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**MEMORANDUM**

**DATE:** July 15, 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 - 2013**  
**REPORT NO. 1**

During the first six months of 2013, 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, 337 cases were heard at mediation, the vast majority of which were settled prior to arbitration – approximately 87%. 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 or Robert L. Sacks.

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

## **DISCIPLINE AND DISCHARGE**

### **Physical altercations**

Case No. 2013-04, January 17, 2013

Arbitrator: Shriftman

The Hotel proposed the termination of a five-year In-Room Dining Service Server/Delegate for gross negligence and violence. A Steward, who was both a friend and co-worker of the Delegate, asked the Delegate if he could take a fork. The Delegate responded that he could not, and approached the Steward waving a butter knife back and forth. The Steward grabbed the knife, and in doing so, cut his hand. The Delegate was very apologetic, claimed that he had been joking around, and went to get the Steward a bandage for his hand. After returning with the bandage, he continued to apologize, and the situation seemed to be mollified. The Steward did not immediately report the incident, and instead waited several days before telling management. The Hotel proposed the Delegate's termination, maintaining that his conduct violated the Hotel's zero tolerance policy against violence in the workplace. The Union maintained that the Delegate's conduct was part of a playful act, and while it was "stupid and careless," the Delegate did not intend to cause harm to his friend and co-worker. Impartial Chairperson Shriftman found that although the Delegate's behavior certainly constituted misconduct, it was not motivated by anger towards his co-worker but was merely horseplay that resulted in a relatively minor injury. Accordingly, IC Shriftman decided that the appropriate discipline for the Delegate's misconduct was a two-week suspension with a final warning for a one-year period with respect to horseplay or any behavior that could lead to the harm of persons or property.

Case No. 2013-11, March 1, 2013

Arbitrator: Ross

The Hotel discharged a ten-year Watch Engineer for assaulting a Room Attendant. The Room Attendant testified that she was cleaning one of her assigned rooms when the Grievant entered the room and started calling her names. The Room Attendant asked him to stop and to leave the room, but he refused and backed her into the bathroom, pushed her against the wall, and choked her. The Room Attendant flailed her arms to defend herself and in doing so, swatted at the Grievant's glasses, which fell off of his face. The Grievant stopped choking the Room Attendant and quickly left the room. The Room Attendant picked the glasses up off the floor, left the room and threw the glasses at the Grievant as he was entering a stairwell. In the hallway, she encountered another Room Attendant who noticed marks on her neck and asked what happened. The Room Attendant explained that the Grievant had left the marks and immediately went to report the matter to Security and to her Manager. A Security Officer and two Managers spoke with the Room Attendant and all of them saw marks on her face that were consistent with her claim that the Grievant had choked her. The Security Officer took a photograph showing a red mark on the Grievant's jaw area. The Grievant was immediately questioned about the incident and he insisted that nothing had happened in the room, even after he was informed of the Room Attendant's allegations. During the investigation, a number of details came out, including the fact that the Grievant had called the Room Attendant's cell phone from the phone in the Hotel's Engineering Office and that he had called and texted her three additional times on the day of the occurrence and on the following day. According to the Room Attendant, the Grievant tried to convince her to change her story. The Room Attendant refused to do so, filed assault charges

with the police and obtained an order of protection against the Grievant. In addition, the Grievant changed his story and claimed that he and the Room Attendant had had an ongoing romantic relationship for several years, that he had gone to the room to end the relationship and that the Room Attendant had attacked him as a result. Although the Room Attendant had initially denied a romantic relationship, she later admitted that the two had been intimate on one occasion two years prior and that, since that time, the Grievant (who was married) had been trying to pursue a romantic relationship with her. Impartial Chairperson Ross noted that a number of witnesses credibly testified that they saw the Room Attendant's face immediately after she reported being attacked by the Grievant, and that the photograph substantiated the Room Attendant's account of the events. Although the Grievant introduced a photograph of a scar on his neck which he alleged had been caused by the Room Attendant, IC Ross gave it little to no weight since it had never been introduced throughout the grievance process and there was no way of knowing who took the photograph, where, and when. IC Ross did not find the Grievant's account believable, explained that acts of violence are not to be tolerated in the workplace and upheld the discharge.

