KANE KESSLER, P.C.

666 Third Avenue
New York, N.Y. 10017
(212)541-6222
fax (212) 541-9799
Direct dial (212) 519-5154
drothfeld@kanekessler.com

CONFIDENTIAL ATTORNEY-CLIENT
PRIVILEGED MEMORANDUM

DATE: February 6, 2017

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. 2

During the last six months of 2016, 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 the last six months of 2016, 282 cases were heard at mediation, the vast majority of which were settled prior to arbitration – approximately 81%. 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.

For the 2016 calendar year, 83% of mediation hearings resulted in settlements (427 out of 512).

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, Robert L. Sacks, Alexander Soric, Jaclyn Ruocco, Jennifer Schmalz, or Michael C. Lydakis.

cc: Vijay Dandapani, President and CEO
Hervé Houdré, Acting Chairman

DISCIPLINE AND DISCHARGE

Drinking on the Job Theft; Theft of Time; Falsification of Records; Adding Gratuities to Guest Checks

Case No. 2016-37, July 26, 2016
Arbitrator: Blyer

The IC sustained the discharge of a four (4) year room attendant for falsification of Hotel records. The grievant was discharged for allegedly falsifying her punch records to indicate on two (2) dates that she arrived for work on time when in fact she admitted to being late on both dates. In total, the grievant was charged with theft of thirty-two (32) minutes which amounted to approximately fourteen dollars ($14) of pay for time not worked. In defense of her conduct, the grievant claimed that a former manager directed the grievant to indicate on the forms the time that her shift started rather than the time the grievant arrived for work in an attempt to set the grievant up for discharge. The former manager denied these allegations. Impartial Chairperson Blyer found the former manager to be highly credible based on her demeanor and lack of incentive to testify falsely in favor of the Hotel. Thus, despite the "meager" amount of money involved, the IC sustained the discharge.

Case No. 2016-39, August 12, 2016
Arbitrator: Drogin

The IC approved the proposed discharge of a six (6) year security officer, delegate, for theft, theft of time, and drinking on the job. The delegate was discharged following an investigation initiated by a guest complaint that Hotel bar service was poor because the bartender and security officer were drinking on the job. Video evidence corroborated the guest's complaint. Based on the Hotel's investigation, the Hotel proposed the discharge of the delegate and terminated three (3) other employees. The Hotel also asked the concessionaire that managed the bar to remove a manager who had also been seen drinking. The delegate's defense of his conduct was two-fold: 1) he had an alcohol problem stemming from a car accident occurring two (2) years prior; and 2) the employees of the Hotel and the concessionaire's Beverage Director regularly drank with the delegate and provided him with alcohol. Impartial Chairperson Drogin rejected both defenses. First, the IC ruled that the delegate cannot raise his alleged alcohol problem as a valid defense, for the first time, only after he learned that the Hotel was proposing his discharge. The delegate had ample time to inform the Hotel of his alleged problem and never did. Second, the IC held that persons who are not the employer or agents of the employer cannot give an employee permission to violate a fundamental industry-wide rule against drinking while on duty. Further, an employee cannot claim that it is permissible for an employee to violate such a clear industry-wide rule just because other employees drank or enabled the employee to drink[1].

Case No. 2016-41, August 16, 2016
Arbitrator: Drogin

The IC approved the proposed discharge of a thirteen (13) year server, delegate, for

[1] Finally, because all employees involved were discharged, the argument of disparate treatment was unavailable to the Union as a defense.

allegedly adding gratuity to guest checks. The Hotel proposed the delegate's termination upon learning that he added eighteen percent (18%) gratuities to guest checks on several occasions in clear violation of Hotel policy. Though the Hotel's policy was never reduced to writing, testimonial evidence established that 18% gratuity is only added, with management approval, to guest checks on certain holidays and for parties of six (6) or more. Hotel management identified numerous checks on which the delegate applied an 18% gratuity to parties of less than six (6). Further, the Hotel presented video evidence of one of these dates which clearly showed a party of four (4) at a table for which the delegate applied this additional charge. Without a credible explanation from the delegate as to why he engaged in this conduct, Impartial Chairperson Drogin approved the proposed discharge.

