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CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: July 17, 2014

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 - 2014 REPORT NO. 1

During the first six months of 2014, the Office of the Impartial Chairperson 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, 257 cases were heard at mediation, the vast majority of which were settled prior to arbitration – approximately 83%. 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, Judith A. Stoll, Niki J. Franzitta, Lois M. Traub, Alexander Soric, Robert L. Sacks or Michael Lydakis.

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

DISCIPLINE AND DISCHARGE

The following cases illustrate the care that Hotels must take in ascertaining if employee conduct is sufficiently threatening of physical harm so as to warrant termination:

Inappropriate and unprofessional behavior

Case No. 2014-07, February 19, 2014
Arbitrator: Shriftman

The Hotel discharged a 15-year Doorman for sexual harassment and improper touching of a female employee who worked in gift shop not operated by the Hotel. The Gift Shop Attendant ("Attendant") complained that while the Grievant was making change for her in the bell station, he put his arms around her and then smacked her on the buttocks. The Attendant also claimed that the Grievant asked her on a date, which she refused. The surveillance footage and testimonies of several witnesses did not corroborate the Attendant's claims. On the contrary, Impartial Chairperson Shriftman determined that the Grievant touched the top of the Attendant's shoulders in a natural and non-hostile way to turn her towards the door and direct her towards the lobby. The video footage did not show the Grievant touching the Attendant's buttocks, and at no point did the Attendant's conduct on the video suggest that she was reacting to offensive conduct. The Grievant explained in a meeting with the Director of Human Resources that he accidentally hit the Attendant either on the side or the behind as he walked past her, and immediately called her to apologize. Although the Grievant had a blemished disciplinary record, IC Shriftman noted the rule that no matter how bad an employee's past disciplinary record is, it is not a substitute for proof of the triggering incident. Accordingly, IC Shriftman directed the Hotel to reinstate the Grievant with full back pay.

Case No. 2014-14, April 10, 2014
Arbitrator: Blyer

A non-Association Hotel discharged a nine-year Banquet Steward for harassing a coworker. The incident that led to his discharge was precipitated by six months of the Grievant's dissatisfaction with a coworker, and prior complaints to management by the Grievant about that coworker's work. On the day in question, the Grievant requested a meeting with the Banquet Manager during which he complained that he was tired of "stupid and lazy people worrying about his work" (referring to the coworker). The Grievant and the coworker, who was also in the meeting, began an exchange and the Grievant told the coworker that if he had something to tell the Grievant, he should grow some "cojones" and tell him directly. He also said that he would never respect the coworker, and that he would not care if the coworker was hit in the head by a tray again (the Grievant hit the coworker in the head with a tray roughly six months earlier, though it was not established that it was intentional). Another incident occurred three days later, involving the Grievant and a Houseman, in which the Grievant allegedly muttered to himself that he was glad the "spic" was off on Friday and Saturday as he would not have to see his "f***ing face." The Houseman believed that the Grievant was referring to him as he was the only employee not scheduled on Friday and Saturday. The Houseman complained to management, but no action was taken. The Grievant had previously been a party to a Voluntary Settlement Agreement for threats of harm which provided that any future incidents of a similar nature would result in discharge. Impartial Chairperson Blyer did not find that either incident was of a similar nature because he did not threaten anyone. In the first incident, the Grievant sought out a meeting

with management to discuss issues with a coworker instead of confronting the coworker on the work floor and potentially disrupting business. Though the Grievant made some pejorative remarks about his coworker in the meeting, the Grievant never threatened him. IC Blyer found that some harsh words are to be expected in such meetings, and did not believe that the Grievant crossed the line by anything he said. As for the second incident, IC Blyer found that it was unlikely that the Housman accurately heard the Grievant when he was standing 40 feet away, it was clear that the Grievant did not intend for anyone else to hear the comment, and even if he had made the alleged comment, it did not provide strong evidence of wrongdoing. IC Blyer found that the Grievant's conduct was unprofessional and disrespectful, but did not warrant discharge. Accordingly, IC Blyer converted the discharge to a two-week suspension without pay and with backpay for the balance of time the Grievant was out of work.

