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CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: January 16, 2015

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. 2

During the last 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, 273 cases were heard at mediation, the vast majority of which were settled prior to arbitration – approximately 86%. 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, Lois M. Traub, Alexander Soric, Robert L. Sacks or Michael Lydakis.

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

DISCIPLINE AND DISCHARGE

Inappropriate and unprofessional behavior

Case No. 2014-26, July 16, 2014
Arbitrator: Blyer

IC Blyer held that the Hotel had just cause to discharge the Grievant, a 29-year banquet captain, for touching a guest in an inappropriate manner during a banquet function. At 11:30pm on the evening of the function, the guest was crouching down near an outlet to unplug her charger when the Grievant approached her, squeezed her neck and shoulder area, and asked if she wanted a massage. The guest confronted the Grievant and immediately went to find a manager. The Grievant testified that he asked the guest twice if she needed help, and then merely tapped her on the shoulder to get her attention. Though a coworker's testimony somewhat corroborated the Grievant's testimony, the IC did not credit the coworker's testimony stating that, because the two worked together for many years, the colleague "had motive to color the evidence" and lie for the Grievant. On the other hand, IC Blyer recognized the guest as an uninterested witness and therefore credited her testimony and upheld the discharge. The IC further held that the mitigation doctrine did not apply because the Grievant was previously discharged and reinstated by the Hotel for similar conduct. Thus, the risk of the Grievant engaging in similar conduct in the future outweighed his long service record.

Case No. 2014-30, August 18, 2014
Arbitrator: Shriftman

IC Shriftman sustained the discharge of Grievant, a short-term room attendant, for creating a hostile work environment and engaging in rude and inappropriate behavior. The Grievant's supervisors sought to have a conversation with her about respecting her coworkers. The Grievant became irate and was asked to leave. Days later, the Grievant left threatening and racist voicemails for three different supervisors. The IC held that unprofessional conduct and the use of racial slurs in referring to other people, even those of the same race, are totally unacceptable and prohibited by Hotel policy designed to preclude hostile work environment, harassment and discrimination in its various forms. Additionally, the Grievant was allegedly upset that management would not switch her shift from AM to PM. IC Shriftman found that, because the Hotel examined its options under the IWA and determined that she was not entitled to a shift change, the Grievant had no right to behave as outrageously as she did towards both supervisors and coworkers. As a side note, the Hotel attempted to rely on a prior decision from another hotel in which the Grievant was discharged for insubordination and verbal harassment of coworkers and supervisors. The Union objected claiming that this discharge could only be sustained for misconduct occurring at the Hotel in this instance. Though the IC agreed with the Union, he explained that, when the evidence against a discharged employee, pro and con, is fairly equal, a prior award reflecting similar misconduct by the same employee may be used to "break a credibility deadlock". However, because the evidence presented was overwhelmingly in favor of the Hotel's decision to discharge the Grievant, the IC did not look to the prior award.

Case No. 2014-50, December 18, 2014
Arbitrator: Blyer

In this case, IC Blyer was asked to review the discharge of two cooks, Grievant A and Grievant B, for violation of the Hotel's workplace violence policy. The Union claimed that the