Case No. 2016-44, September 8, 2016
Arbitrator: Blyer

The IC converted the discharge of grievant, a doorman, for theft of time to a two (2) week suspension for unilaterally altering Hotel practice -- where doormen covering the swing shift (11 a.m. to 7:30 p.m.) take a one (1) hour break towards the beginning of their shift and a one and one-half (1.5) hour break towards the end of their shift -- by combining the two breaks into a single two and one-half (2.5) hour break at the end of his shift. Despite management testimony that doormen only receive a thirty (30) minute break and must obtain approval for any additional breaks, the IC held that because there was a long standing practice of extended paid breaks for the swing shift, the grievant did not commit theft of time as the Hotel alleged.

Case No. 2016-51, October 11, 2016
Arbitrator: Shriftman

The IC approved the proposed discharge of a ten (10) year server, delegate, for theft, failure to follow procedures, and dishonesty. The Hotel conducted an investigation based on suspicions that servers were either giving away or "topping off" alcoholic beverages without charging the guests. The Hotel presented video evidence supporting its position that the delegate engaged in such conduct on two (2) different dates. The delegate denied doing so and stated that in some instances, other servers were responsible for the certain checks. Impartial Chairperson Shriftman rejected these arguments as they were clearly contradicted by the Hotel's video and documentary evidence, which included check reports, closed checks, and aids to arbitration indicating the sequence of illegal activity. The IC found that the Hotel met the high burden associated with theft cases and approved the discharge.

Case No. 2016-63, November 22, 2016
Arbitrator: Blyer

The IC sustained the discharge of grievant, a four (4) year tournant, for sleeping on the job and theft of time. The grievant was assigned to work as a runner in the kitchen by assisting two tournants in preparing and cooking food for the employee cafeteria. After transporting food to the cafeteria, the grievant was supposed to report back to the kitchen but instead proceeded to a storage room at the far end of the kitchen. There, she remained in the storage room sleeping for forty (40) minutes and was paid for this time. One witness, a tournant, went to the storage room and noticed that the door was closed when it is usually kept open. He opened the door and noticed that the grievant was sitting on a chair with her head down and body slumped over. The tournant did not attempt to communicate with the grievant and left the room closing the door.

Grievant did not respond to the fact that the tournant entered the room. A few minutes later, a manager and executive sous chef opened the door to the storage room as part of a routine walk through of the kitchen. They saw grievant sitting in a chair with her hair down, headphones in her ear and her head resting on a large storage container. One of the managers closed the door leaving the grievant in the room and a few seconds later re-opened the door and took a photo with one of their cell phones. After about four seconds, the grievant raised her head and looked at her two colleagues, who noted that she looked groggy and that she said in a soft groggy voice, "what's up." The grievant claimed that she was working either in the kitchen or some other hotel area during this time but video showed that the grievant neither walked into nor left the kitchen area. Grievant also testified that she was delivering food to the cafeteria during the relevant time period, of which she used five to six (5-6) minutes to walk into the storage room to place a phone call. In this regard, the grievant testified that she made a second trip to the cafeteria by using the freight elevator, which was again unsupported by video footage. The grievant claimed that the Hotel doctored the video, but no evidence was offered to prove the same. Grievant also claimed that the Hotel retaliated against her for filing grievances against certain managers and for filing an EEOC complaint. The IC discredited this allegation because the Hotel suspended the grievant prior to her filing the EEOC charge and the Hotel permitted the grievant to work instead of implementing a suspension, at the Union's request, during the investigation. Finally, the Union argued disparate treatment because two other employees were suspended and not discharged for sleeping on the job. The IC distinguished those cases because those employees were ill and took medication that made them drowsy and inadvertently pass out.