Case No. 2013-19, April 4, 2013

Arbitrator: Shriftman

The Hotel terminated two employees, a Utility Steward and Cafeteria Attendant, for engaging in a fight in the men's locker room. Both Grievants claimed that they were victim to the other employee's assault. Impartial Chairperson Shriftman cited the well-settled tribunal rule which holds that "employees who engage in physical violence provide their employer just cause to discharge them unless it is very clear that one of the disputants was merely defending himself from the punches, slaps, and kicks, among other forms, suffered from the other." Although IC Shriftman found the Utility Steward to be more credible than the Cafeteria Attendant, he could not conclude that the Utility Steward was merely a victim of the Cafeteria Attendant's attacks because he did not tell his co-worker to stop his attacks, leave the room, and report the incident to Security. Instead, he continued to participate in the fight which was made evident by the fact that the altercation spilled over from the locker area to the toilet area. Thus, IC Shriftman found that both employees were guilty of engaging in a serious fight, and upheld both discharges.

Case No. 2013-20, April 5, 2013

Arbitrator: Ross

The Hotel discharged a 15-year PBX Operator for engaging in a physical altercation and behaving in a threatening manner towards her co-worker. On the day of the triggering incident, the Grievant was working with two other Operators, each assigned to her own cubicle. At some point during the shift, one of the Operators reached over into Grievant's cubicle to get some tape. The Grievant reacted by slapping the Operator's hand, putting her finger in the Operator's face, and saying "No you don't. Everyone has her own tape. And you didn't say excuse me." The Operator then said "Excuse me," and again tried to reach for the tape. The Grievant again slapped her hand, and then threw papers from her desk and her headset onto the floor. The Operator who had been reaching for the tape testified that she was frightened by the Grievant's behavior and put a chair between herself and Grievant because she was scared. The other Operator who was present at the time but was not involved in the incident called security because she "thought that [the Grievant] was going to beat [the other Operator] up." The Grievant testified that her co-workers were whispering about her when she came into work and that while she was on a call, one of the operators reached over to get some tape, to which the Grievant responded that she was on a call and asked her co-worker to wait. The Grievant claimed that her

co-worker did not try to reach for the tape a second time, and that Grievant at no point touched her coworker. The Grievant had received several prior disciplinary actions, including a three-day suspension approximately one month prior to the incident in question which resulted from the Grievant screaming at another coworker for reaching into her cubicle to get tape without saying "excuse me." At that time, the Grievant had declined the Hotel's suggestion that she seek counseling for anger management. Impartial Chairperson Ross found that the only way to credit the Grievant's testimony would be to believe that there was a conspiracy of her co-workers, the Hotel, and the Union against her, for which there was no evidence. Accordingly, based on the circumstances of the case, the Grievant's history, and the industry's "iron cast intolerance of violence," IC Ross denied the Union's grievance and upheld the discharge.

### **Theft; theft of time**

Case No. 2013-02, January 15, 2013

Arbitrator: Blyer

The Hotel discharged a 37-year Bellman for falsification of documents and theft. The Hotel had an established practice whereby the Hotel compensated bellmen for instances when they brought a bag to or from a guestroom and did not receive a tip. In order to receive compensation, the bellmen marked each of the occasions on a voucher which they handed in weekly. The bellmen kept track of bags brought up to and down from hotel rooms in a log, and then used the information from the log to fill out the voucher at the end of each week. A Manager noticed an increase in the amount of money the Hotel was paying out on these vouchers, and decided to conduct an investigation. Based on his audit, the Manager determined that the Grievant unjustly requested compensation on 46 occasions over a five-month period. This conclusion was reached by the observation that compensation was requested on days when there were no guests checking in or out of the rooms marked on the voucher, or the guest rooms marked were vacant. The log was not introduced into evidence, so there was insufficient evidence to prove that the Grievant made all of the questionable log entries, since it was undisputed that bellmen often made log entries for their colleagues. Additionally, testimony explained several circumstances that would require a bellman to transport luggage to or from a room when there was no check-out (for example, a guest in the room arrived at a later date or departed earlier than other guests in the room). Impartial Chairperson Blyer found that the Hotel did not carry the high burden of proof required in theft cases, since the evidence was insufficient to conclusively show that the Grievant made the entries. Accordingly, IC Blyer directed that the Grievant be reinstated with backpay.