Hotel did not have just cause to discharge either grievant, and that Grievant A was actually discharged for engaging in activity that is protected by the National Labor Relations Act ("NLRA") rather than for violation of Hotel policy. The Grievants, who had a history of conflict with one another, were each discharged for violating prior voluntary settlement agreements ("VSA") for violation of the Hotel's workplace violence policy in 2012. Each Grievant's VSA contained a final warning that any future violation of a similar nature would result in immediate termination. The Hotel terminated the Grievants as a result of a verbal altercation. Grievant A was working with two coworkers in preparation for a banquet. While prepping, Grievant A and one of the coworkers were discussing who the better cook was and who would be better suited for a promotion to sous chef. Grievant A and the coworker each called each other "bluffers" several times. At this point, Grievant B who was a sous chef at another hotel and believed that the comments were directed to him interjected and said that he does not "bluff". Grievant A continued his banter with the co-worker and said to the coworker, "you know what train I take" (jokingly implying that the coworker could find him there if he was to continue the discussion). Grievant B believed this comment was directed to him and said that he does not take the train to work, he takes a cab, and that he (Grievant B) he does not "bluff", he "kills". Grievant A asked Grievant B to repeat himself, and Grievant B once more said that he does not bluff; he kills. Grievant A then responded "you will kill me? you will kill?" and further stated that Grievant B must think that he (Grievant A) is "one of those foreigners who would not do anything". Grievant A then left the work area and proceeded to file a report with the Hotel. After conducting an investigation, the Hotel discharged Grievant A for instigation and for the statements he allegedly made during the altercation, and discharged Grievant B for making the alleged threats of physical violence during the altercation. At the hearing, Grievant B denied making the statements attributed to him. However, the two coworkers who were present during the conversation corroborated Grievant A's version of the events. IC Blyer held that Grievant B's conduct violated the prior VSA and that, even if there was no prior VSA, Grievant B's statements were sufficient to warrant discharge. The Union attempted to argue disparate treatment, asserting that Grievant A violated the Hotel's workplace violence policy in 2013, but only received a suspension despite the final warning contained in the 2012 VSA. However, the IC did not agree that one incident constitutes disparate treatment. With regards to Grievant A, IC Byler held that the Hotel did not have just cause to discharge and ordered reinstatement with back pay. The IC found that Grievant A did not instigate a confrontation with Grievant B and that Grievant A's statement that Grievant B must think that Grievant A is "one of those foreigners who would not do anything" was too ambiguous and thus insufficient to warrant discharge. As a result, the IC declined to fully address whether or not Grievant A was discharged for engaging in protected activity under the NLRA, though in a footnote he indicated that the evidence presented was insufficient to connect Grievant A's discharge with his protected activity.

Negligence

Case No. 2014-28, July 31, 2014
Arbitrator: Shriftman

IC Shriftman sustained the discharge of the Grievant for using his master key to let a person into a guest room. The person, a guest of the Hotel, was attempting to enter room 601, but without success. The guest asked the Grievant to let him in and, after allegedly attempting to contact the front desk, also without success, the Grievant used his master key to let the person into the room. When the person saw luggage in the room, he called the front desk to clear up the confusion and learned that he was given the wrong key and was supposed to be staying in room 501. In his defense, the Grievant testified that the guest implored him to open the room, and because the guest claimed he had been working all day, the Grievant felt it was permissible to open the door. The IC noted the well-settled rule that, where discipline is grounded on a guest complaint, the Hotel cannot rely on hearsay but, rather, must produce the guest as a witness. However, understanding that the Hotel may not have wanted to embarrass itself further, and that the guest's testimony would still not have excused the violation of Hotel policy in this case, the IC allowed the Grievant to testify to the hearsay evidence and reserved the right to afford it little or no weight. The Hotel argued that this incident, standing alone, was sufficient to warrant discharge and that, even if the IC disagreed, the Grievant's poor disciplinary record, including a final written warning for losing his master key, warranted discharge nonetheless. The Union argued that the Grievant made an effort to follow Hotel procedure and chose ultimately to satisfy the guest out of respect and sympathy. The IC held that the Grievant, in the name of everyone's safety and security, was obliged to direct the person to the front desk. In light of the serious nature of the offense and the fact that the Grievant's disciplinary record included losing his master key, the IC was constrained to uphold the discharge.

Case No. 2014-33, September 9, 2014
Arbitrator: Blyer

IC Blyer sustained the discharge of the Grievant, a 16-year order taker. The Grievant was discharged for disclosing confidential guest information in violation of the Hotel's guest confidentiality policy. During the Grievant's shift, a call came into the hotel. The caller, a scam artist, claimed to be a detective investigating a robbery and requested the names and room numbers of guests who ordered room service between 5:45pm and 6:15pm. The Grievant complied with the request. He then gave the phone to his manager, who was told by the caller that the caller was from security and was investigating a robbery. Upon investigation, the Hotel learned that no robbery was reported and alerted the guests. In the interim, the scam artist called the guests and tried to solicit credit card numbers along with other personal information. The IC found that the Grievant knew of the Hotel's policy and knowingly violated its terms. The incident caused embarrassment to the Hotel and undermined its promise to provide a safe and secure place to stay. Further, the mitigation doctrine did not apply because, even though he was a long-term employee, the Grievant's disciplinary record was replete with discipline.

