

IN RE ARBITRATION BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION, SEIU, LOCAL 113

and

ABBOTT NORTHWESTERN HOSPITAL

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 050425-55383-7

JEFFREY W. JACOBS

ARBITRATOR

July 19, 2006

IN RE ARBITRATION BETWEEN:

SEIU, Local #113,

and

**DECISION AND AWARD OF ARBITRATOR
FMCS CASE 050425-55383-7
Fikre Cherinet grievance matter**

Abbott Northwestern Hospital,

APPEARANCES:

FOR THE UNION:

Roger Jensen, Jensen, Bell, Converse & Erickson
Fikre Cherinet, grievant
Karmen Ortloff, Union Business Representative

FOR THE EMPLOYER:

Ryan Olson, Felhaber, Larson, Fenlon & Vogt
Paul Zech, Felhaber, Larson, Fenlon & Vogt
Peter Huber, Mgr. of Transportation Services
Randall Huskamp, Parking Supervisor
Kevin McKenna

PRELIMINARY STATEMENT

The above matter came on for hearing on June 5, 2006 at the offices of Felhaber, Larson, Fenlon & Vogt in Minneapolis, Minnesota. The parties presented testimony and documentary evidence at that time. The parties also submitted written post hearing Briefs, which were dated July 7, 2006 and received by the arbitrator on July 10, 2006.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from march 1, 2003 through February, 28, 2006. Article 2 (B) provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The Parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Whether the Employer had just cause to terminate the grievant? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The Employer took the position that there was just cause to terminate the grievant for theft of cash from the parking receipts. In support of this the Employer made the following contentions:

1. The Employer conducted an audit of its parking services and the auditors made specific recommendations to, among other things, prevent theft of cash from the money boxes. One of the recommendations based on the audit was to conduct random integrity audits of the cashiers' cash drawers to make sure that the cashiers are honest and to make sure they are properly accounting for all money they handle during their shifts.

2. The hospital maintains a parking ramp for its employees and patients and their families. Obviously, this involves a great many cash transactions and the cashiers can handle up to \$1,500.00 per day. The proper maintenance of cash is critical. The Employer also pointed out that a parking attendant in a typical shift can service 400 to 500 hundred customers.

3. At the beginning of each shift, the parking attendants are given a \$200.00 cash drawer to start the day. At the end of the shift they are required to account for the cash by comparing the cash register tape in the booth with the cash receipts in their drawer. Any adjustments must be made in the Cashier Report. The grievant was well aware of the requirement to account for all cash in his draw were and of the requirement to account for any overages and shortages. The Employer has a clear and well-understood policy that any overages must be accounted for and not simply left in the \$200.00 starter drawer for the next day.

4. The Employer also pointed out that the grievant is in sole control of the cash box except for approved breaks or a cash audit. The box is returned to a locked safe at the end of the shift. While other people than the grievant have access to this safe only the grievant's direct supervisor, Mr. Huskamp, and Paul Krogness had access to his personal safe with his cash drawer.

5. As the result of the audit, the Employer selected several parking attendants randomly to run an audit. This was done by adding cash to the attendants' drawer at various times in order to check the honesty and integrity of the attendants and to see if they were properly accounting for the cash that had been added. No one other than Mr. Huskamp knew whose drawers were being audited in this way or how much was added to each drawer. Various amounts were added at various times.

6. The Employer argued that on 4 separate occasions and at various times within each shift, the Employer added certain dollar amounts to the grievant's cash drawer. This was done to ensure that no inadvertent errors were made and that they could be certain that the relief cashier was not responsible for any missing cash. These were as follows:

- January 31, 2005 - \$5.00 was added to the grievant's cash drawer before his shift by Mr. Huskamp. After the shift the grievant's cash drawer and documents were reviewed and the \$5.00 was not accounted for.
- February 1, 2005 – another \$10.00 was inserted into the grievant's cash box. The drawer was audited on February 4th but there was no accounting for the additional money.
- February 10, 2005 – \$10.00 was added at 10:00 p.m., after the grievant's break, and there was no accounting for the \$10.00 in either the drawer or the cash accounting documents.
- March 2, 2005 - \$7.00 was added to the grievant's drawer. Once again, upon audit there was no accounting made for the additional money.

7. Based on the above, the employer asserted that it was clear that the grievant stole the money added to his box. This is a clear violation of work rules and generally accepted standards of behavior in the workplace. Theft simply cannot be tolerated and must be dealt with severely.

8. The Employer countered the Union's argument that someone else took the money by pointing out that the grievant was the only person who could have known how much was added when he did his cash report at the end of the shift. The Employer also asserted that the notion that Mr. Huskamp took the money is not only preposterous but does not square with the fact that he added money to several other cashier's drawers. Some of them properly reported the overage. Others admitted to theft and were terminated. One cashier went to arbitration on the discharge. His case was denied by another arbitrator who also dismissed the claim that Mr. Huskamp may have taken the money.