Case No. 2013-09, February 26, 2013

Arbitrator: Shriftman

A concessionaire discharged an Audio Visual Technician for theft of time, job abandonment, and sleeping while on duty. The Grievant was scheduled to work an evening shift that ran through the morning of the next day. Video footage showed that, after setting up a DJ booth, the Grievant repeatedly left the premises for extended periods of time. The Grievant neither received authorization from a manager or supervisor, nor informed a manager or supervisor that he would be leaving and not returning for hours. The concessionaire investigated further and found that the Grievant had done the same thing on several other occasions. On one occasion, the Grievant came into the Hotel, not in uniform, with a female and consumed complimentary alcoholic beverages at the bar while on duty. The Grievant's actions were ironic

since, just six months earlier, when the concessionaire proposed to have Grievant set up the DJ booth in the evening and break it down the next morning, the Grievant had insisted that he had to be present throughout the evening in case there were any problems with the equipment. The Grievant maintained that certain managers, who had since left the concessionaire's employ, were aware of his comings and goings. Impartial Chairperson Shriftman did not find the Grievant credible, and held that the Hotel proved its case "beyond a shadow of doubt." Accordingly, he found that the Hotel had just cause to terminate the Grievant.

Case No. 2013-23, April 19, 2013  
Arbitrator: Drogin

The Hotel discharged an eight-year House Officer for theft of time. On the day in question, the Grievant worked two shifts in a row: the first from 3:30pm-11:30pm and the second from 11:30pm to 7:30am the next morning. The Grievant's punches showed that he punched in when he arrived at 3:30pm, that he punched out at 8:30pm and back in at 9:30pm (presumably for his meal break during his first shift), and that he punched out again at 3:30am and back in again at 4:30am. However, security cameras showed the Grievant leaving the hotel at 1:30am and returning at 3:14am without punching out or in for that time period. They also show the Grievant working at Dispatch from 3:30am to 4:30am even though he was punched out for that hour. According to the schedule, the Grievant's meal break for the second shift should have been from 1:30am-2:30am, at which point he was supposed to relieve the Dispatcher from his post for his break. The schedule had been revised and it was unclear whether or not the Grievant had seen the new schedule (although according to the Dispatcher's testimony, he had informed the Grievant of the revised schedule via radio and the Grievant responded with something to the effect of "it looks like it will be an easy night"). In any event, the Grievant should have been back at the Hotel at 2:30am either relieving the Dispatcher as per the new schedule, or posted at 5<sup>th</sup> Avenue as per the old schedule. It was undisputed that at 2:30am, the Grievant neither relieved the Dispatcher, nor was he seen at the 5<sup>th</sup> Avenue post where another House Officer was posted. The Dispatcher attempted to contact Grievant numerous times via radio and cell phone but was unsuccessful. The Grievant eventually relieved the Dispatcher at 3:30am.

The Grievant testified that at 1:30 am, he went to the cafeteria, and because he did not like any of the food available in the cafeteria, he decided to go to a nearby food truck. According to the Grievant, it was a common practice for House Officers working the overnight shift to leave the Hotel while still on the clock to get food, and the Assistant Director of Security was aware of this custom (on rebuttal, the Assistant Director of Security denied any knowledge of such a practice). Because Grievant claimed he never saw the revised schedule, he did not know he was supposed to relieve the Dispatcher at 2:30am. However, he asserted that he was back at his post at 2:30am, though he could not recall what his post was. He also testified that his radio was dead and his cell phone did not have reception where he was in the building so that is why he did not receive the Dispatcher's calls. Additionally, the Grievant claimed the he was not required to punch out for a break during an overnight shift (even though he punched out and in at 3:30 and 4:30am, but continued to work through that period). Assuming Grievant had no knowledge of the revised schedule, and his cell phone and radio were not working, and he took his meal from 1:30am to 2:30am—there was still no explanation for where Grievant was from 2:30am-3:30am. Impartial Chairperson Drogin found the Grievant's testimony to be unconvincing, and determined that the Grievant intentionally acted to cause the Hotel to pay him for time he did not work. Accordingly, IC Drogin sustained the discharge.