Case No. 2014-17, April 22, 2014
Arbitrator: Blyer

The Hotel discharged a 26-year Housekeeping Supervisor for engaging in a verbal altercation with a coworker. The Grievant's discharge was precipitated by an argument between the Grievant and a Houseman who complained about the Grievants' assignment of a particular task to him. Witnesses testified that both the Grievant and the Houseman were cursing at each other during the altercation, and at one point, another employee stepped between the Grievant and the Houseman to prevent the Grievant from reaching the Houseman. The Grievant never raised her hand or attempted to strike the Houseman. In a meeting with the Hotel's General Manager the following day, the Grievant admitted that she had planned to slap the Houseman in the face if not for the coworker's intervention. The Grievant admitted the same to a Delegate. The Hotel terminated the Grievant's employment based on her admitted attempt to engage in a fight with the Houseman. Impartial Chairperson Blyer found that there was too much uncertainty regarding whether the Grievant could have, or would have acted on her expressed intention to hit the Houseman. IC Blyer believed that the Grievant was entitled to the benefit of the doubt, and reinstated her. However, because the Grievant was guilty of misconduct, IC Blyer did not award full back pay, and only awarded back pay from a date that was roughly 14 weeks after the date of the Grievant's termination.

Case No. 2014-23, June 10, 2014
Arbitrator: Drogin

The Hotel discharged a ten-month Bellperson for threatening his coworker. Specifically, the discharge was based on the Grievant's comment, "If you don't put your hands down, I am going to make you eat your hands." The comment arose in the middle of a dispute between the Grievant and another Bellman with regard to obtaining transportation to the airport for a guest. Surveillance footage of the interaction showed that the Bellman thrust his hand outward toward the Grievant three separate times. The video also showed that at one point, the Bellman moved slightly towards the Grievant, and that the Grievant stepped back. The Grievant did not appear to be red-faced, angry, or shaking in the video, as the Bellman described him during his testimony. The video also did not show the Grievant making any movement towards the Bellman. Impartial Chairperson Drogin cited the following as factors that courts have considered in determining whether speech constitutes a true threat: 1) the reaction of the recipient to the speech; 2) whether the threat was conditional; 3) whether the speaker communicated the speech directly to the recipient; 4) whether the speaker had made similar statements in the past; and 5) whether the recipient had reason to believe the speaker could engage in violence. Applying the factors above

to the incident in question, IC Drogin determined that the Bellman's reaction to the Grievant's comment was not one associated with fear or fright. Although the Bellman testified that he had been frightened, he did not take a step back nor was there any physical indication that he was concerned. Further, IC Drogin found that the threat was conditional, which made it different than a true threat because it carried an element of self-defense. IC Drogin found that the Grievant had reasonable cause to believe that the Bellman was going to strike him based on the Bellman's conduct of thrusting his hands and taking a step towards the Grievant, and conditionally threatened him as a defensive action to cause the Bellman to keep his hands down. IC Drogin did not find that Grievant acted unreasonably, and coupled with the Grievant's unblemished record, determined that the Hotel did not have just cause for discharge. However, IC Drogin found that the Grievant was still guilty of misconduct and determined that a 30-day suspension without pay together with a written warning was the appropriate discipline for the Grievant's behavior.

Theft; theft of time

Case No. 2014-04, February 4, 2014
Arbitrator: Shriftman

The Hotel discharged a Bellperson for theft of time and abandonment of his post. The Union did not argue that on the day in question, the Grievant was in the cafeteria for a period of roughly one hour and fifty-seven minutes without notifying management or obtaining approval for the break. The Union instead argued that the Grievant was not feeling well and did not inform a manager because none was readily accessible at the time. Five months prior to this incident, the Grievant had been terminated for "disappearing" from his post for two hours. That discharge had been converted to a three-week suspension by the Hotel, in recognition of the Grievant's lengthy service with the Hotel. Impartial Chairperson Shriftman did not credit the Grievant's claim that he was not feeling well, and instead determined that his failure to notify the Hotel that he was ill demonstrated a "wholesale lack of respect for the Employer that, in the interest of the safety and well-being of guests and employees, including Grievant, had a right to know that Grievant was ill." IC Shriftman found that the Grievant's misconduct was worthy of discharge standing alone, and discharge was certainly warranted when the misconduct was coupled with the Grievant's deplorable record. Accordingly, IC Shriftman sustained the discharge.

