

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between:

THE UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION
LOCAL 1445,
Union

Grievance: Termination of

And

THE STOP AND SHOP SUPERMARKET
COMPANY, LLC
Employer

Case No.: 01-17-0006-
5029

Before: Marilyn Zuckerman, Esq., Arbitrator

Appearances:

For the Union: Ian O. Russell, Esq.
PYLE, ROME, EHRENBERG, PC

For the Employer: Joseph P. McConnell, Esq.
MORGAN, BROWN & JOY, LLP

Date of Hearing: January 18, 2018

Place of Hearing: 30 Stergis Way, Dedham, MA

Briefs Received: March 2, 2018

BACKGROUND

██████████ worked as a full-time meat cutter for Stop and Shop for 20 years with a break in service for about a year from 2008 until July 1, 2009. The last store in which he worked was Store 18 in Dorchester, MA. His job duties included organizing the meat case and its products, operating the cutting machines and cutting meat for customers. He normally worked in the back end of the store in the “cutting area.”

On August 8, 2017, █████ arrived at work at 6:55 a.m. for a 7 a.m. shift. At about 8 a.m., the Deli Manager, Donald Moore, asked █████ to continue “pulling the case”. This means identifying and pulling expired and soon-to-be-expired packages from the meat case. Moore had begun to perform this task himself, but had to go upstairs for a Managers’ meeting. There was an audit of the store that day and the Managers were meeting over it. An audit day is a stressful event because everything in each department must be in order. If not, the employees and/or the Managers can be disciplined.

█████ needs reading glasses in order to see small print such as expiration dates on meat packages. He kept a pair of reading glasses in his car and had another pair at home. However, on this day, he had driven his nephew’s car to work without thinking about reading glasses. When his Manager asked him to pull the case, he realized that he did not have a pair of reading glasses with him. He wanted to perform the task of pulling the case as soon as possible, so he went to the health and beauty care aisle of the store and selected a pair of reading glasses from the display case. He took the glasses and knew that he was being videotaped (Employer Exhibit #4). He did not intend to steal the glasses. But he did not pay for them at the front end registers. He intended to pay for them after he had completed the task of pulling the case. He went back to the meat department and took the tag off the glasses and put the tag in his pocket. He did this because the tag was on or adjacent to the front of the glasses and he could not see through them without removing the tag. He proceeded to pull the case with the use of these reading glasses.

About 10 or 15 minutes later, █████ was approached by the Store Manager, Michael Draper, and taken upstairs to a Managers’ meeting. █████ was not offered union representation at this meeting nor did he request it. At this meeting, Russell Raymond, the

Company's Asset Protection Manager, asked [REDACTED] if he paid for the reading glasses that he was using. He responded that he had not paid for the glasses and said that he had the tag in his pocket. [REDACTED] told Raymond that he had intended to pay for the glasses. Raymond asked him if he understood the Company's Associate Purchase Policy. [REDACTED] said that he thought that the policy applied when someone stole something by walking out of the store without paying for it.

At arbitration, Raymond testified that [REDACTED] did not try to hide that he had removed the tag from the glasses. Raymond also testified that [REDACTED] said in the meeting that he had worked for the Company for 20 years and that he intended to pay for the glasses.

The Company decided in this meeting to suspend [REDACTED] pending termination. The Managers told him that he was being suspended because of the Associate Purchase Policy. He was ordered out of the store that day. Before he left, he put the reading glasses on his Manager's desk.

Stop and Shop has strict rules regarding when and how employees may purchase merchandise. Stop and Shop maintains an Associate Purchase Policy which states in relevant part:

- ...3. Associates must purchase and have a receipt for any store merchandise that is to be consumed or used in the store.
- ...10. Associates are not permitted to hold, or have held, any merchandise for later purchase.
- ...11. Merchandise must remain on the selling counter until it is purchased.
(Employer Exhibit #2)

At arbitration, [REDACTED] testified that he did not recall whether he attended an orientation session when he returned to work in July 2009. He did not recall sitting at a kiosk and reviewing Company policies online and signing for them. The Company produced

evidence at arbitration that [REDACTED] electronically signed for the Associate Purchase Policy on July 1, 2009 (Employer Exhibit #5). Store Manager Michael Draper testified that all new and re-hired employees undergo a policy-review orientation with their Hiring Manager.