The Hotel discharged a nine-year Tournant for theft of time. On the day of the triggering event, the Grievant was scheduled to work from 5:30pm to 1:00am. In accordance with the Hotel's practice of allowing employees on that shift to work through their meal break, leave early, and to receive a seven-minute grace period, this meant that he was allowed to leave at 12:23am. Sometime shortly after midnight, the Hotel's Banquet Chef noticed the Grievant leaving the Hotel, even though he should not be leaving until 12:23am. The Hotel reviewed video footage and found that on every day of a two-week period preceding the date of the triggering incident, the Grievant left the Hotel no later than 12:13am. On five of those days, the Grievant signed in at 5:30pm and signed out at 12:30am on the sign-in sheet. On the other three days, the Grievant did not sign in or out on the sheet. Additionally, the Grievant did not use the electronic scanning device to punch in or out on any of the eight days investigated. The Hotel terminated the Grievant for falsifying the sign-out sheets and for leaving his station prematurely. The Grievant testified that he had been leaving shortly after midnight for six years because the Executive Chef and other managers had given him and others authorization to leave if all the orders were filled and their duties were completed. The Grievant's claim was corroborated by the testimony of another Tournant that he would also leave the kitchen soon after midnight whenever he worked the 5:30pm to 1:00am shift, and was always paid for the full shift. The Hotel did not provide any witnesses to contradict this testimony. Though the evidence did not support the Grievant's contention that he received explicit permission to leave early if all of his duties were finished, it was clear that such a practice had developed at the Hotel many years earlier. Evidence showed that other Tournants were also leaving the Hotel shortly after midnight and had not been admonished for their behavior. It was also established that on at least one occasion, a Manager had been looking for Tournants after midnight but did not find any in the kitchen because they had all left the kitchen for the evening. None of the Tournants working that shift, including Grievant, were instructed that they could not leave before the end of their shift. As for the sign-in sheets, Grievant and another Tournant both testified that they always wrote 5:30pm as their sign-in time and 12:30am as their sign-out time. The sheets were located right outside of the Executive Chef's office, so he had to have noticed this conduct since they had been doing it for years. Impartial Chairperson Blyer determined that before discharging Grievant, the Hotel should have informed him that he must sign the exact time he left on the sign in sheet, and that he must not leave the Hotel before 12:23am. Thus, IC Blyer directed the Hotel to reinstate Grievant. However, because of the Hotel's legitimate concerns in a theft of time case and the considerable evidence of Grievant's continued misconduct which bordered deception, no backpay was required.

The Hotel discharged a Bellperson who had worked for the Hotel for less than one year for being away from his work station for roughly an hour without authorization. The Grievant was working the overnight shift and took his meal break from 1:20am to 1:50am which he spent with a friend of his in her car. Immediately upon returning to the Hotel, he went back outside until around 2:43am. Sometime around 3:00am, he began to assist his friend in getting her car started along with the help of a Security Officer. The Grievant and his friend both testified that the Grievant was also assisting his friend with her car from 1:55am to 2:43am. Based on video footage and testimony, Impartial Chairperson Blyer found that Grievant and his friend could not

have been sitting in a car that would not start on a freezing cold January night for approximately an hour before seeking assistance and that it was more likely that the Grievant was away from his workstation for about an hour, came back into the Hotel to resume working, learned of his friend's car not starting from a telephone call he received around 2:50am, and went back outside to assist with the car along with the help of a Security Officer. Citing previous IC decisions, IC Blyer explained that the seriousness of a theft of time offense is not mitigated by the minimal amount of time that was stolen and upheld the discharge.

Case No. 2013-25, May 21, 2013

Arbitrator: Drogin

The Hotel discharged an eight-year Steward for poor work performance, leaving work early without authorization, and theft of time. The poor work performance charge was based on photographs taken at the beginning of the shift following the shift which Grievant worked. (Grievant's shift was from 4pm to midnight, and as there was no overnight Steward, the next Steward arrived at 6am the following morning). Upon arrival, the Steward found a dirty station with a number of dirty pots and pans that had been left over from the night before, and asked Security to take photographs of the station. Based on the photographs, the Hotel concluded that the Grievant had failed to clean a number of items before she left for the evening. However, Impartial Chairperson Drogin found that the evidence was insufficient to prove that the dirty items did not appear after the Grievant's shift ended. Instead, IC Drogin expressed that the Hotel relied on Grievant's prior discipline for poor work performance and had improperly assumed that the Grievant failed to clean the pots and pans based on a theory of "prior bad acts," which is insufficient to sustain a discharge in the absence of sufficient proof.