Case No. 2016-69, December 22, 2016
Arbitrator: Blyer

The IC sustained the discharge of a twenty-eight (28) year lobby attendant for theft of time. During the grievant's morning shift, she reported to work with her puppy, which she kept in the security office while she worked without permission from the Hotel. On three (3) separate occasions during her shift, the grievant left the Hotel with her puppy without authorization and without clocking in or out. One of those occasions was grievant's lunch break. The Grievant's lunch break is normally thirty (30) minutes. On this day, the grievant exceeded her break by forty-four (44) minutes. Grievant was paid for this time. In finding that the grievant had the intent to steal time, the IC rejected her claims that she lost track of time and that she was simply trying to care for her puppy. Grievant was well aware that she had to notify management of her breaks and properly clock in and out. Finally, the IC noted that while it is unclear if the mitigation doctrine applies in theft of time cases, it did not apply here despite the grievant's tenure with the Hotel and despite the fact that she was well liked by her colleagues. Impartial Chairperson Blyer explained his reasoning - the amount of stolen time was not trivial (eighty-seven (87 minutes)), the grievant was less than forthcoming when asked her whereabouts by her manager, and her testimony that her puppy took fifteen to twenty (15-20) minutes to relieve himself undercut the grievant's argument that she was simply trying to care for her puppy since her breaks extended well beyond that amount of time.

Threats of Violence; Workplace Violence; Verbal Altercation

Case No. 2016-45, September 8, 2016
Arbitrator: Blyer

The IC upheld the discharge of a twenty-nine (29) year houseman for allegedly

threatening a coworker. While in the employee cafeteria watching a soccer match, a coworker made a comment to another employee. The grievant, who assumed the comment was directed towards him, turned around to face the coworker. On the grievant's lap was a two-foot long heaving duty extension cable with three metal prongs sticking out of one end. The grievant and the coworker exchanged insults in Spanish and eventually the grievant stood up and began swinging the extension cord over his shoulder. In self-defense, the coworker wrapped his belt around his hand in preparation for a strike from the grievant. Other employees intervened before any physical contact was made. The coworker reported the incident to Human Resources and both employees were terminated. After investigating further, the Hotel reduced the coworker's discharge to a suspension but maintained its position on the termination of the grievant due to the grievant's poor disciplinary history of engaging in similar conduct. The grievant testified that the coworker was the aggressor and that the coworker invited him to fight. The coworker testified that he felt threatened by the grievant and that he was acting in self-defense[2]. The IC credited the testimony of the coworker, testimony which was corroborated by a Union delegate who was among the witnesses to the incident. By contrast, the Impartial Chairperson Blyer found the grievant's testimony incredible and unsupported by the evidence.

Case No. 2016-46, September 8, 2016
Arbitrator: Shriftman

In a non-association award, the IC converted a discharge to a one (1) week suspension of grievant, a cocktail server who worked on the floor of a casino. The grievant was terminated for larceny, assault, and failure to follow protocols with respect to handling unruly customers. The incident at issue began when a guest took out her cell phone took several photos of the grievant while grievant was working and without grievant's permission. The grievant took the phone from the guest, which the Casino claimed was larceny, and the guest reached towards the grievant, grabbing grievant's neck in an attempt to choke her. The grievant was carrying a tray of hot coffee, which spilled on the guest during the altercation and which the Casino deemed assault.

Numerous servers testified as part of the Union's case. The servers testified to experiencing constant customer harassment due to the lack of security personnel presence on the floor of the casino. The servers also testified that the employer never provided training on how to handle such harassment. The IC discredited the Casino's witnesses and rejected a finding of just cause because video clearly showed the grievant did not take the guest's phone with the intent to keep it and did not intentionally spill hot coffee on the guest. The IC noted that while it "boggles the mind" that servers were not given proper training for handling unruly customers, servers were aware that they could contact security or managers if a situation arises, thus warranting grievant's suspension. The IC also noted that a separate grievance may be appropriate for the Casino's failure to properly staff servers and security, which servers claim lead to increased exposure to customer harassment.