[REDACTED] testified that he had not seen the Associates Purchase Policy before he was suspended. He was not aware that the policy was posted in the store. He was surprised when he was told that he was being suspended because he did not steal anything. He testified that he knew that he couldn't consume food from the store without purchasing it first. But he explained that he was using the glasses for work. He said that this was different from having a sandwich and paying for it later.

Human Resources Manager Michael Keany testified that there is an exception to the Associates Purchase Policy if the item is for store use, such as a broom that an employee takes from the store. But this use has to be approved by a Manager. Keany also testified that he had no reason to believe that [REDACTED] was dishonest during the meeting at which he was suspended or during the grievance meetings thereafter.

Following the conclusion of the grievance procedure, [REDACTED] was terminated for "violation of Stop and Shop's Purchase Policy." (Employer Exhibit #1) Keany testified that [REDACTED] was not terminated for theft. Keany testified that Stop and Shop made the decision to terminate [REDACTED] because he violated the clear company policy: he took and made use of an item without paying and obtaining a receipt; he failed to keep unpaid merchandise on the sales counter; and he held the merchandise for later purchase. Keany further testified that in the past two years, Stop and Shop has consistently and regularly discharged employees for violations of the Associate Purchase Policy.

Prior to being suspended, █████ did not have any prior discipline for violating this Policy which does not mandate termination for a first offense. The Policy states that failure to follow it “may result in disciplinary action, up to and including termination of employment.” (Employer Exhibit #2)

The Company has not terminated all employees alleged to have violated the Policy. (Employer Exhibit #3) At arbitration, Keany testified that there was no rule requiring termination for violation of the Policy and that “each suspension pending termination for Associate Purchase Policy is individually reviewed. It’s not automatic.” (Tr. 68) Employer Exhibit #3 contains the result of the grievances filed by the Union since 2012 concerning alleged violations of the Associate Purchase Policy. Because the document only contains information regarding cases that were grieved, it does not provide any information regarding discipline that was not grieved. If discipline short of termination was issued but not grieved, it would not be reflected in this document. Employer Exhibit #3 does establish that some employees were not terminated when they were alleged to have violated the Policy.

In 2012, an employee, V.D., was returned to work with a final warning after “violating the mark down policy and holding items out back for herself.” (Employer Exhibit #3) Also in 2012, employees C.R., K. F and M.S. were each returned to work with a final warning on separate occasions after violating the Policy. *Id.* In 2013, an employee, C.M. was returned to work with a final warning and transfer after engaging in theft. *Id.* Also in 2013, an employee, A.S. was returned to work after arranging to receive a refund of \$25.83 that was not owed to her. *Id.* In 2013, an employee, F. B. was given a final warning after he placed product in his locker to purchase later in the day. *Id.* In 2014, an

employee, T.S., was returned to work with a demotion after marking down the price of an item in exchange for a gift from a customer. *Id.*

STIPULATED ISSUE

Did Stop and Shop have just cause to terminate the Grievant, [REDACTED]? If not, what shall be the remedy?

POSITIONS OF THE PARTIES

The Employer.

The Company argues that the Arbitrator should deny the pending grievance because Stop and Shop has demonstrated just cause for terminating Grievant [REDACTED] for his clear violation of the Company's Associate Purchase Policy. It is undisputed that [REDACTED] willingly and knowingly took eyeglasses from the Company store's display case, tore the tag from the glasses, and made use of them—all without paying for them. The Employer maintains that on these facts, there was just cause for [REDACTED]'s termination and the grievance should be denied.

The Company maintains that it has satisfied all of the elements for proper or just cause. The tests for just cause generally include: 1) Did the employee know of the work rule?; 2) Was the work rule reasonably related to the efficient operation of the business?; 3) Did the Employer conduct a fair and objective investigation prior to concluding that the employee committed the infraction and issuing discipline?; 4) Had the Employer applied its rules to employees without discrimination?; and 5) Was the degree of discipline issued related to the seriousness of the infraction and the employee's service? See N. Brand & M. Biren, Eds., Discipline and Discharge in Arbitration (ABA/BNA 2nd ed. 2008) at 33-34.

The Employer states that the rules in the Associate Purchase Policy are written in plain language and clearly set forth the steps that must be followed if an employee is going to purchase product. The Company maintains that █████ willfully violated three of the principal points of the policy when he decided to take and use the eyeglasses from the store's display case on August 8, 2017 without paying for them. He took and made use of an item without paying and obtaining a receipt for it; he failed to keep unpaid merchandise on the sales counter; and he held the merchandise for later purchase.