As for the charge of leaving work early and theft of time, the Hotel claimed that Grievant left work over 30 minutes early without authorization. The Grievant's shift ended at midnight, but because she only took a thirty-minute meal break, she was allowed to leave at 11:30pm. It was undisputed that the Grievant punched out at 10:53pm. Video footage showed the Grievant leaving the kitchen at 10:28pm and leisurely walking in the direction of the locker room. She spent some time in the locker room, and then casually walked to the time clock where she spent some more time before finally punching out at 10:53pm, some 25 minutes after she left her work station in the kitchen. The Grievant testified that she had not been feeling well due to feminine problems, and had secured permission from her managers earlier in the afternoon to leave early, which both managers denied. IC Drogin did not credit the Grievant's testimony that she had not been feeling well and had received permission to go home early, and found that she had intentionally stalled on paid time before punching out, which constituted theft of time. The Grievant knew that theft of time was a terminable offense since she had been discharged for theft of time less than a year earlier, which termination had been converted to a suspension with a final warning. Based on the Grievant's theft of time, IC Drogin sustained the discharge.

### **Threats of violence**

Case No. 2013-07, February 21, 2013

Arbitrator: Shriftman

The Hotel discharged a Bellperson for violation of the Hotel's Workplace Violence Policy. The Grievant had previously been a party to a Voluntary Settlement Agreement ("VSA") that converted a discharge for a violation of the workplace violence policy to a time-served suspension without pay and a final warning on the condition that Grievant successfully complete

MHAP. The Grievant was terminated for two incidents. First, the Grievant wrote “David after [a fall] motorcycle rule” on a sketch of a co-worker (named David) who had recently had a motorcycle accident. The Grievant continuously denied that the writing was his until the Hotel called a handwriting expert to testify that the writing on the sketch was his. The Grievant eventually admitted that he had written the words, and claimed he initially denied it on the advice of his delegate. Despite the Grievant’s dishonesty, Impartial Chairperson Shriftman did not find the drawing to constitute a threat of harm, even if the Grievant did wish that his co-worker would take a fall on his motorcycle. The second event for which the Grievant was terminated occurred sometime after the sketch, when the Grievant was called into a meeting with the Director of Human Resources to discuss the sketch. The Director of Human Resources testified that the Grievant became extremely irritated with her questions about the sketch and made a comment about how disputes today are handled with guns. IC Shriftman was convinced by this testimony that she was afraid for herself and for other employees. Based on this, he found that the Hotel had enough reason to believe that the Grievant’s further retention would be too risky. Coupled with the prior related VSA and his dishonesty during the hearing, IC Shriftman upheld the Grievant’s discharge.

Case No. 2013-22, April 12, 2013

Arbitrator: Ross

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The Hotel discharged a 24-year Banquet Server for insubordination and violation of the Hotel’s Workplace Violence Policy. According to the testimony of three different witnesses, the Grievant was improperly using a large bulky kitchen table to set up the ballroom for an event when the Captain asked him not to use that table, per the Senior Assistant Banquet Director’s instructions. The Grievant did not obey the Captain’s instructions, prompting the Senior Assistant Banquet Director to approach the Grievant himself to ask the Grievant to remove the table from the ballroom. The Grievant again refused the order and began to curse, saying something to the effect of “F\*\*\* you guys. This is bullshit. I’ll take you guys out.” Because there were about five guests present in the ballroom, the Director of Banquets, who heard the interaction, told the Grievant to stop and to come to his office where a meeting was convened and was then moved to Human Resources because of the Grievant’s continued recalcitrance. The Grievant testified that Management was always picking on him which ultimately caused him to file a lawsuit against the Hotel. He claimed that his Manager screamed in his face not to use the bulky table and, for the first time at the arbitration hearing, that his manager hit him in the face. The Grievant denied threatening anyone or using profanity in the ballroom. Impartial Chairperson Ross addressed the merits of the two elements of this case, insubordination and violence, separately. He found that Grievant was guilty of both: he blatantly refused to comply with orders to not use the heavy table without even bothering to contradict the charge, and repeatedly threatened to “take out” several Managers. IC Ross explained that Grievant’s statements were “violence plain and simple” and that such threats are “intolerable and violate the IWA.” While the Grievant was a long-term employee, IC Ross found that he was not entitled to any mitigation because this was the second time he had been terminated for violence, the first termination having been converted to a suspension with a final warning that any future violations of a similar nature would result in immediate termination, conditioned upon on the Grievant’s successful completion of MHAP treatment. Accordingly, IC Ross upheld the discharge.