Theft of time

Case No. 2014-40, October 22, 2014
Arbitrator: Drogin

The IC sustained the proposed discharge of a 17-year security officer and delegate for theft of time. The Hotel conducted an investigation which revealed seven (7) instances in which the delegate falsified "punch in punch out" forms regarding the actual times that he reported to work. As a result, the delegate was paid for 251 minutes of time during which he performed no work for the Hotel. The delegate argued that the time on the video footage reviewed by the Hotel was incorrect and that two of his coworkers were engaged in a conspiracy to have him fired. Specifically, the delegate claimed that he saw one of the coworkers photographing documents, which the delegate presumed to be the "punch in and out" forms, and that the coworkers must have "photo-shopped" the documents in an attempt to get him fired. The coworkers denied the accusations when confronted by the Hotel. The Hotel retained a handwriting expert who testified and concluded that the handwriting on the forms was that of the delegate. The Union argued that the Hotel did not go far enough and that the Hotel had the burden of proving that the documents were not altered by Photoshop. The Union pointed to the Hotel's willingness to retain a handwriting expert as an indication that the Hotel assumed this burden. The IC found this to be a question of first impression and held that the Union had the burden of proving the affirmative defense that the forms had been altered. The IC found that "generally, under the rules of evidence, the party raising an affirmative defense has the duty of establishing it". Here, "[The delegate] cannot prove that the documents were photo-shopped or even altered simply by challenging the Hotel to disprove his suspicions that they were, any more than he could establish that he was transported to an alien spaceship by challenging the Hotel to disprove that". Based on the lack of evidence presented by the Union, the affirmative defense failed. Further, IC Drogin refused to apply the mitigation doctrine, finding that "[m]itigation for length of service, or because of physical condition, has no application where a security officer, who is responsible for the protection of the Hotel's property, as well as for the property of its guests and the safety of its guests and employees, fails in his honesty". Thus, the discharge was sustained.

Attempted theft

Case No. 2014-44, November 20, 2014
Arbitrator: Drogin

IC Drogin held that the Hotel had just cause to discharge the Grievant, a 14-year bellman, for falsification of Hotel records and attempted theft. Bellmen at the Hotel received commission for car service bookings. Months prior to the date of the incident in question, the bellmen agreed among themselves to have the car booking procedure reduced to writing in order to ensure fairness and eliminate jealousy. The Grievant was terminated when he was found to have made a reservation for a guest car in the bellmen logbook without obtaining proper confirmation from the guest in violation of the agreed upon policy. According to the Grievant, upon the guest's arrival, the Grievant explained to the guest some amenities the Hotel offered and the guest indicated that he would be interested in the car service. However, the guest provided no departure information to the Grievant. Despite having insufficient information, the Grievant logged a reservation for the guest. Days later, another bellman noticed the incomplete reservation and called the guest to confirm. The guest denied making a reservation and became upset. The Hotel launched an investigation, determined that Grievant violated the policy, and

discharged him. The IC held that the policy was unambiguous and that the Grievant knew exactly what he was doing. The Grievant was unable to provide any evidence of discrimination and, thus, the IC held that the Hotel met its high burden of proof. As for the remedy, the IC found the Grievant's conduct to be of a "similar nature" to the Grievant's conduct which lead to a June 2013 VSA. Accordingly, IC Drogin sustained the discharge.

Sleeping While on Duty

Case No. 2014-37, October 9, 2014
Arbitrator: Shriftman

In a non-Association case, IC Shriftman held that the Hotel had just cause to discharge the Grievant, a houseperson, for sleeping on the job. The Grievant was caught sleeping in a Hotel storage room when an employee tipped off the restaurant manager. The manager informed the Director of Human Resources ("HRD"). The HRD proceeded to take pictures of the sleeping Grievant before bringing in a delegate to witness the Grievant sleeping and to wake him up. The Union argued that the Grievant was on break when he was caught and that he was tired as a result of taking allergy medication. However, the IC accorded little weight to those arguments because the Grievant did not mention that he was on break during his first meeting with the HRD after this incident and because the doctor's notes submitted by the Union regarding the Grievant's allergies were written six days after the Grievant's termination. The IC explained that if the Grievant was truly not feeling well, he should have told a manager or supervisor. The IC noted that "the law is well settled that an employee who sleeps while on the clock is guilty of theft of time and may be summarily dismissed. An employer need not actually prove that the employee is in a sleep state; it is enough to find an employee sitting in a chair in a quiet location at a time when he/she should be performing tasks or waiting to be assigned them". Here, the IC found that the Grievant's sleep exceeded his 15 minute break where evidence showed that the storage room light has a motion sensor which keeps the light on for 14.5 minutes. The light was off when the Grievant was found, indicating that he had been asleep for at least that amount of time. The fact that the Grievant worked two jobs was also irrelevant. IC Shriftman found that an employer "is entitled to a full days' work for a full days' pay".

