

In The Matter Of
The Arbitration Between:

Local 26, UNITE HERE
And
The Ritz Carlton Hotel Boston

AAA Case No. 01-18-0003-1354
Discharge of [REDACTED]
Date of Award: May 1, 2019

Preliminary Statement

An arbitration hearing involving the above-captioned matter was held in Boston, Massachusetts on January 15, 2019. Representing the Hotel at such hearing was Andrew L. Gniewek, Esq., and representing the Union was James Hykel, Esq.. No stenographic notes of the hearing were taken; both parties filed post-hearing briefs which were received by the undersigned on April 15, 2019.

Issues

The parties agreed upon the issues to be submitted for decision; they are: "Did the Employer have just cause to terminate [REDACTED] If not, what shall be the remedy?"

Background

[REDACTED] now [REDACTED] who is the grievant herein and has been employed at Marriott-operated properties for approximately 18 years, was discharged effective February 28, 2018 on grounds of theft/attempted theft of a Hotel guest's apple watch. The grievant had no prior discipline of record.

In particular, the circumstances surrounding this case were as follows. The grievant began work as a server at this Ritz property in June 2016 having worked consistently at other Marriott-operated

properties since December 1999. At this Ritz property the grievant worked a 4 PM to roughly 11:30 PM shift.

On February 17, 2018 the grievant reported to management that \$300 in cash was taken from her wallet which she had left in the Hotel's pantry room with other personal articles. The \$300 was not recovered. The Hotel does not have security cameras in the pantry room.

On February 21, 2018, which was the grievant's next day of work following February 17th, the grievant during her 4 PM to 11:30 PM shift recovered a new apple watch in its original packaging that a guest had left behind. The grievant's account of her actions thereafter was as follows. The grievant placed the watch in the pantry behind some of her own personal articles. At the end of the shift per common practice the grievant in the presence of her manager closed out her receipts for the evening. At that time the grievant made no mention of the apple watch that she had recovered. The grievant then went into the pantry to gather her personal items to leave the Hotel. She testified that when she then saw the apple watch covered behind her personal items, she then remembered that she had found the watch earlier that evening. She testified that she then called the Hotel's Loss Prevention Office to report that she had found an apple watch, and that no one answered the phone at around 11:30 PM. The grievant testified that she then decided to take the apple watch with her to safeguard it overnight, and that she placed it in her tote bag. The next day approximately 15 minutes after her shift had begun, the grievant was asked by her supervisor whether she had found an apple watch the previous evening. She replied that she had. She then went to retrieve the apple watch from her tote bag and found that it was not there. She returned to her vehicle and found it there inasmuch as it had fallen out of her tote bag. She then delivered the apple watch to the Hotel in its original packaging, and the same day the Hotel was able to return the apple watch to the customer who had left it behind.

The Hotel's evidence was that it has a policy regarding unclaimed property, and that its policy requires employees to immediately turn

in lost property to the Hotel's Loss Prevention Office¹ and further prohibits an employee from removing such property from the Hotel's premises without first obtaining approval from management. The Hotel's policy in this regard reads as follows:

"Unclaimed Property & Removal of Property - Any property found in a guest room, public area or on Company premises should be immediately turned in to Lost & Found. Company property or items left by a guest, visitor, vendor or employee cannot be removed from the premises without first obtaining approval from management..."

The Hotel's evidence also was that if the Loss Prevention Office does not answer its phone, an individual can leave a message or can have the Loss Prevention officer paged or radioed. The grievant left no message for Loss Prevention and did not have the Loss Prevention officer paged or radioed.

As previously indicated, the grievant was terminated for theft/ attempted theft effective February 28, 2018. A grievance protesting the grievant's discharge was filed promptly thereafter, and inasmuch as such grievance has remained unresolved, the Union has elected to bring the matter to arbitration for resolution.

Position of the Parties

Position of the Union

The Union contends that there was no just cause for the discharge of the grievant, and that the Hotel inappropriately conflated a policy violation with theft.

In particular, the Union argues that intent is a necessary element in the proof of theft, and that no intent to steal was demonstrated in this case. The Union contends that the Hotel's decision to discharge the grievant must stand or fall upon the reason given at the time of discharge, and that the grievant's intent was not taken into account in the Hotel's decision to discharge. The Union

¹ The grievant testified that it was practice to hold onto lost items until the end of the shift since hotel guests often returned quickly to reclaim lost items. No evidence of this practice outside of the grievant's testimony was offered.

argues that wrongful intent is a necessary element in the proof of theft. The Union notes that a heavy social stigma of disapproval attaches in the case of theft, and that before an employee is characterized as a thief, all the elements of theft including intent must be proven.