[2] It is not uncommon in threat cases for the Union to make note of an alleged victim's age, size, weight, etc. as compared to that of an alleged aggressor. We have maintained that this comparison is irrelevant to the facts. It is worth noting that in this case, the alleged victim (age 58) was eleven (11) years younger than the grievant (age 69) and also larger in size.

Case No. 2016-47, September 15, 2016
Arbitrator: Shriftman

The IC ordered the Hotel to reinstate and make whole a houseperson whom the Hotel discharged for allegedly assaulting a coworker. The grievant was discharged following an allegation made by a coworker that the grievant struck and harassed the coworker in the vicinity of the Union's office. The grievant's defense was that the coworker was the one who actually struck and harassed him. The Hotel did not find the grievant to be credible and terminated his employment. Impartial Chairperson Shriftman declined to rule on the alleged altercation and instead found that there was no link between the altercation (which took place in front of the Union's building and at a time when both employees were off the clock) and the coworker's assertion that the grievant assaulted him due to his response to an inquiry from a manager about the grievant's whereabouts during work some three (3) months prior.

Case No. 2016-49, September 26, 2016
Arbitrator: Shriftman

The IC granted the Union's motion for a directed verdict where the alleged victim of the grievant's assault failed to appear despite being issued a subpoena by the Hotel. In so ruling, Chairperson Shriftman noted that "it is the duty of every employee to cooperate with an employer . . . particularly when subpoenaed, about being a victim of an assault". The IC also noted that "lying to management about alleged misconduct by others constitutes gross misconduct and affords an employer the right to summarily dismiss the errant employee".

Case No. 2016-62, November 16, 2016
Arbitrator: Shriftman

In this non-association award, the IC upheld the discharge of a public area cleaner for allegedly engaging in a verbal altercation with a coworker. Prior to her discharge, the grievant was on a final warning for making threatening remarks to a coworker and contributing to a hostile work environment. The grievant was discharged for such conduct and reinstated pursuant to a Voluntary Settlement Agreement ("VSA"). The VSA contained a final warning that future infractions of a similar nature would result in immediate termination. On the date in question, the employer alleged that the grievant verbally assaulted a coworker when, upon seeing the coworker cleaning an area the grievant claimed she cleaned earlier, the grievant yelled, screamed, and belittled the coworker. Specifically, the grievant is alleged to have said "I already did those machines! . . . you're stupid" and continued to yell at the coworker. The grievant, in turn, claimed that the coworker intimidated the grievant with her delegate status and cursed at the grievant as well. The IC did not credit the grievant's defense in large part because the grievant did not include these allegations in her statement to Human Resources. The IC determined that the grievant's misconduct "fit reasonably within the confines of the incident underscoring her VSA". In view of this finding, the IC explained that "it did not require much" for the employer to demonstrate that the grievant was guilty of misconduct and that discharge was warranted.

Case No. 2016-65, December 5, 2016
Arbitrator: Blyer

The IC converted a six (6) week suspension to a four (4) week suspension of grievant, a thirteen (13) year banquet server with no disciplinary history, for using derogatory and vulgar

comments towards a co-worker. A number of banquet servers were in the Hotel cafeteria when the grievant complained that she did not get paid for certain worked she performed. The delegate banquet server told the grievant that she had been properly paid and that she was greedy to ask for more. The grievant followed the delegate to the elevator, where she told him "watch how you speak to me, you do not know what I can do to you." Once inside the elevator, the grievant called the delegate a "malaka" (a derogatory term in Greek) and a "fucking malaka", pointed her finger at him saying "fuck you" and called him an "asshole." At no point did the delegate curse at or threaten the grievant. The Union alleged that the Hotel engaged in disparate treatment because it only issued a three (3) day suspension of the delegate. The IC held that the grievant used malaka in a derogatory manner and demeaned and embarrassed the delegate. The IC further held that the grievant was insubordinate when she ignored management, also present in the elevator, when they requested that she calm down and cease her "outlandish" behavior. Finally, the IC found that the grievant's warning the delegate that he didn't know what she could do to him, while not a threat of physical harm, was another instance of misconduct. Therefore, there was no disparate treatment given that the delegate did not engage in similar behavior. The IC did find, however, that the mitigation doctrine applied because the grievant was a long term employee with no disciplinary record and because the Hotel did not consistently deal with workplace misconduct in the past.

