AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

UFCW LOCAL 1445

AAA Case No. 01-18-0004-0232

And [redacted] Termination

STOP & SHOP SUPERMARKET CO.

Before: Marilyn H. Zuckerman Esq., Arbitrator

Appearances:

For the Employer: Keith H. McCown, Esq.
MORGAN, BROWN & JOY

For the Union: Patrick N. Bryant, Esq.
PYLE, ROME, EHRENBERG

Date of Hearing: February 25, 2019

Briefs Received: April 11, 2019

BACKGROUND

Stop and Shop operates a large chain of over 400 supermarkets throughout the Northeastern United States. The Company employs approximately 57,000 employees. Local Union 1445, United Food and Commercial Workers, represents a geographically delineated bargaining unit of store employees, including employee classifications under a separate collective bargaining agreement specific to the meat and poultry departments (Jt. Ex. #1). There are 8000 employees in this bargaining unit.

This case involves the termination of [redacted], a meat cutter in the Westborough, MA store. At arbitration, the parties entered into the following stipulations:

1) The termination was processed by the Company on September 1, 2018 but in the Company's records, it was effective on July 16, 2018;
2) Only accrued vacation pay is paid out on a normal basis when an employee is fired;
3) Union Exhibit #3 was prepared as a result of the second step grievance meeting. [redacted] prepared it and sent it to [redacted] on September 25, 2018.

The Grievant testified that he began work for Stop and Shop in July 2012 as a part-time meat cutter at the Shrewsbury, MA store. He became a full-time meat cutter in 2014. He moved to one of Stop and Shop's Westborough stores (Store 19) in 2016 where he worked until his termination. His Store Manager, [redacted], viewed him as an excellent worker: productive, dedicated and discipline free (Union Exhibit #2). He was always on time and did what was asked of him.

He is an honorably discharged Coast Guard veteran and a single parent raising two teenage daughters on his own. He testified that he is 63 years old and an alcoholic. But at the time of hearing, he had been sober for four years. He explained that his driver's license was suspended in 2015 when he was charged with operating a motor vehicle under the influence of alcohol ("OUI"). On the night of the incident, his daughters were staying with his sister and he was drinking at home alone. He decided to go to a club called "JJs." After leaving there, he drove toward home and was pulled over on Route 20 in Shrewsbury. He was charged with OUI, obstructing an emergency vehicle, a marked lanes violation and negligent operation of a motor vehicle. His driver's license was suspended and remained so at all relevant times in this case.

When he was transferred to the Shrewsbury store in 2016, he relied on others to bring him to work, including his sister, a meat department manager, and even [redacted] on one occasion. He explained the situation to his daughters, but he told them that if they ever found themselves in an emergency, they should not hesitate to call him. He would find a way to pick them up.

Stop and Shop accommodated his lack of a driver's license by adjusting his hours when needed and by deferring his planned transfer to a Milton, MA store. He persuaded the Company to hold off on that until after his license was restored. It was scheduled to be restored in July 2017.

His commitment to his daughters was tested one night in June 2017 about two weeks before his license was to be restored. His older daughter, Isabella, called him one evening. She was at a party at a friend's house and said that there was peer pressure around drugs and boys. She said that she felt unsafe and asked her father to come and get her. The Grievant initially hesitated, but he felt that he could not leave his daughter in peril. He drove his car with the suspended license and on returning to his home, pulled into the driveway. Police stopped him there and discovered his suspended license. He doesn't know why the police stopped him. He had not been speeding or drinking. He was arrested, booked, and then released. Soon thereafter, he told Store Manager [redacted] what had happened. His arrest resulted in court appearances for various preliminary hearings and court conferences. He maintains that after each court appearance, he updated [redacted] about the status.

Before the Grievant's criminal trial on driving with a suspended license, [redacted] wrote a letter to the court on his behalf. [redacted] had requested that she write such a letter.

It said:

> [redacted] (Employee #AA00581089) is currently an employee at Stop and Shop in Westborough, MA, 290 Turnpike Road. James is an exemplary employee who always goes above and beyond. He has perfect punctuality and attendance. [redacted] is a leader and mentor when it comes to customer service in our store. If you have any questions or concerns, please feel free to reach out to me with my contact information below. Thank you. (U.Ex. #2)

At arbitration, [redacted] testified that she knew nothing directly about the Grievant's criminal case. She claimed to only have heard rumors about it through the grapevine. She admitted to authoring the above letter, but she still claimed to be unfamiliar with the Grievant's criminal case. [redacted] testified that he told her that the letter was related to his criminal case.