9. Further, the argument that the relief cashier took the money was equally unlikely. They have access to the drawer for a short time but would have to essentially run and audit of the money, find the amount missing, somehow know that money had been added as a part of the audit, take the money while servicing the 75 or so customers that come through every hour. It simply does not make sense that the relief cashier would or even could do this even though they had the opportunity.

10. Moreover, the idea that someone else with access to the grievant's cash safe while it was locked up between the grievant's shift is even less likely. Only a very few people have access to the grievant's personal safe where his cash drawer is kept. The Union presented literally no evidence to suggest, much less prove, that anyone would have had a motive to set the grievant up like this. No one other than Mr. Huskamp knew when the audits were to be done or how much additional money was added to the cash drawers. In each case the only money missing was the exact amount that had been added to the cash drawer. It strains credibility to believe that on 4 separate occasions, people who did not know whose box was salted with the money or by how much, would steal that exact amount.

11. The essence the Employer's argument is that it is abundantly clear that the grievant stole the money added to his cash drawer and as regrettable as it is to discharge such a long-time otherwise seemingly good and loyal employee, termination is the only appropriate remedy for theft of this nature.

The Employer seeks an award of the arbitrator denying the grievance in its entirety and upholding the Employer's action.

UNION'S POSITION:

The Union's position was that there was not just cause for the grievant's termination and that he did not steal money from the parking receipts as alleged by the Employer. In support of this position Union made the following contentions:

1. The Union and the grievant flatly denied that he took money from his cash drawer and have maintained that denial from the very start of this case. Contrary to the statements made by others who were caught up in this sting operation, this grievant never offered to give the money back, as did one other person who was also fired for theft. Rather this grievant has always maintained his innocence of these charges.

2. The Union further pointed out that the grievant is a long time employee of the hospital with a long record of exemplary service. He is well liked and respected by co-workers and his supervisors. He had no reason to risk his job and his reputation by stealing such trifling amounts of cash. Moreover, he has a solid reputation for honesty and integrity and has always been accurate and above board in all his dealings with the Employer.

3. The Union pointed to what it terms the many errors made in the process here that could well have allowed others to tamper with the grievant's cash drawer. First, the Union noted that no one witnessed Mr. Huskamp place the money in the grievant's cash drawer. There is just as much reason to believe he took the money and falsely reported the placement of the money there than there is to believe that the grievant stole it.

4. Further, the grievant takes an hour-long break in the middle of his shift. He is therefore relieved by a relief cashier. That person would of course have access to the cash drawer. It would be a simple matter for them to run a cash register tape and see what the total receipts were, count the money in the cash drawer and pocket any overage. This would not take long to do and the cashier could easily do it while servicing the customers exiting the parking ramp.

5. The Union also pointed out that several other people have keys to the safe into which the cash drawers are placed when the grievant is not working. There is no guarantee that someone with access to that safe and to his cash drawer did not take the money either.

6. The Union argued that the burden of proof for this type of offense and penalty should be higher than a simple preponderance of the evidence. Certainly there is ample reason to leave at least reasonable doubt in the mind of the arbitrator as to whether the grievant stole the money. The Employer used a process that was fatally flawed and did not provide for a “doubt proof” method for making sure that Mr. Huskamp was being honest and in fact placed the money in the drawer to begin with. Further there were many other chances for someone else to take this money.

7. The essence of the Union’s case is thus that the grievant did not take the money. Further, that there were many points along the way that someone else could have take the money that it raises considerable reasonable doubt that the Employer cannot meet its burden of proof.

The Union seeks an award of the arbitrator sustaining the grievance and ordering the Employer to reinstate the grievant to his former position with all accrued back pay and contractual benefits.

MEMORANDUM AND DISCUSSION

Cases such as this are exceedingly difficult to determine since they by definition must mean that someone is not telling the truth, the whole truth and nothing but the truth. Here the grievant maintained his innocence from the very start and seemed very sincere at the hearing. Frankly too, anyone faced with this type of charge and with the loss of a job usually is, and had better be, to have any chance at all of reinstatement. However, the evidence and the reasonable inferences to be drawn from that evidence are what govern the result. Emotion rarely does and probably never should.

The Employer is a large metropolitan hospital facility in the Minneapolis area. It operates a parking ramp for its employee, patients and their families and visitors. The grievant was employed as a cashier at the ramp. It is largely a cash business and both parties agree that the honesty and integrity of the cashiers is critical. Since the cashier position by definition involves handling large amounts of cash the proper accounting and handling of cash is a critical piece of the job.