Case No. 2016-66, December 13, 2016
Arbitrator: Blyer

The IC sustained the discharge of an eight (8) year houseman for threatening a coworker. The grievant was asked by a guest to provide towels for the Hotel's fitness room. The grievant approached the front desk and asked a front desk agent for a key to the fitness room. The front desk agent complied, but simultaneously, a second front desk agent stated that housemen are not allowed in the fitness room. Having already secured the key, the grievant left for the fitness room and returned to the front desk shortly thereafter. When he returned, video evidence showed the grievant approach the second front desk agent and loudly tell her to "mind you own business" while gesturing demonstratively. The grievant also stated that he "knew things" about the front desk agent and that he would "settle" her, "finish it" or "handle it" his way, and that he could take her down in minutes. The front desk agent asked if the grievant was threatening her, to which the grievant did not respond.

The grievant testified that he did not threaten the front desk agent and instead stated that he was telling her to focus on her own work and not his. The IC did not credit the grievant's testimony. Two witnesses testifying on the Hotel's behalf largely corroborated the front desk agent's account of what transpired. Further, the grievant conceded that the front desk agent asked if he was threatening her. The IC found it hard to believe that the front desk agent would ask this question if he merely told her to focus on her own work. Though Impartial Chairperson Blyer noted that there is no bright-line test for determining what remarks constitute a threat, Chairperson discussed certain factors that have been applied by past Chairpersons in making such a determination. These factors include: 1) the reaction of the recipient to the speech; 2) whether the alleged threat was conditional; 3) whether the speaker communicated the speech directly to the recipient; 4) whether the speaker had a history of making threatening statements; and 5) whether there was reason to believe the speaker could engage in violence. Applying these factors, the IC found that the grievant threatened the front desk agent. The IC also held that discharge was appropriate in light of the grievant's lengthy disciplinary history. Finally, the IC explained that "it certainly makes sense in the context of today's current environment that hotels

are extremely sensitive to workplace violence issues and are not waiting for violence to occur before taking action".

Case No. 2016-71, December 28, 2016
Arbitrator: Blyer

The IC approved the proposed discharge of a delegate but converted the discharge of the non-delegate grievant to a written warning. During a late morning shift, the delegate, while in the Hotel locker room, asked several of his co-workers about who removed the schedule he posted on the side of his locker. All present said that they did not know and the delegate stated that when he found out who did, he would "smash someone's face." After leaving the locker room to attend a meeting, the delegate asked grievant if he removed the delegate's schedule, to which the grievant initially denied but then admitted that it was he who removed the delegate's schedule. They proceeded to engage in an argument during the meeting. At some point, the delegate told the grievant to Google him so that the grievant knows what the delegate "is about" and gave the grievant his home address. After the meeting, the delegate and grievant walked by each other in the hallway, where the delegate told the grievant not to touch his "fucking locker." At this point, the grievant walked up to the delegate and they began to argue, to a point where they were nose to nose and a co-worker believed that the incident might become physical and attempted to separate them. The delegate told grievant that the issue "could be handled a different way" and that the two could "step outside." The grievant walked away at this point. The IC found that the delegate made a threat of physical harm when he said that he would smash someone's face and when he told the grievant to step outside. These threats of physical harm warranted immediate termination of the delegate. The delegate's statement about Googling him was too vague a statement to constitute a threat of physical harm. The grievant, on the other hand, did not engage in any threatening behavior, did not make any threatening remarks and did not utter any profanities. He walked away when he was threatened and only engaged the delegate when the delegate provoked him by telling the grievant to stay away from his "fucking locker." Moreover, the grievant was an eight (8) year employee with no disciplinary record. The IC ordered the Hotel to issue a written warning and to reinstate grievant with full back pay.