Workplace Violence

Case No. 2014-27, July 31, 2014
Arbitrator: Blyer

IC Byler held that the Hotel had just cause to discipline the Grievant, a 19-year room attendant, for engaging in workplace violence. However, applying the mitigation doctrine, the IC converted the Grievant's discharge to an unpaid suspension. The Grievant was discharged for shaking a ladder on which a co-worker was standing. Though there was conflicting testimony regarding exactly what took place, IC Blyer explained that his findings were based on the testimony of neutral witnesses, which he found highly credible. While the IC recognized the Hotel's interest in avoiding workplace violence or any threat thereof, the IC found mitigating circumstances as the Grievant was a 19-year employee with an admittedly excellent service record. Thus, the Grievant was accorded a last chance. IC Blyer ordered the Hotel to immediately reinstate the Grievant conditioned upon the Grievant's agreement to MHAP evaluation. This decision also served as a final warning that any similar conduct will result in discharge.

Case No. 2014-47, December 11, 2014
Arbitrator: Shriftman

IC Shriftman upheld the suspension of a 17-year banquet captain for getting into a physical altercation with a co-worker. After getting into a heated argument regarding desserts, the Grievant grabbed his co-worker by the elbow. Despite being told by his co-worker never to touch him again, the Grievant grabbed his elbow a second time. Later, the Grievant again engaged his co-worker, which prompted the co-worker to complain. The IC explained that the merits of an argument between two employees are irrelevant and that a suspension based on a mere heated argument would have to be overturned. Here, however, because the Grievant evidenced no respect for the rights and concerns of his co-worker, and because he did not leave his co-worker alone, the IC upheld the suspension.

CONTRACT

Pension Contributions

Case No. 2014-35, October 1, 2014
Arbitrator: Shriftman

The Union brought a grievance alleging that the Hotel violated the IWA when it ceased to make pension fund contributions in March of 2014. Pursuant to the 2004 IWA, bargaining unit members were given the option to remain under the Hotel's pension plan or to become participants in the Industry's Health Benefits Fund. If choosing the latter, the employee was to execute an election form. In early 2014, the Hotel became aware that it did not have the election form for 76 employees and was thus making contributions unnecessarily, which it chose to stop in March. The Union argued that the Hotel was bound by the IWA and that it could not lawfully cease making the contributions. IC Shriftman issued a nunc pro tunc remedy and called for the Funds to present election forms to the employees. However, the IC ordered the Hotel to make the employees whole for contributions (from February 2014, when Funds contributions ceased) up until the date the election.

Seniority/Scheduling

Case No. 2014-42, November 5, 2014
Arbitrator: Drogin

The Union filed a grievance alleging that the Hotel's seniority list was inaccurate. The Hotel listed the Grievant's seniority date as December 1, 2007. The Grievant was able to produce schedules from December 2006 showing that he was scheduled to work as a server rather than "commis server" (bus attendant), the job classification in which he was originally hired and from which he asked for a transfer to the server position shortly after he was hired in November 2006. In addition, several employees testified that Grievant began performing server duties as early as December 2006. Thus, the IC directed the Hotel to correct Grievant's seniority date to December 3, 2006.

Work Assignments

Case No. 2014-48, December 18, 2014
Arbitrator: Ross

The Union sought clarification on whether or not management could assign coffee break servers to a tipped function to which coffee break servers had historically been assigned, or if management was required to assign club dining employees (banquet servers) to all tipped functions, including the one in dispute. After reviewing prior agreements and hearing the testimony of the parties, the IC held that the Hotel may assign coffee break servers to functions they have historically performed and that the club dining employees are not entitled to work every tipped function in this Hotel. Based on the bargaining history of the parties, the IC found that coffee break servers can be assigned to work continental breakfasts with one hot item, regardless of whether or not gratuity is included, and the club dining employees must be assigned to serve all other banquet breakfast functions.