█████ did not say that he was ignorant of the rule either during the investigation or at arbitration. He simply claimed that he did not steal the glasses and he intended to pay for them later. A violation of the Associate Purchase Policy is not premised on an intent to commit theft. Rather, the Policy is violated when its terms are not followed so that stealing from the Company or other loss of merchandise never becomes an issue.

At arbitration, Keany explained that the Company ordinarily and consistently terminates employees for violation of the Associate Purchase Policy because of the importance of upholding the integrity of employee purchases. Keany further explained that █████ had attended an orientation session regarding this Policy and he admitted during the grievance procedure that he was familiar with the rule even if he did not recall the particular orientation session. Keany testified that the Company tried to follow its own practices and that █████ was discharged because of his infractions.

For all of these reasons, the Company concludes that the grievance should be denied since there was just cause for the termination of the Grievant.

The Union.

The Union argues that the Company did not have just cause to terminate ██████ for violation of the Associate Purchase Policy. The Policy does not mandate termination for a first offense. The boilerplate language that failure to follow the Policy may result in disciplinary action, up to and including termination, does not provide notice to an employee that any violation of the Policy will necessarily result in termination. Whether ██████ had seen the Policy or not, he was not on notice that if he violated it in any way, he would be terminated. It is undisputed that several employees who violated the Policy were not terminated. Within the last five or six years, employees have been returned to work with a final warning after holding items in the back of the store without purchasing them, placing product in a locker for later purchase, and other violations including theft. (Employer Exhibit #3)

The Union maintains that even if the Policy mandated termination for a first offense, this rule would conflict with the just cause provision of the collective bargaining agreement (Joint Exhibit #1) which supersedes any unilaterally implemented Company policies. Any violation of the Associate Purchase Policy would require the application of progressive discipline. See Brand, Discipline and Discharge in Arbitration, at 2-41. There is no evidence in the present case that ██████ was disciplined for any prior alleged infraction of the Associate Purchase Policy. Therefore, the Company did not use progressive discipline when it terminated ██████.

The Union argues that ██████'s actions were not egregious, and therefore worthy of summary termination, where the evidence established that he took the glasses in order to provide a benefit to the Company. There is a distinction between an employee eating a sandwich and consuming a beverage that was Company property without paying for it

and using a pair of eyeglasses to perform a required task without paying for them. The Union maintains that since [REDACTED]'s actions were not egregious and there is no evidence of prior discipline, the Company did not have just cause to summarily terminate him.

The Union argues that [REDACTED] also was treated differently from other employees who allegedly violated the Associate Purchase Policy. The Company cannot seriously argue that [REDACTED]'s actions were more serious than those of other employees who were not terminated. His actions were far less serious than those of employees who fraudulently arranged to receive an improper cash refund or otherwise engaged in theft. Yet the Company did not terminate some employees whose violations of the Associate Purchase Policy also included theft. See Employer Exhibit #3.

[REDACTED] was employed by the Company for 20 years (with the break in service for about a year). The Union maintains that his long tenure should serve as a mitigating factor. His honesty and forthcoming responses during the disciplinary investigation and the grievance procedure should also be mitigating factors.

[REDACTED] only took the glasses and used them without paying for them so that he could perform a task assigned by his Manager. The circumstances established that he was a conscientious and hardworking employee who was trying to do his job. He made a simple mistake by not paying for the glasses before he started using them. The Union argues that the Company should not have terminated him for committing a single, minor, mistake.

For all of these reasons, the Union concludes that the Arbitrator should find that the Company lacked just cause to terminate the Grievant. The Arbitrator is asked to order his

reinstatement with back pay. The Arbitrator is also asked to retain jurisdiction for 90 days to address any issues regarding the remedy.

DISCUSSION AND DECISION

Stop and Shop has to have a rule such as the Associate Purchase Policy because otherwise the Company could stand to lose product and would not be able to trust any employees who took it.

The Associate Purchase Policy states in relevant part:

- ...3. Associates must purchase and have a receipt for any store merchandise that is to be consumed or used in the store.
- ...10. Associates are not permitted to hold, or have held, any merchandise for later purchase.
- ...11. Merchandise must remain on the selling counter until it is purchased.
(Employer Exhibit #2)

At arbitration, Human Resources Manager Michael Keany testified that there is an exception to the rule if an employee takes an item from the Company floor for store use such as a broom to sweep the floor. This use has to be approved by a Manager.