[redacted] last day of work for Stop & Shop was July 16, 2018. His trial was set for the next day, a scheduled day off. He notified [redacted] about the trial date. His children attended the hearing and the older daughter testified on his behalf. [redacted] believed that he would not be found guilty. At several pre-trial conferences, the judge told the prosecutor that there was no way that he could win the case and that he should settle. Unfortunately, the case did not settle. The Grievant relied on his attorney's advice in proceeding to trial. [redacted] believed that he qualified for a legal defense that excuses driving with a suspended license under exigent circumstances.

It was a jury trial and the Grievant was convicted and sentenced to 60 days in jail. He was taken immediately into custody which he did not anticipate. Social Services immediately assumed custody of his daughters, but the court appointed an attorney for them the next day and they ended up staying with his sister. His conviction is on appeal.

In jail, the Grievant was not permitted to use his cell phone. He was permitted to make phone calls only to specific numbers and specific names that he provided. He could not remember Stop & Shop's phone number, but he had his sister go to the store the next day and explain the circumstance.

His sister, [redacted] spoke with [redacted], an Acting Manager, because [redacted] was on vacation. According to [redacted] she told [redacted] that her brother was in jail. The Company maintains that the sister only said that the Grievant would be out for the remainder of the week. The Acting Manager placed the Grievant on paid leave and removed him from the schedule. The following week, [redacted] returned to Store 19 to speak with [redacted] about [redacted] status. As [redacted] testified, [redacted] informed her that he would be imprisoned for 60 days.

M.G.L. c. 149, Section 148 requires Stop & Shop and other companies to pay an employee "in full on the day of his discharge." Stop & Shop's policy and practice is consistent with the law. The Company pays all accrued vacation time in a final lump sum payment on the day of discharge, excluding accrued sick and personal time. The practice is not to pay employees out their accrued leave (vacation or otherwise) on a weekly basis until exhausted. [redacted] has experience with paying out terminated employees, but this was the first time that she had the situation of an employee unable to work because of incarceration.

After speaking with [redacted], [redacted] continued the Grievant on paid leave and provided Family Medical Leave Act (FMLA) paperwork to [redacted]. [redacted] spoke with a Company Human Resources Business Partner (HRBP), [redacted] about the situation and the Grievant's placement on paid leave. [redacted] told [redacted] that

[redacted] did not qualify for FMLA leave and that the next step for the Grievant would be a suspension pending termination. [redacted] also inquired of HR whether she should continue to pay the Grievant his PTO (Paid Time Off). She received no response. She therefore continued to pay the Grievant accrued vacation, sick and personal time on a weekly basis.

Following these conversations, no one from the Management team suspended or terminated [redacted]. [redacted] called [redacted] to report that her brother was ineligible for FMLA leave. [redacted] did not tell [redacted] that her brother was or would be terminated as a result of the incarceration. [redacted] never told the sister that the Grievant would face discipline.

[redacted] was never scheduled to work after July 18, 2018. The Company introduced no evidence of schedules or shifts for which he was assigned and failed to appear. For the week ending July 21, the Company paid him 32 hours of his accrued sick leave (C.Ex. #4). For the week ending July 31, the Company paid him 40 hours of accrued sick leave. For the next two weeks, the Company paid him 40 hours of his accrued vacation leave each week. For the week ending August 25, Stop and Shop paid eight hours of personal leave.

At arbitration, [redacted] testified that when Stop & Shop seeks to discipline an employee up to and including discharge, the Company places the employee on unpaid suspension pending discharge. The employee or the Union can request a Step One grievance meeting. When an employee fails to report to work, the Company frequently places him/her on unpaid suspension, and the employee is required to pursue the grievance process before being reinstated. Union representative [redacted] testified that

employees who are repeatedly tardy or miss scheduled shifts are not automatically suspended or fired.

In late August, [redacted] noticed that the Grievant's leave had been exhausted. She contacted an area operations supervisor and was told to terminate the Grievant. On or about September 1, less than two weeks prior to the Grievant's release, Stop & Shop processed a termination. This was retroactive to July 16, 2018 even though the Grievant had been compensated for the time in between and even though he was not convicted and incarcerated until July 17 (CX#2). The Company never notified the Grievant that he was going to be terminated or that he was terminated. No one from the Company called the Grievant's sister despite having her contact information to notify her of a pending suspension or discharge.

Stop & Shop's termination of [redacted] on September 1 occurred without a suspension pending discharge and without providing notice to him, his sister, or the Union.

The Grievant was released from jail on September 14. He contacted [redacted] who stated that he had been removed from the schedule and that the situation was out of her hands. He then contacted Union Rep [redacted] to arrange a Step One grievance meeting. This meeting occurred on September 24, 2018 and was attended by [redacted] [redacted] and [redacted]. The Union raised the Grievant's positive work record and lack of disciplinary history. [redacted] said that the decision to terminate had been made by her superiors and that she lacked authority to grant the grievance.