Case No. 2014-08, March 14, 2014
Arbitrator: Drogin

The Hotel proposed the discharge of a four-year Server/Delegate for theft. During the course of her shift, the Delegate gave one of her tables an extra bottle of wine as a service recovery without following the Hotel's standard procedure of informing a manager of the service error and obtaining permission to "comp" the item. One of the guests at the table later thanked a manager for the extra bottle of wine. Because of the guest's comment, the manager later asked the Delegate whether she had given an extra bottle of wine to the table and the Delegate responded that she had not. The Delegate received permission to leave early that evening, and after punching out and leaving the Hotel, the Delegate returned, put her uniform back on, and went back to the restaurant. The Delegate asked another server to borrow his card (which was not an unusual practice), created a new check for the $110 bottle of wine which she had given the table, and paid for the check with her own personal credit card. The server whose card she borrowed testified that this was not a normal practice in the Hotel, and that if there was ever a need to rectify a service error, the procedure in the Hotel requires servers to contact a manager.

After leaving the Hotel a second time, the Delegate telephoned the manager and explained that she had misunderstood his question earlier, and that she did in fact give the table an additional bottle of wine, which she had paid for with her own money. The Union argued that the Delegate did not have the necessary intent to steal. However, Impartial Chairperson Drogin found that the Delegate's actions proved otherwise. IC Drogin explained that, had the Delegate paid for the wine when she gave the check in initially, or had she explained the situation to her manager when he first asked about it, her actions may have been mitigated. IC Drogin found that the Delegate's actions, including the phone call she made after leaving the Hotel the second time, were made in an attempt to cover her tracks. IC Drogin added that restitution is not an excuse for theft, and that it may be considered only with regard to the penalty to be imposed. Accordingly, IC Drogin found that the Delegate was guilty of theft and upheld the discharge.

Case No. 2014-11, April 3, 2014
Arbitrator: Blyer

The Hotel proposed the discharge of an eight-year Steward/Delegate for theft of time and attendance issues. The Delegate had given the Hotel incorrect starting times for two days within the same week, one which was 25 minutes before he arrived, and another which was 30 minutes before he started his shift. The Hotel paid the Delegate for these periods during which the Delegate erroneously claimed to have been working. The Delegate claimed that he was not seeking to steal from the Hotel but had mistakenly provided the wrong start times. Impartial Chairperson Blyer did not credit the Delegate's claim that he made a mistake because on one of the occasions, he called the Hotel an hour before his shift to advise it that he would be late, so it was not believable that he would forget that he arrived late when he provided the Hotel his start time later that same day. In addition to the theft of time issue, the Delegate was guilty of reporting to work late on the two days when he misrepresented his time. The Delegate had a long history of time and attendance issues, including a 2013 Voluntary Settlement Agreement which included a final warning that any future incident of a similar nature would result in immediate discharge. IC Blyer noted that as a Union delegate, the Delegate set the wrong example for other employees by his frequent infractions. Finding that the Hotel had just cause for both the theft of time as well as the lateness issues, IC Blyer upheld the discharge.

Case No. 2014-19, May 8, 2014
Arbitrator: Blyer

The Hotel discharged a ten-year Security Officer for theft of time and leaving his post without authorization. Sometime in February, the Grievant's Manager saw him in the cafeteria. The Manager called the Security Dispatcher and asked if the Grievant was on a break. The Dispatcher responded that he was not. The Manager advised Human Resources and an investigation was conducted. The Hotel determined that on February 1, the Grievant was in the storage area and in the Hotel cafeteria for a period of 12 minutes when he was assigned to be posted at one of the Hotel's entrances, and then spent 22 minutes in the cafeteria when he was assigned to the safe deposit area. On February 8, the Grievant was in the cafeteria for eight minutes, and then in the storage area for another 15 minutes when he was assigned to patrol the Hotel. Impartial Chairperson Blyer did not credit the Grievant's claim that he had received permission from the dispatcher to take a 15 minute personal break on that occasion. Lastly, on February 15, while on duty in the safe deposit area, the Grievant was on his cell phone on a personal call for roughly 27 minutes. The Grievant had been disciplined for being on a personal call while on duty just nine days earlier. The Grievant asserted that his discharge was in