### **Harassment**

Case No. 2013-08, February 20, 2013



The Hotel proposed the discharge of a five-year Loss Prevention Officer/Assistant Delegate for violation of the Hotel's Anti-Harassment Policy. After calling the Hotel's Director of Services for the Housekeeping Department ("Director") three times to discuss an employee's grievance and receiving no response, the Assistant Delegate confronted her at the service elevator bank and began yelling at her. The Assistant Delegate told the Director that he needed to speak with her, and when she asked what the issue was, he loudly replied, "Do you think I'm stupid? I can see you are a chicken, you are a stupid chicken. [You have] no clue what is going on in [your] own department." The Director testified that the Assistant Delegate was standing so close to her that he spit on her while he was screaming at her and that he was blocking her egress from the elevator, essentially trapping her inside. Video surveillance showed the Assistant Delegate standing half in half out of the elevator, holding the door open and preventing the Director from exiting the elevator. The Director of Engineering heard the Assistant Delegate shouting from his office and stepped between the Assistant Delegate and the Director in order to allow her to escape from the elevator. The Director immediately filed a report with security and filed a criminal harassment report with the police the following day. The Assistant Delegate claimed that he had held the door open to prevent it from closing on the Director, and denied knowing that the Director had an office where he could go to speak with her, even though he admittedly called her office several times. At the conclusion of the hearing, Impartial Chairperson Drogin issued a bench order denying the Hotel's proposed discharge of the Assistant Delegate, and instead directing the Hotel to suspend him without pay for three weeks, with a final warning stating that any future violation involving the same or similar conduct would result in his discharge. IC Drogin further directed the Assistant Delegate to enroll in and complete the MHAP anger management program as well as delegate training. In his decision, IC Drogin emphasized how deplorable the Assistant Delegate's conduct of harassment and false imprisonment was and noted that the only reason he did not uphold the discharge was because the Assistant Delegate was acting in his capacity as such in the interests of a fellow employee.

Upon the Union's request for reconsideration of the award, IC Drogin issued a Supplemental and Corrected Award, amending several aspects of his initial award. After being advised by the Union that no delegate training program exists, IC Drogin eliminated the requirement that the Assistant Delegate go through such training. He further decreased the discipline from three weeks to three days when the Union presented documents which demonstrated that the Hotel had initially only proposed a three-day suspension and had subsequently increased the proposed discipline to discharge. IC Drogin explained that the effect of allowing an increase of the proposed penalty after the Union disagrees with it would be to chill and intimidate the Union from utilizing the grievance procedure. He added that an arbitrator should not increase the penalty sought to be imposed by a Hotel unless the employee has engaged in additional improper conduct before the arbitration hearing. In response to the Union's argument that the Assistant Delegate was entitled to special protection as a matter of law because he was acting in his capacity as a representative, IC Drogin pointed out that while Delegates may be afforded protection when using loud, aggressive, and even foul language, no such protection is afforded for physical acts. IC Drogin explained that his award was based on the Assistant Delegate's conduct of physically holding the elevator door open and imprisoning the Director inside (rather than the use of foul and intemperate language) which he does not consider privileged Delegate conduct. Accordingly, he amended his award by reducing the suspension to three days and eliminating the final warning letter, delegate training and MHAP anger management requirements.