The Union disputes the Hotel's claim that the Hotel is not required to meet any particular standard with respect to an employee's intent inasmuch as the employee's intent is irrelevant. The Union argues that the Hotel is mistaken on this point.

The Union argues that the Hotel lacked just cause to discharge the grievant inasmuch as the grievant did not intend to steal the apple watch, and that in the absence of such intent, there can be no actionable claim of theft. The Union argues that the record indicates that there was no persuasive evidence that the grievant intended to keep the apple watch for herself. The Union says that while the grievant acknowledged that she could have devoted more time and effort to delivering the watch to Loss Prevention before she left work, she was tired and did not believe it was necessary to do so. The Union says that while that decision was short-sighted and a violation of the Hotel's policy, such decision does not transform this case into one of theft. The Union says that the grievant simply had a lapse in judgment.

The Union argues that many undisputed facts establish that the grievant had no intention of stealing the apple watch. The Union says that the grievant freely admitted to having the watch when asked about it and immediately produced it in its original packaging. The Union says that if the grievant intended to steal the watch, she could have denied ever having seen it or claimed she left it in the pantry where she herself had experienced most recently a theft. The Union further says that the grievant's 18 years of service without discipline demonstrates her trustworthiness. The Union says that over that period of time the grievant found and returned many lost items attributable to customers including two thousand dollars in cash.

In sum, the Union says that the Employer has not carried its burden of proof in establishing theft in this case, and that the

grievant should receive the first step in progressive discipline, a verbal warning, for her violation of policy in taking the apple watch off property without permission. The Union asks that the grievant be re-instated to employment and be made whole for all benefits lost including back pay.

Position of the Hotel

The Hotel contends that it had just cause to discharge the grievant. In particular, the Hotel says that when it comes to theft of a customer's property, arbitrators sustain the discharge of the culpable employee regardless of the employee's length of service or prior work record.

The Hotel contends that the appropriate standard of proof in theft cases is proof by a preponderance of the evidence. The Hotel argues that the standard of proof in such cases should not be affected by assertions that discharge is "capital punishment" or "economic capital punishment".

The Hotel argues that the undisputed evidence established that the grievant failed to return recovered property to the Hotel or its Loss Prevention Office as was required by the plain terms of the Hotel's policies which the grievant admitted receiving, reading, and understanding. The Hotel says that the grievant compounded her problems by failing to notify any supervisor before leaving work that she had found lost property, and that she further failed to obtain approval for removing recovered property from the Hotel's premises.

The Hotel says that the grievant plainly violated multiple Hotel policies which can lead to termination and which permit the Employer to deviate from progressive discipline under the type of circumstances that existed here.

The Hotel argues that the Union's efforts to excuse the grievant's serious misconduct are not compelling. The Hotel says that multiple witnesses refuted the grievant's assertion that Hotel employees regularly retain recovered property during their shift while waiting for customers to return to reclaim such property. The Hotel

further says that its witnesses testified that its lost and found policy is strictly enforced and that lost property is promptly turned over to the Hotel's Loss Prevention Office.

The Hotel further argues that the grievant's claim that she tried to contact the Loss Prevention Office before leaving work is not credible. The Hotel argues that the grievant had not forgotten about the apple watch when she entered the pantry at the end of her shift, that she knew that there were no security cameras in the pantry, and that she knowingly placed the watch in her bag before leaving the Hotel's premises on the night in question.

The Employer argues that all of the grievant's actions evidence an intent to steal the apple watch and that she never intended to return it had she not been approached by Hotel management about the lost item. The Employer argues that what is relevant is that the grievant left the Hotel premises with the apple watch and returned without it; this, the Hotel says, is evidence of guilty intentions.

In sum, the Hotel asks that the discharge of the grievant be sustained, and that the grievance be denied.

Analysis

The grievant was discharged for the theft/attempted theft of an apple watch. The basic issue presented is whether the grievant is guilty of such charge.