Tardiness

Case No. 2016-61, November 16, 2016
Arbitrator: Drogin

The IC approved a proposed three (3) day suspension of an eleven (11) year bellman, delegate, for violating the Hotel's time and attendance policy. The Hotel proposed the delegate's suspension after his thirteenth, fourteenth, and fifteenth absences of the calendar year. The Hotel's policy states that, following exhaustion of contractual sick days, two (2) unexcused absences in a thirty (30) day period or three (3) unexcused absences in a ninety (90) day period is grounds for discipline. Hotel practice in enforcing the time and attendance policy was to suspend all employees who violated the policy for three (3) days after two (2) written warnings; this was the case here. The IC determined that this policy was reasonable. When the delegate called out on the three (3) dates in question, he did not provide any reason for calling out. The delegate testified that it was the Hotel's responsibility to ask him for a doctor's note or a valid explanation for calling out. The IC rejected this defense and approved the suspension. In closing, Impartial Chairperson Drogin noted that "Grievant, as a delegate, must set the example for other employees".

Case No. 2016-70, December 28, 2016
Arbitrator: Blyer

Shortly after Impartial Chairperson Drogin's decision in #2016-61, the Hotel proposed the discharge of the same delegate for continuing to violate the Hotel's time and attendance policy. The delegate was late to work on three (3) additional dates. Pursuant to practice, the Hotel decides, on a case-by-case basis, whether a particular tardiness is considered excused. The Hotel rejected the delegate's excuses for each lateness, which included a misreading of the work schedule, a viewing for a deceased distant relative of his wife's, and a train delay. In opposition to the proposed termination, the Union argued that the prior IC award concerned the delegate's absences from work and that, because this case dealt with tardiness, that award could not be used as a basis for discharge in this case. The IC found this argument to be meritless and considered the prior award as allowing for progressive discipline to be applied. In addition to the three (3) instances of lateness, Chairperson Blyer found that the delegate violated Hotel policy a fourth time by failing to notify the Hotel of an absence two (2) hours prior to the start of his shift on another date. Based on the foregoing, the proposed discharge was granted.

Job Abandonment; Insubordination

Case No. 2016-54, October 25, 2016
Arbitrator: Blyer

The IC upheld the discharge of a six (6) year night auditor for job abandonment, insubordination, and threatening behavior. The grievant was scheduled to work an overnight shift from 11pm to 7am. Shortly before 7am, the grievant received a call from her relief co-worker stating that he would not arrive at the Hotel "anytime soon". With no other employees available to cover the grievant's work station, a Hotel manager directed the grievant to stay. The grievant refused and left the Hotel at the end of her shift. During a meeting with the Hotel's Director of Human Resources ("HRD") the next day, the grievant became extremely upset. She proceeded to point her finger in the HRD's face and stated numerous times to the HRD that she would be "sorry, so sorry". The HRD directed the grievant to leave her office and then asked a manager who was present during the meeting to call security for the purpose of escorting the grievant from the building after the grievant refused to leave. The grievant then agreed to leave voluntarily, and as the HRD was escorting the grievant from the building, the grievant put herself inches from the HRD's face and again stated that the HRD would be "sorry, so sorry".

Following these events, the HRD left the Hotel in fear of her safety. Chairperson Blyer began his analysis by finding that the grievant was aware of the Hotel's policy requiring her to stay until her relief arrived. The IC then found that the grievant's words and conduct during and after her meeting with the HRD constituted threatening behavior. Specifically, he explained that while the words used by the grievant may not give rise to an inference that a threat occurred, the grievant's accompanying behavior led him to the conclusion that the grievant engaged in threatening conduct. The Chairperson further noted that "the law generally construes ambiguous statements against the interests of the person who created the ambiguity"; in this case, the grievant. Thus, the discharge was sustained.