Case No. 2013-10, March 7, 2013

Arbitrator: Drogin

The Hotel discharged a seven-year Front Desk Agent for creating a hostile work environment. Specifically, the Grievant followed the Hotel's elderly owner (who is both physically and mentally impaired due to health conditions) into his office and began screaming at him to fire the Hotel's manager. A number of witnesses testified about the incident, explaining that the Grievant's conduct was loud, disruptive, aggressive, and "out of control." According to one of the witnesses, a guest even asked what the commotion was about. The Front Desk Director tried and to calm the Grievant down, but he began to scream at her. The Assistant Front Desk Manager eventually had to get between the Grievant and the owner to end the tirade. The Grievant testified that the owner was the aggressor in the conversation, and that the Assistant Front Desk Manager had to calm the owner, not the Grievant, down. The Grievant also alleged that all of the witnesses who testified lied because the Hotel's manager threatened to fire them if they did not lie to get the Grievant fired. The Grievant pointed to two previous arbitration decisions in which the Hotel unsuccessfully attempted to discharge him as evidence that everyone was involved in a conspiracy against him. Although those decisions did not reflect well on the Hotel, Impartial Chairperson Drogin held that they stand on their own and on their own facts. Leading up to his discharge, the Grievant had received two prior written warnings for similar conduct. In one incident, the Grievant had "exploded" in a loud voice after being asked about a package. In the second incident, the Grievant began screaming after being asked to speak French (which he does speak) in order to assist a French-speaking guest. IC Drogin explained that this was a very close case to decide, since no one from management ever asked the Grievant for his version of the incident at any time prior to discharging him. However, after weighing all of the evidence and testimony, IC Drogin found that the Grievant was guilty of engaging in serious hostile conduct and verbally abusing the Hotel's owner. Accordingly, IC Drogin upheld the discharge.

Case No. 2013-21, April 17, 2013

Arbitrator: Blyer

The Hotel discharged a 15-year Steward for creating a hostile work environment by engaging in aggressive behavior. Specifically, a group of guests in the Hotel's restaurant had been waiting for a while to receive their desserts. After the desserts failed to appear for some time, the restaurant Manager went to the kitchen to inquire about the delay. He found the desserts in the kitchen, but could not find the Grievant, whose duties included carrying the desserts on a tray from the kitchen to a dumbwaiter to transport them from the kitchen level to the restaurant. The Manager spoke with Grievant's immediate Supervisor, and both attempted to find the Grievant. It was noted that just a day before this incident, the Grievant had received a written warning as a result of being away from his work area without authorization. The Supervisor eventually found the Grievant by the dumbwaiter. The Grievant began yelling at the Supervisor, accusing the Supervisor of watching him, and telling him that he knows how to do his job. The Supervisor tried to calm the Grievant down, and asked him to send the desserts upstairs, but the Grievant continued to yell and, while doing so, came within a foot of the Supervisor and forcefully poked him several times in the chest. The Supervisor stepped away and sought out the Manager. The Manager and Supervisor returned and the Grievant continued yelling at them, saying that he knew how to do his job, that they should "back off," and asking why he was being watched. The attempts to calm the Grievant down continued to be futile, and the Grievant

eventually walked away without loading the desserts into the dumbwaiter. The Grievant testified that he never screamed at or touched the Supervisor and that his Manager was not present for the interaction. Impartial Chairperson Blyer found the Grievant's misconduct in loudly challenging the authority of his supervisors and the directives issued by them to be similar in nature to two prior VSA's he had entered into and upheld the discharge.

### **Work Performance**

Case No. 2013-15, March 21, 2013

Arbitrator: Shriftman

The Hotel discharged a Bellperson for failure to follow baggage-handling procedures. A guest presented the Grievant with a claim ticket for seven bags which another Bellman had checked earlier that day. Video footage showed the Grievant going into the storage room to collect the bags and then placing them on the cart. At one point, the Grievant carried two bags to the door of the baggage room, placed one on the ground and loaded the other on the cart. He then turned to the bag he had just placed on the ground, compared something on the tag with the bag, lifted it up, and then placed it back down and squared it to the wall. The Grievant collected the remaining bags on the ticket, placed them on the cart, and then rolled the cart out to the guest. The bag that Grievant had examined but left in the luggage room did, in fact, belong with the bags that went out to the guest. The co-worker who had checked in the bags earlier that day recognized it as one of seven and informed his manager that he believed it had been left behind. Shortly thereafter, the guest called the Hotel about the missing luggage and the manager had to take a cab to meet the guest at Penn Station in order to deliver the bag. The Grievant's termination was preceded by a Voluntary Settlement Agreement which converted a prior discharge for failure to follow baggage tagging procedures to a final written warning with a final warning that any future incident of a similar nature would result in immediate discharge. The Hotel also introduced another "final written" warning for failure to give certain bags to guests. At the hearing, the Grievant divulged that he had a history of epilepsy and was not sure whether he had a momentary seizure that caused him to overlook the bag in question. The Grievant's neurologist testified that although she could not state for certain based on video footage that the Grievant had suffered a seizure at that moment, she was reasonably comfortable concluding that he had suffered a momentary seizure. Furthermore, the Hotel introduced evidence that after the Grievant's discharge, he contacted a co-worker to request that he speak with the Bellman who had checked in the luggage on the day of the incident to ask him not to show up at the arbitration hearing.