retaliation for an argument he had with the Director of Security regarding the discipline he received about being on his cell phone. Despite the suspicious timing, IC Blyer found that there was insufficient evidence to support the retaliation claim. The Union also argued that the Grievant was disparately treated since two security officers had received two day suspensions for leaving their post. IC Blyer found that those situations were dissimilar and reiterated the well-settled rule that theft of time is a dischargeable offense. He added that longevity, by itself, is insufficient to warrant mitigation. Because of the Grievant's blemished record, the fact that the amount of time stolen was not trivial, and the fact that the three instances occurred within a short period of time, the Grievant was not entitled to mitigation. IC Blyer reiterated that hotels have a very strong interest in preventing any kind of theft or dishonesty on the part of those who work for them. Accordingly, IC Blyer sustained the discharge.

Solicitation of gratuity

Case No. 2014-02, January 16, 2014
Arbitrator: Blyer

The Hotel discharged a 14-year Doorman for soliciting a gratuity and for unprofessional behavior. A Hotel guest complained to two different managers that the Grievant repeatedly asked for a tip while receiving and tagging the guest's luggage. Though the guest did not testify at the hearing, a Doorman who witnessed the interaction between the Grievant and the guest and the two managers who received the guest's complaints credibly testified that without prompt, the Grievant repeatedly told the guest that he is a "tipped employee." The Grievant admitted that he informed the guest he was a "tipped employee," but denied soliciting a gratuity from the guest. Impartial Chairperson Blyer cited past decisions from the IC's office which have established that solicitation of gratuities qualifies as gross misconduct and justifies summary dismissal unless less harsh discipline has been historically imposed. IC Blyer found that, despite his lengthy service with the Hotel, the Grievant was not entitled to the benefit of the mitigation doctrine due to his blemished record, which included four written counselings for misconduct and two suspensions, the most recent of which was about a year prior to the Grievant's discharge. Accordingly, IC Blyer sustained the discharge.

Sleeping While on Duty

Case No. 2014-06, February 21, 2014
Arbitrator: Blyer

An Audio Visual Concessionaire discharged an Audio Visual Technician for sleeping while on duty. The Grievant had previously worked for the predecessor Concessionaire at the Hotel for two years, but had only been working with the Concessionaire for a week prior to his discharge. The Grievant had been directed to return to a banquet room at 10:45 a.m. after the client's presentation had begun. The Grievant did not return to the room as instructed and did not respond to his radio when called. At around 11:30 a.m., the Hotel's Director of Banquets found the Grievant in a dimly lit banquet room, asleep across two chairs which were positioned facing each other. The Grievant's radio was on the floor, his cell phone plugged into the wall being charged, and his jacket was draped on the back of one of the chairs. The Director of Banquets called the Grievant's name, but received no response. He then took a photograph of the Grievant, sought out the Concessionaire's owner, and the two approached the Hotel's Director of Human Resources together. The three of them returned to the Grievant's location with a delegate at

around 12:00 p.m. and found the Grievant still asleep. The Grievant did not respond to his name being called, but finally woke up when touched on the shoulder. The Grievant responded that he did not feel well when asked if he was OK, but admitted that he had not told anyone that he was not feeling well. Impartial Chairperson Blyer cited the well-settled rule in the industry that employees who create a place to go to sleep while on duty are guilty of theft of time and that such conduct warrants immediate discharge. IC Blyer did not credit the Grievant's claim that he inadvertently fell asleep and instead, noted that it was more likely that he intentionally sought out a dimly lit room, arranged two chairs face to face, removed his jacket, phone and radio, and settled into a reclining position with the intention of going to sleep. IC Blyer also found insufficient evidence to mitigate the severity of discipline, since the Grievant's tenure with the contractor had only been one week, and his entire tenure with the Hotel was two years. Accordingly, IC Blyer sustained the discharge.