Case No. 2016-57, November 9, 2016
Arbitrator: Drogin

The IC reinstated the grievant, a server at a concessionaire restaurant, with full back pay and ordered liquidated damages of fifteen percent (15%) on the amount of back pay due to the Restaurant's "crude and blatant" willful violation of the IWA. Grievant, a three (3) year employee, worked the morning shift at the Restaurant and for the first three (3) months of her employment, she was paid in cash. The grievant filed a Fair Labor Standards Act lawsuit against the Restaurant claiming certain unpaid wages. The Restaurant attempted to settle the lawsuit but the grievant declined the offer. About a month later, the Restaurant changed grievant's schedule to the evening shift without five (5) days' notice required by the IWA. The grievant attempted to change her schedule by speaking with management about the lack of trains for her to take during that time of day and by agreeing with a co-worker to switch shifts with her. The Restaurant refused to change her schedule. Additionally, it hired a new server with less seniority for the morning shift that grievant used to work (and who was later found to be unqualified for the job). Grievant called out for two shifts in a row – one because trains stopped running and another due to sickness. She texted her manager for the first call out explaining that she could not make it in and had her fiancé call the Restaurant for her second shift. The IC ruled that this was not a resignation as the Restaurant claimed. The IC noted that while an employer has a right to change schedules in accordance with the IWA for bona fide reasons, the motive for such change must be closely examined. Here, the IC held that the Restaurant retaliated against the grievant due to her FLSA lawsuit and failed to follow the seniority and notice provision in the IWA.

Violation of Hotel Rules; Gross Misconduct

Case No. 2016-67, December 20, 2016
Arbitrator: Shriftman

In this non-association decision, the IC upheld the discharge of a short-term valet attendant for gross misconduct and violation of employer rules. The grievant worked the overnight shift as a "ticket writer" and was responsible for, among other things, providing valet parking vouchers for guests and inspecting cars for damage. The Employer's policy requires a valet attendant to remain at the work station at all times unless s/he first obtains relief from another valet attendant. Valet attendants are also prohibited from closing valet service, a revenue generating operation, without management's authorization. Video evidence showed that, shortly after midnight, the grievant closed both valet lanes, lounged near the ticket booth, and then left his work area for approximately thirty (30) minutes without obtaining proper relief. In defense of his conduct, the grievant stated that he was anticipating the valet to be busy at around 1am and that no manager from which he could seek authorization to close the valet was in the area. The IC rejected the grievant's contentions. Instead, the IC credited testimony from \a manager who was located in an office fifteen (15) feet from the grievant and found that there was no reasonable explanation for the grievant's conduct. The IC explained that the grievant was guilty of gross misconduct by deciding, without authorization, to close the valet, thereby depriving guests of valet service and the employer of revenue; this conduct illustrated a lack of respect for the employer and was worthy of discharge.

Case No. 2016-34, June 22, 2016
Arbitrator: Drogin

The IC upheld the discharge of a long-term Room Attendant for gross misconduct when she returned to the Hotel inebriated after attending a company-sponsored holiday party that was held at an affiliate hotel a few blocks away. The Hotel has a practice of hosting holiday parties for its employees and providing alcoholic beverages at these parties. On the day of the holiday party, the Grievant finished her shift at 3:00 p.m. and changed at the Hotel before leaving to attend the holiday party. She left her house and car keys and clothes in her locker, intending to return to the Hotel after the party before taking the subway home. The grievant testified that she drank six (6) glasses of wine at the party and became intoxicated. She then called her fiancé to meet her at the party and to assist her in getting home. Video showed the grievant returning to the Hotel with her fiancé, where she staggered down the hallways and bounced off the wall at least once. The grievant then obtained a beer from the adjoining restaurant (though no evidence showed her drinking it) and entered the ladies locker room with her fiancé. The IC rejected the Union's argument that the Hotel facilitated the grievant's intoxication and refused to rule that the practice of company-sponsored holiday parties are wrong or should be stopped. The IC noted that employees are expected to drink responsibly and not become intoxicated if they intend to return to their work place. The IC ruled that the grievant created a possible liability to the Hotel by creating a safety hazard to herself, co-workers, and guests and that the grievant's behavior affected the Hotel's reputation.