██████'s taking of the reading glasses from the Store's display case so that he could perform the task of pulling the meat case is more like the broom example than it is like an employee's eating a sandwich and having a beverage for his/her own benefit without paying for them. ██████ could not tell his Manager on August 8, 2017 in the early morning that he took the eyeglasses because his Manager was upstairs in the meeting about the audit that day. ██████ was especially concerned about the audit and wanted to make sure that he pulled the case so that the meat would pass inspection.

He was not charged with stealing the eyeglasses. He was charged with violating the Associate Purchase Policy. He knew that he was being videotaped when he took the

glasses and he removed the tag from them in open view. It is understandable that he removed the tag. The reading glasses for sale, say at CVS, have the tag placed right between the frame and one arm of the glasses. It is very hard to see through one lens of the glasses as a result with the tag on. ██████ took the tag off in order to be able to use the glasses for work to pull the case before the audit began. He intended to pay for the glasses when he finished pulling the case.

He knew that there was a store policy against stealing items and removing them from the store. He knew that he couldn't eat a sandwich and have a beverage that was Company property without paying for them first. He did not recall seeing the actual Associate Purchase Policy before he was suspended in the meeting on August 8, 2017. He did not recall the orientation session that he attended when he returned to work in July 2009 or signing for a series of store policies at a computer kiosk at that time. At arbitration, the Company provided evidence that he did attend an orientation session and that he did sign for Company policies upon his return to work.

██████ took the eyeglasses on August 8, 2017 for his use for the Company's benefit so that he could perform an assigned task. If we compare what he did with what other employees did before him, the penalty of termination for him seems quite severe. In 2012, an employee, V.D., was returned to work with a final warning after "violating the mark down policy and holding items out back for herself." (Employer Exhibit #3) Also in 2012, employees C.R., K.F. and M.S. were each returned to work with a final warning on separate occasions after violating the Policy. *Id.* In 2013, an employee, C.M., was returned to work with a final warning and transfer after engaging in theft. *Id.* Also in 2013, an employee, A.S., was returned to work after arranging to receive a refund of

\$25.83 that was not owed to her. *Id.* In 2013, an employee, F.B., was given a final warning after he placed product in his locker to purchase later in the day. *Id.* In 2014, an employee, T.S., was returned to work after marking down the price of an item in exchange for a gift from a customer. *Id.*

At least four of these employees were returned to work with final warnings after engaging in theft. The “final warning” might suggest that they had received prior warnings for engaging in other violations of the Associate Purchase Policy. That is not clear from Employer Exhibit #3.

At arbitration, Human Resources Manager Michael Keany testified that in the last two years, employees who have filed grievances related to discipline issued for violation of the Associate Purchase Policy have either resigned or been terminated. He also testified that each case is taken on a case by case basis. This would be consistent with the language of the Associate Purchase Policy and the proper cause provision of the collective bargaining agreement (Jt. Ex. #1, Article 2).

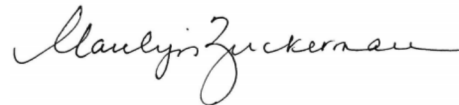
Proper or just cause requires progressive discipline except in the most egregious cases of which ██████’s is not one. The Arbitrator has determined that on the unique facts of the present case, the Employer had proper or just cause to discipline ██████, but the penalty of termination for a first offense of the Associate Purchase Policy was much too severe.

██████ was a 20 year employee of the Company. He had no prior discipline for violation of the Policy. He was a conscientious and serious worker. He was honest with the Employer and at arbitration. Yes, he took the eyeglasses from the Company display case and used them without paying for them first. But he used them to perform the assigned task of pulling the case before the audit began. He intended to pay for the glasses after

pulling the case but was never given the chance to do so. He was summarily suspended pending termination and ordered to leave the store. He left the glasses on his Manager's desk before leaving.

As compared with other employees who had engaged in theft (of which [REDACTED] was not accused) and were returned to work with a final warning, the treatment of [REDACTED] in terminating him was quite severe.

The Arbitrator concludes that the Employer had just cause to discipline [REDACTED] for a first violation of the Associate Purchase Policy, but that the penalty of termination was much too severe. The termination is reduced to a written warning. [REDACTED] is reinstated to his former position as a Meat Cutter in Store #18 in Dorchester, MA. He is to receive back pay and benefits to August 8, 2017. The Arbitrator will retain jurisdiction for 90 days should there be any issue with the remedy.



April 2, 2018

Marilyn Zuckerman