Work Performance

Case No. 2014-16, April 22, 2014
Arbitrator: Blyer

The Hotel suspended a five-year Bellman for seven days for a violation of baggage handling procedures. The Grievant accepted a piece of luggage and two shoeboxes from an individual without following the Hotel's baggage handling procedures. Specifically, the Grievant failed to ascertain whether the individual was a Hotel guest (as it turned out, the individual was a non-guest and did not return for the items until the following day), he failed to tag the items, and he failed to inform management of the individual's failure to return to the Hotel. Impartial Chairperson Blyer found that the Grievant's conduct was in violation of several baggage handling procedures, and warranted discipline. Based on the Grievant's history of discipline for failure to follow baggage handling procedures (a 2012 VSA with a final warning, a 2012 IC decision converting a discharge to a suspension without backpay) and other discipline for attendance issues, IC Blyer found that the seven-day suspension was justified.

CONTRACT

Past Practice

Case No. 2014-13, April 11, 2014
Arbitrator: Drogin

A dispute arose between the Union and the Hotel after the retirement of a 27-year Banquet Coffee Server with regard to which classification should be offered the position. The parties stipulated that Banquet Housemen covered the position during busy periods, breaks, days off, call outs, and other paid and unpaid time off. They also stipulated that A List Banquet Servers covered the position when the Banquet Coffee Server was on vacation. The Hotel argued that the position should be offered to Banquet Housemen on the basis of past practice, while the Union argued that it should be offered either to Banquet Housemen or A List Banquet Servers. Impartial Chairperson Drogin found that the elements of a past practice were present in the case, and that the practice could not be changed by a coexisting practice which was limited to vacation periods. Accordingly, IC Drogin supported the Hotel's position and determined that the current practice should be continued with respect to Banquet Housemen.

Seniority

Case No. 2014-01, February 4, 2014
Arbitrator: Shriftman

The Union sought clarification of the seniority status of three Banquet Housemen who started working in the classification on the same day (it did not make any claim against the Hotel for either a contract violation or adverse effect). A long-term employee and delegate at the Hotel testified that the rule developed by the Hotel and applied in past situations established seniority by earliest punch time on the date in question. Though there was some confusion about the start date of one of the employees, Impartial Chairperson Shriftman found that the time cards were controlling.

Layoff/Bumping Rights

Case No. 2014-15, April 15, 2014
2014-20, May 19, 2014
2014-21, June 5, 2014
Arbitrator: Shriftman

The Hotel sought an award that would clarify how the Hotel should assign, bump or lay off Food and Beverage employees as a result of major changes that would be implemented in nearly all of the Hotel's outlets. Impartial Chairperson Shriftman cited the well-established rules that 1) hotels with multiple outlets will normally use room seniority regarding temporary layoffs/scheduling unless practice dictates otherwise, 2) in the event of a permanent closing of an outlet or of certain shifts in an outlet, employees have the right to bump between shifts or outlets in accordance with their general classification seniority, and 3) laid off employees retain recall rights under the IWA. IC Shriftman added that the right to bump is applied to the least senior person in the same classification, regardless of the outlet. With respect to bidding, employees may bid on open positions within the same outlet on the basis of classification seniority within

that outlet. After all of the open positions have been bid upon, employees may elect to bump on the basis of classification seniority without regard to outlet or room, including other Food and Beverage positions such as Room Service. Employees may only bump into positions within the same classification. In the case of permanently established combination jobs in a permanent layoff scenario, employees accrue seniority in each of the sub-classifications and may exercise seniority in any one of the sub-classifications (ex. a Back Server/Busser/Pantryperson would be entitled to exercise his/her seniority in either a Server, Busser, or Pantryperson position). If an employee has gained seniority in more than one classification (not simultaneously), he/she may only exercise his/her seniority in the position held at the time of an election. If that seniority is insufficient to prevent layoff, then the employee may rely on a previous classification seniority to bump. After bidding and bumping take place, the least senior employees who are to be laid off are entitled to severance pay pursuant to Article 52.