There can be little question that the label of thief carries a heavy social stigma influencing public perception of an individual as well as jeopardizing an individual's prospects for employment/re-employment. It is not a label to be imposed lightly.

Typically, theft is deemed to have two elements: 1) the non-consensual taking of the property of another (i.e., the act) and 2) the intent to deprive another of his/her property permanently (i.e., the intent to steal). See generally Perkins, Criminal Law (The Foundation Press, Inc. 1957).

Does the evidence in this case indicate that the grievant intended to deprive the owner of the apple watch of his property

permanently? The initial steps that the grievant took which included placing the watch in the pantry behind her personal articles, failing to tell her manager at the close-out conference that she (the grievant) had found an apple watch, failing to take more proactive steps beyond calling Loss Prevention before she left the Hotel's premises for the evening, and failing to produce the watch as her very first action upon her return to work the following day reflect negatively on an intent to return the watch to its owner. However, at the most critical moment when the grievant was asked by her supervisor 15 minutes after her shift began whether she had found an apple watch the night before, she forthrightly and without hesitation replied that she had. She testified that she then went to retrieve the watch from her tote bag in which she had placed the watch the night before, and that when she discovered it was not in the tote bag, she went to her car believing it might have fallen out of the bag inside her car, and she found it there. She returned the watch in its original packaging. Had the grievant intended to retain the apple watch for herself, she might not have had the quick access to it on the day she was asked about it nor might she have still had the original packaging.

The evidence further was that, as one might imagine, hotel guests over the course of the grievant's 18 year history of employment at Marriott-operated properties have left personal items behind with some frequency. The grievant's record in recovering and returning lost items over those 18 years is without blemish and indicative of trustworthiness. Given the grievant's record over 18 years of employment, given the grievant's forthright, non-hesitant response that she had the apple watch when asked about it, and given my assessment of the grievant's credibility with respect to her testimony as to what she did after her supervisor asked her about the lost apple watch, I must conclude that the grievant had no intent to permanently take the property of another.

I would further point out that no matter what standard of proof one wishes to apply in this case, namely, proof beyond a reasonable doubt or preponderance of the evidence, the Hotel has not carried its burden of establishing that the grievant had an intent to permanently

take the apple watch in question. I think the customer whose watch was lost and then recovered would be startled to learn that the employee who recovered and returned it had been discharged for theft.

While the conclusion in this case must be that the grievant did not intend to steal the apple watch, the grievant nonetheless committed a violation of the Hotel's Unclaimed Property & Removal of Property Policy for which she must be held accountable. The Hotel's policy in this regard reads as follows:

"Unclaimed Property & Removal of Property - Any property found in a guest room, public area or on Company premises should be immediately turned in to Lost & Found. Company property or items left by a guest, visitor, vendor or employee cannot be removed from the premises without first obtaining approval from management..."

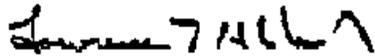
The grievant violated the above policy in two respects. She did not immediately turn in the apple watch to Lost & Found (Loss Prevention); rather, she placed the watch behind some of her personal articles in the pantry room which she knew was not a secure location inasmuch as cash had been stolen from her wallet on her previous shift and inasmuch as there were no security cameras inside the pantry.

Also, the grievant chose to take the apple watch off the premises without first obtaining approval from management which was a significant and serious lapse of judgment and clearly in contravention of policy. While the grievant testified that she sought to reach the Loss Prevention Office before she left work that night, the grievant clearly could have and should have done more. The grievant could have asked for Loss Prevention to be paged or radioed or could have spoken to the front desk clerk explaining the situation and asked for front desk help in addressing the problem.

Given the above violations of policy and considering the grievant's otherwise unblemished record, I find that the appropriate discipline for violating the Hotel's Unclaimed Property & Removal of Property Policy is a three day suspension.

Therefore, after having considered the evidence and arguments of the parties, I award as follows:

The Employer did not have just cause to terminate [REDACTED]. [REDACTED] discharge shall be converted to a three day suspension. [REDACTED] shall be re-instated forthwith to employment with the Hotel and shall be appropriately made whole for benefits lost including back pay except for the period of the three day suspension. Back pay shall be adjusted to account for interim earnings if any. I shall retain jurisdiction for a period of 30 days from the date of this decision to resolve any dispute arising out of the implementation of the award ordered herein.



Lawrence T. Holden, Jr.
Arbitrator