Case No. 2016-40, August 12, 2016
Arbitrator: Drogin

The IC sustained the discharge of a twenty (21) year Room Attendant, who had no prior discipline on her record, for gross misconduct when she called a guest a "liar" and a "yellow bitch." Following this incident, the grievant used the "F" word on the floor of the Hotel as well as subsequently when leaving Human Resources (HR) office in the Hotel. After the grievant was terminated, she left a message with an HR manager demanding holiday pay and other things and added "They don't have to worry about me no more, and good riddance, bitch." The grievant admitted to doing these things but claimed that she takes cancer medication, Tamoxifen, which causes anxiety and nervousness and, according to the Grievant, "drove her out of her mind" the day of the incident. Other than grievant's testimony, the Union did not offer evidence of the effects of this drug. The IC noted that in a Federal Food and Drug Administration publication on the drug, several side effects are listed but mood disorders were not one of them. In any event, the Grievant testified that she had been taking this drug for six (6) years and so should have known if any side effects would affect her job performance. The IC held that the mitigation doctrine did not apply and that the Hotel carried its burden of proof even though it could not show that the Grievant was put on notice that conduct of her type would lead to immediate discharge, citing the "Law of the Shop" – that there are certain offenses an employee knows he or she may not do, even if there is no written prohibition against it – and stating that "all employees in this industry, particularly a twenty-one (21) year employee, know the Law of the Shop."

CONTRACT

Room Quota

Case No. 2016-38, July 28, 2016
Reconsideration granted in-part, denied in-part: Case No. 2016-55R, October 26, 2016
Arbitrator: Shriftman

The Hotel requested a hearing to address management's right to determine the daily room quota for room attendants. When the Hotel opened, the Union and the Hotel entered into an agreement which obligated the parties to negotiate a quota and, failing agreement, submit the matter to the IC. The Hotel submitted photographs and documentary evidence in support of its position that the established quota was fair and had regularly been fulfilled by nearly all room attendants. The Union countered that the Hotel failed to take into account changed conditions since opening, including time lost waiting for a service elevator, loss of assistance by Housepersons, and other factors. After considering all of the evidence, the IC found that the Hotel's quota reflected "an honest appreciation of the size and number of the rooms assigned to each section, the cleaning protocols, including, among other factors, the number of amenities, as well as availability of linens and the number of lines needed to complete each". Thus, the Hotel's quota was reasonable.

Upon the Union's request for reconsideration, Impartial Chairperson Shriftman agreed to rescind his initial award based on the fact that he overlooked the parties' prior agreement that the quota must be reasonable and consistent with industry standards. However, the IC found that the Hotel's quota satisfied this requirement and again declined to adjust the quota.

Clarification of Work Assignments

Case No. 2016-64, December 1, 2016
Arbitrator: Shriftman

Both parties sought a determination as to the proper assignment of employees working in various food and beverage operations, including in-room dining servers ("IRD"), banquet employees, and a la carte employees. The dispute principally involved hospitality events in guest rooms and suites and service of functions held in a Hotel outlet. With respect to service in guest rooms and suites, the IC began his decision by noting the long-held belief that "in the absence of anything expressly stated in the IWA or any 'local' amendments thereto, respect must be shown to longstanding practices that develop in any particular hotel notwithstanding an equally virtuous, general desire of the parties to achieve nearly identical practices throughout the industry". Applying this principle, Impartial Chairperson Shriftman ruled that, consistent with the Hotel's practice, IRD servers can continue to service events in guest rooms and suites. With respect to service of functions in the Hotel's outlet, the IC relied on an agreement between the parties broadly defining banquet work in concluding that banquet employees must serve functions scheduled therein.