: Ross

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In a prior Interim Award, Impartial Chairperson Ross found that the Hotel had violated Articles 59(B) and (C) of the IWA and directed an expedited hearing on the issue of remedies. The Union argued that its members should be permitted to engage in economic action without further delay because a delay would jeopardize rights that had already been violated. The Hotel argued that urgency would worsen the Hotel's already difficult and complex situation. IC Ross held that he is bound by Article 38(F) which does not allow for any lockout, strike or stoppage pending the determination of a grievance.

### **Failure to Assign Work**

Case No. 2012-22, April 24, 2012

Arbitrator: Shriftman

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The Union grieved the Hotel's alleged failure to assign a Banquet Restroom Attendant to all banquet functions at the Hotel. Impartial Chairperson Shriftman found that the Hotel did not violate the IWA or past practice by failing to assign the Grievant work as a Bathroom Attendant, because there was no longer a need for such work. Additionally, IC Shriftman found that the Hotel went "the full distance" in attempting to find other suitable jobs for the Grievant, but he turned down all offers. Accordingly, IC Shriftman denied the Union's grievance.

Case No. 2012-25, August 9, 2012

Arbitrator: Ross

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The Union grieved the Hotel's failure to assign duties to the proper classification. Specifically, the issue was whether Room Service Servers or Banquet Servers should service functions/meetings which occur in guest rooms in which sleeping accommodations are removed from the rooms. Impartial Chairperson Ross found that the status quo should be maintained, so that Room Service Servers continue to service such functions/meetings, as in the past.

## **Assumption Agreement**

Case No. 2012-26, March 29, 2012

Arbitrator: Ross

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The Union grieved the Hotel's failure to require its proposed buyer to assume the Union's proposed Assumption Agreement. The Hotel maintained that it was prepared to sign an Assumption Agreement that would fully comply with all provisions of the IWA. The Hotel further maintained that it is not truly a hotel since a prior agreement between it and the Union states that it "...leases apartments on a temporary basis..." Impartial Chairperson Ross found that the definition of hotel was not decisive and that past IC awards reflect that the fundamental purpose of Article 59 is job preservation and accordingly directed the Hotel to adopt the Union's proposed Assumption Agreement.

## **Transitional Duty**

Case No. 2012-62, October 23, 2012

Arbitrator: Shriftman

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The Hotel sought an award allowing it to end a Room Attendant's transitional duty status. The Room Attendant had been on transitional duty for several years due to her medical restrictions. However, the Hotel questioned the continued need for transitional duty, and, in accordance with the procedures set forth in a prior agreement with the Union, the Room Attendant was examined by an impartial physician whose medical opinion was that she was able to return to work at full duty status. The Room Attendant testified that the physician did not perform a thorough physical examination and that she could not resume full duties without considerable pain. Impartial Chairperson Shriftman held that because the impartial physician's findings were completely at odds with the employee's, more weight must be given to the physician. Accordingly, he held that the Hotel had the right to increase the Room Attendant's quota by one additional room per week until she reached the full 13-room quota.