After the meeting, Stop & Shop issued an undated termination letter which states: "Your employment was terminated effective your last day worked, July 16, 2018. Reason for termination was 'failure to meet schedule/job requirements.'" (U. Ex. #3)

A Step Two grievance meeting was held the next day, September 25, attended by the same three individuals as well as [redacted] an area HRBP assigned to Store 19. The Company again denied the grievance and did so without documenting its reasons in writing. The Grievant was never offered the option to request a leave of absence. The Company rejected the Union's request that he be reinstated as a new hire.

A Step Three grievance meeting was held on October 24, 2018. The Grievant and Union Rep [redacted] attended with the Local's Organizing Director [redacted] [redacted] was joined by [redacted], but [redacted] did not attend. U. Ex. #2. [redacted] contemporaneous notes state that [redacted] said, "If you had called the store, [redacted] and let us know, we may have been able to grant you a leave." At arbitration, both [redacted] and the Grievant testified that [redacted] said this. She denied it. According to the Union's notes of the Step Three meeting, [redacted] later stated, "He failed to meet the requirements of the schedule, he did not show up or call."

[redacted] did not recall anyone from the Company mentioning a policy barring employees from Leaves of Absence for incarceration. [redacted] testified that there is such a policy, but stated, as did [redacted], that the policy is not written anywhere. Such a policy was not communicated to the employees in the bargaining unit including the Grievant.

At the Third Step, the Company again denied the grievance without stating its reasons in writing.

A Company employee who is terminated is eligible for rehire six months after separation. A criminal record is not an automatic bar to employment and the circumstances of [redacted] conviction would not have barred him from rehire.

At arbitration, [redacted] testified that there is generally a significant impact on scheduling when a full-time Meat Cutter misses work. Coverage is tight and it is a challenge to backfill especially during the summer vacation season.

RELEVANT CONTRACTUAL PROVISIONS

Article 17:

> SECTION 1--Fulltime employees with one or more years of continuous service may be granted a leave of absence of up to six (6) months, provided such requests are reasonable. ...
>
> SECTION 3 –Requests for a leave of absence shall be in writing and submitted to the Vice President of Human Resources Division, 1385 Hancock Street, Quincy, MA 02169. The authority to approve or disapprove a leave of absence shall be vested with the Vice President of Human Resources, The Stop & Shop Supermarket Company, LLC.
>
> SECTION 4—An employee shall be notified in writing, within a reasonable period of time, if the requested leave of absence has been approved or denied. This letter shall specify the time limit placed on the leave of absence. A copy of such letter shall be sent to the appropriate Local Union. If the employee fails to return to work or to communicate with the Personnel Division before his leave expires, his employment shall be terminated. …
>
> SECTION 11—Requests to extend a leave of absence shall be in writing and shall be subject to the Company's approval. A copy of any correspondence on such requests shall be sent to the appropriate Local Union….
>
> Article 25 (1)(H)(2) provides that an employee "shall be terminated in the event … the employee is discharged for just cause."

STIPULATED ISSUE

Was there just cause for the discharge of [redacted] effective July 16, 2018? If not, what shall be the remedy?

POSITIONS OF THE PARTIES

Management. The Company argues that it did not violate the CBA by failing to provide [redacted] with a leave of absence and then terminating him. Management maintains that the case turns on the leave of absence provisions and not the just cause clause of the CBA. Arbitrator [redacted] decided a similar case between the Company and a sister Local of the Union. She decided that the Company did not violate the Leave of Absence provisions in denying leave to an incarcerated employee because the contractual language was discretionary with the Employer. The Arbitrator found that the Company's exercise of discretion to deny the leave of absence request to cover the period of incarceration did not violate that CBA.

The Employer argues that the present case precisely matches. The Company maintains that Article 17 of the CBA is identical in all material respects to the contract language in the [redacted] case decided by Arbitrator Brynie. In both cases, the Company exercised its discretion in not allowing a leave of absence for a period of incarceration. Under the contract, the Employer "may" grant such a leave, but is not required to. The Employer claims that the consistent, long-standing Company practice is not to grant leaves of absence for employees who are incarcerated.

The discretionary language on requests for leave of absence has been present in other cases which have been decided by other Arbitrators. In Dunlop Tire Corp, 106 BNA LA 84 (Teple 1995), the Arbitrator upheld both the denial of a leave of absence and the

employee's termination. The opinion was that the word "may" in the contractual provision allowed the Company this kind of discretion. Other Arbitrators have upheld the terminations of employees who have been absent from work due to incarceration on the basis that the employees were unavailable and therefore could not meet their job responsibilities. See Sasol North America, Inc., 119 BNA LA 591 (Bowers 2004); Mosinee Paper Corp., 104 BNA LA 281 (Lundberg 1995); and Electrolux Home Products, 124 BNA LA (Bognanno 2007).