There was no dispute about that nor was there any dispute about the consequences that should follow if one is caught stealing money. The nature of this case is not that the grievant simply mis-accounted for the money or made some clerical error in a cash report at the end of his shift. The allegation is that he took money that was placed there as a part of a so-called integrity audit, i.e. a sting operation, to see if the extra money placed in the cash drawer without his knowledge would be accounted for and still there at the end of the shift.

The first matter to be determined is the burden of proof. Generally, the quantum of proof in arbitration widely held by most arbitrators and arbitration commentators is by a preponderance of evidence. It is thus whether the side with the burden can show that it is more likely than not that something occurred. It is the standard used in most civil litigation matters and requires only that it is more likely than not that a certain fact has occurred.

The Union argued that the standard should be much higher. Here it is appropriate that the standard of proof be somewhat higher than a preponderance of the evidence. Elkouri notes as follows: “in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher standard of proof, typically a ‘clear and convincing evidence’ standard, with some arbitrators imposing the ‘beyond a reasonable doubt standard.’” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. 950-951. Beyond a reasonable doubt is appropriate for the criminal courts and while the consequences of discharge are certainly severe they do not involve the loss of liberty and the other types of penalties imposed by the criminal courts. Thus, a clear and convincing standard will be used.

Having said that it is important to note that this is not an insurmountable burden or that some special sort of evidence is necessary. The evidence must provide a clear and convincing quantum of proof and that any inferences drawn from any circumstantial evidence must not be equally as logical as some other alternative. It must be more than 50% + 1 as is the case in other civil and arbitral matters.

It is thus against this backdrop that the analysis of the evidence must proceed. As noted above, the Employer operates its parking facility and it was clear that this is largely a cash business. An audit of the parking operations showed significant flaws in the cash handling procedures and the auditors suggested several changes. One recommended action was to conduct random integrity audits to check on the cashiers to see if any of them were guilty of pilferage of the cash.

The record reveals that several of the cashiers were selected randomly for this integrity audit. Significantly, there was no evidence to suggest that there was any personal animus toward the grievant by anyone or that he was unfairly or illegally selected for this scrutiny. The evidence showed that he was well liked and respected and that there was no reason for anyone to have set him up as the Union suggested.

The integrity audit was accomplished by “salting” their cash drawers at various times during their shift or before it to see if the additional money would be accounted for at the end of the shift. The record was clear that the cashiers are required to account for all money collected during their shift and that they do this through an accounting sheet submitted at the end of the shift. Any underages must be reported and any overages must be reported and deposited along with the other receipts. It was also clear that the grievant is a long-time employee and was well aware of his duties and responsibilities with regard to the proper handling of cash and accounting for it on his report to the Employer.

Several other cashiers were caught up in this sting operation. Some properly reported the overages accurately. One was caught and admitted taking the money. She was terminated. One other cashier was also caught and grieved his termination. This was brought to arbitration and the grievance was denied. See *Allina Hospitals and SEIU #113*, FMCS case # 050425-55384-7 (Flagler 2006).

Several of the observations made by Arbitrator Flagler in that matter were applicable in this matter as well. It involved the same basic set of facts and while the individual facts were different the procedure was essentially the same. It should be noted that one of the main issues in that matter was the absence of testimony from Mr. Huskamp, who was the supervisor who performed the integrity audit and who placed the extra money in the cash drawer. After a thorough review of the evidence, which was quite similar to that which was presented here, Arbitrator Flagler concluded that even without the testimony from Mr. Huskamp there was ample cause to believe that the grievant in that case took the money as alleged. Obviously, this case rises or falls on these facts but it was significant that Mr. Huskamp did testify in this matter as is discussed more below.

Arbitrator Flagler noted that the Employer's procedure contained a significant flaw in that there was no witness to the placing of the additional money in the cash drawer. I would agree that this is a weakness in the Employer's case and that different facts in the face of this shortcoming could well have potentially yielded a very different result. It would have been better if there had been some other type of evidence, either through testimony or some sort of video evidence for example, showing that Mr. Huskamp did in fact place the money in the box as he alleged. However, as will be discussed more fully herein, this fact is not fatal to the employer's case in this matter.

The Union argued that there is nothing to show that Mr. Huskamp was honest either and that he could have taken the money himself and forged the receipts showing that he had placed the additional money in the cash boxes. Mitigating heavily against this conclusion are several very significant facts.

First, Mr. Huskamp did testify in this matter and provided credible testimony that he did in fact place the money in the cash drawers as he stated. He also provided a plausible reason why no one else was there and that was for security reasons. The more people who know about the audit and its details, such as when the money was placed there or how much, the greater the chance the audit can be compromised. A review of the results of the main audit itself supports this rationale for why there was no other person present when he salted the money drawers.

Moreover, several other people were also audited. It is very significant that several of the other cashiers accounted for the extra money. Two did not and were terminated for theft. One actually admitted taking the money and admitted to taking the exact amount Mr. Huskamp claimed he placed in that person's drawer.