Impartial Chairperson Shriftman found that the Grievant made an honest mistake, that the Grievant's attempt to tamper with a witness was wrong and that the Hotel has a right to expect the Grievant to perform his job properly. However, the VSA did not properly set Grievant up for discharge. It was clear to IC Shriftman that the discharge that had resulted in the VSA had been excessive, since the Hotel had converted it to a written warning and had paid the Grievant 14 weeks of back pay. The written warning, albeit "final", did not mean that the Hotel could "throw him over into the abyss of discharge." After fully assessing all of the facts and circumstances, IC Shriftman directed the Hotel to reinstate Grievant, without back pay, provided that a doctor certifies his fitness to work.

Case No. 2013-28, June 5, 2013

Arbitrator: Shriftman

The Hotel terminated a Houseperson who had worked for the Hotel for less than one year for poor work performance. One of the Houseperson's duties was to close, but not lock, all of the doors in the basement after midnight and to open them again at 6am. The Grievant worked an 11pm to 7am shift, and video footage showed the Grievant entering the Maintenance room twice between midnight and 12:16am, turning on the lights, and leaving the room without closing the door. At approximately 12:20am, the footage showed an individual entering the basement, looking into the fitness center, and then entering the open and lit Maintenance Room. Within three minutes, the individual stole \$600 worth of equipment. The Union asserted that the Grievant simply forgot to close the door and that essentially, an unlocked door is the same as an open door, so that the Grievant should not to be blamed for the theft. The Hotel emphasized that the thief did not attempt to open any closed doors, and that he only entered the room that had a wide-open door, with the lights on, and no one present. In addition, in the Grievant's short tenure at the Hotel, he had been disciplined four times, including a suspension with a final warning, for his work performance. Impartial Chairperson Shriftman found just cause to exist and upheld the discharge.

## CONTRACT

### Overtime

Case No. 2013-05, February 12, 2013

Arbitrator: Drogin

This case involved two issues: contractual overtime and insubordination. The Hotel proposed a three-day suspension of a four-year Cook/Delegate for insubordination for refusing to work overtime. On a day that the Delegate was scheduled to work the 5AM to noon shift, another cook called out for his 4PM to 11PM shift. The Hotel's Deputy General Manager ("DGM") offered the overtime to two other cooks with higher seniority than the Delegate, both of whom refused the overtime. The Delegate was then asked to work the 4PM shift to which he responded "I'm working this shift and I can't work too much." The DGM explained that he could require the Delegate to work the overtime and the Delegate replied "I'm the Union Delegate—you cannot force me to stay." The Hotel's Director of Human Resources ("DHR") then called the Delegate into her office around 9:45AM and the Delegate told her that he "has a life too" and that he would not work the overtime. The Delegate asked to speak with his Business Agent, so the DHR called her on speakerphone and, according to the DHR's testimony, the Business Agent also told him that he would have to stay, but asked the DHR to try to find another option. The DGM again asked the other two cooks if they would stay and both refused, and the DHR phoned a chef that she knew to see if he could help out but he was not available. Immediately prior to the end of the Delegate's shift, the DHR advised him that the Hotel would provide him with a room to rest in for the four hours between the two shifts, and that the shift would be shortened by two hours. The Delegate again refused and, at the end of his shift, he left the Hotel and went to the Union to speak with a Business Agent about his complaint that he was forced to work overtime too often. At the hearing, the Delegate testified that he was not feeling well that day and had diarrhea and that he had advised the DGM that he was not feeling well. Impartial Chairperson Drogin did not credit the Delegate's testimony, noting that he certainly knew from his sanitation training that he should not be touching or preparing food if he had diarrhea. IC further noted that the Delegate did not go home at 9AM when a second cook came in, nor did he go home after his shift, since he went to the Union to speak with a Business Agent.

Based on the Delegate's testimony regarding the number of times he had to work overtime in the month preceding the triggering incident, IC Drogin did not find that the Delegate had been asked to work an unreasonable amount of overtime and approved the proposed three-day suspension without pay.