Obviously, without a witness or a video with time and location on it showing Mr. Huskamp actually placing the money into the grievant's drawer no one can be absolutely certain he did so. However absolute certainty is not required. What is required is that the inferences to be drawn from the available evidence show by clear and convincing evidence that the money was placed in the grievant's drawer just as Mr. Huskamp claimed it was. The conclusion is thus, to use the words of the venerable Arbitrator Flagler, that the "bait was in fact in the trap."

The Union did not claim that the money was not missing or that there was some sort of clerical error that would have explained the discrepancy in the figures. The Union's claim was that the grievant did not take the money as alleged and that someone else must have. Contrary to the Petros matter referenced above, the Union did not point the finger at any one individual. Rather the Union claimed that the grievant goes on break for up an hour during his shift. During that time, the relief cashier, whoever that person was, would have had access to the grievant's cash drawer and could have counted the money, determined that there was an overage and pocketed the money at that time.

The facts of this matter do not support the Union's contentions on this point. First, it must be noted that the cashiers at the Employer's facility are quite busy. The evidence showed that they may service up to nearly 500 customers in a shift. This would afford very little time to count the cash in the drawer, run an audit, pocket the money and still be dealing with the customers that are coming at a rate of more than one per hour in certain cases. Moreover, the cashiers do not know when people will come to exit the ramp. This would indeed make it very difficult to pocket the money and is frankly an unlikely scenario.

Second, and quite significantly, the evidence showed that in one case, the money was added to the grievant's drawer after the break. This obviously would eliminate the possibility that the relief cashier did it since they were gone by the time the money was added. Further, it was not entirely clear that any one individual was always the relief cashier. There is not one single person who can perform this task. This would imply that several of the relief cashiers were all dishonest and all did the exact same thing to count the money during the shift and pocket any overage at that time. That simply was unsupported by the facts of the case or by any reasonable inferences to be drawn from those facts.

Finally, it was clear that other cashiers were randomly selected for this audit and in those cases where the money was not accounted for, it was clear that the cashier's involved took the money. There was no evidence to suggest at all that anyone had a grudge against the grievant or some sort of vendetta that would have provided a motive or incentive to cast aspersions on him individually.

The Union also raised the prospect that someone could have gone into the grievant's cash drawer when it was locked in the safe and taken the money then. It was never quite clear how this would have occurred even if it were a possibility but the evidence again does not support the Union's claim. It is exceedingly unlikely that this would have occurred 4 times. It is even less likely that the unnamed and unknown person who would have stolen the money in this fashion would have known exactly how much to take. The evidence showed that the accounting sheet with the receipts was not with the cash box. This simply suggests a level of conspiracy far beyond that which was supported by the facts in this matter.

It is always a somewhat difficult case to establish a conspiracy. In order to establish the "conspiracy theory" one normally needs to demonstrate not only the possibility but also the probability that such occurred and even that it actually did. In the face of the compelling evidence that the grievant took the money the Union would have had to show that there was more than the simple possibility that someone else took the money.

What was needed was evidence that someone else in fact did take the money and some supporting evidence as to who that was or that there was some reason that someone else had some kind of personal animus against this particular grievant in order to do that. No such evidence was presented. The grievant was by all accounts a well-liked person and there was no evidence whatsoever to suggest that any one person would have taken the time and the risk to steal a small amount of money in order to somehow set the grievant up in order to get him fired. By all accounts only a select few people even knew the integrity audit was even being conducted and no evidence that any of the other cashiers knew about it, including the relief cashiers.

As noted above, the Employer needed to provide clear and convincing evidence through facts and the reasonable inferences to be drawn from those facts that it was clearly more likely that the grievant took the money than some other scenario or possibility. On this record the Employer did provide more than sufficient support for the unfortunate proposition that the grievant took the money as alleged.

The arbitrator was mindful of the grievant's position and his long record of otherwise good service to the Employer. It was also apparent that the grievant came here from another country and has worked very hard to become a part of the fabric of American society. These facts were considered and weighed along with the other factors in this case. It was clear however that the need to maintain the integrity of the cash drawers is paramount in a situation such as this. It is also apparent that many of the other cashiers who were subjected to this audit, at least two of whom lost their jobs due to the factors presented in their respective cases, were in a somewhat similar situation. These facts mitigate against any special treatment of r this grievant.

Accordingly, the evidence taken as a whole showed by clear and convincing evidence that the grievant took the money as alleged by the Employer. Moreover, the facts and evidence in this case also support the Employer's actions to discharge the grievant for this offense. The discharge must therefore be allowed to stand and the grievance denied.

AWARD

The grievance is DENIED.

Dated: July 19, 2006

Abbott NW and SEIU #113 – Cherinet.doc

Jeffrey W. Jacobs, arbitrator