The Employer in the present case also argues that Stop & Shop met any just cause standard. As to the elements of just cause, the Company maintains that there is no need for a specific rule that employees are required to show up for work to meet their job responsibilities. This is a given. It is an implied fair and reasonable rule. The Employer maintains that there is no need for a specific rule that an employee's job will not be protected if he/she is absent from work due to incarceration. See Dunlop Tire, *supra* and Sasol North America, *supra*. At the present arbitration, [redacted] and [redacted] testified that Stop & Shop maintains a consistent practice that does not treat incarceration as a basis for an excused leave of absence. There was no evidence presented that the Grievant was treated differently than other incarcerated employees of the Employer.

Stop & Shop argues that the termination in the present case was justified despite any mitigating factors. The Company is aware of the Grievant's positive work history, his single parent status, his sympathetic story about driving on a suspended license only because he felt compelled to remove his daughter from an unsafe party situation and his trouble over the years in battling alcoholism. But the Company's decision to terminate

him due to his inability to report to work for approximately two months was based on sound Company practice which is applied regardless of mitigating factors.

Next the Employer maintains that the Union's arguments in the present case are without merit. First, [redacted] independent decision to pay the Grievant his accrued PTO does not provide a ground to reverse the discharge. [redacted] testified that she did not know how to treat his absence because she had never been faced with one of her employees being incarcerated. She asked HRO and when no one got back to her, she continued to provide the Grievant with PTO on a weekly basis. The Union maintains that this created an expectation in the Grievant that his absence would be covered in this way. But the Company argues that the PTO did not excuse the obligation of the Grievant to request a leave of absence and have it considered by the Company. And when [redacted] spoke with [redacted] she explained that under the circumstance of the incarceration, [redacted] would be suspended pending termination. Therefore, even if we were to give credence to the Union's argument that [redacted] may have tried to "bridge" the Grievant's incarceration time with PTO until he could get back to work, this does not detract from the legitimacy of the Company's decision once [redacted] became involved. [redacted] had no role in making the discharge decision. Even if [redacted] took steps to try to make it easier for the Grievant to complete his jail time and return to work, HR personnel with a broader organizational perspective immediately saw this as a discharge.

The Company's reasons for terminating the Grievant have remained consistent. The Union maintains that during the grievance meetings, Stop & Shop informed [redacted] that if he had notified the Company of his incarceration, he would not have been

terminated. [redacted] testified that during the Step Three grievance meeting, [redacted]. [redacted] stated that if the Grievant had called the Company during his incarceration, he would have been granted a leave. The Union presented handwritten notes from [redacted]. [redacted] taken during this meeting which state: [redacted])—"If you had called the store [redacted] and let us know, we may have been able to give you a leave, but you never called." (Union Ex. #4, p.1) [redacted] notes also indicate that [redacted] stated that the Grievant "failed to meet the requirements of the schedule, he did not show up or call." (*Id.*, p.2) However, [redacted] testified at arbitration that she did not make any statements inferring that the Grievant could have saved his job if only he had called the Company. She maintains that [redacted] case was treated consistently with those of all the other employees who have been terminated by the Company because they were incarcerated.

This view was reiterated to the Grievant at each step of the grievance procedure. Since a jailed employee cannot go to work, he is unavailable without an excused absence which is grounds for discharge. Management maintains that there is no basis to credit the Union's attempt to manufacture supposedly shifting reasons for the discharge.

Based on all of these arguments and the record as a whole, the Company concludes that the present grievance should be denied. There was also just cause for the termination of the Grievant.

The Union.

The Union argues that Stop & Shop violated the CBA by terminating the Grievant for being incarcerated. His jail term for sixty days was as a result of exceptional circumstances. He was a reliable worker for the Employer without disciplinary history.

The Company identified no operational harm due to his absence. And the termination was inconsistent with direct arbitral authority.

In the S*aylor* Award which was an arbitration between Stop & Shop and a sister Local to the one in the present case, the Arbitrator determined that the Company lacked just cause to terminate a meat cutter whose failure to appear for six consecutive shifts was as a result of incarceration. The Grievant in that case, [redacted] had sufficient accrued leave to cover the absence. The Arbitrator found that her Award was supported by "other noted factors including length of service, dependability, length of unavailability, and prior disciplinary record." The Grievant there had worked six years for the Company, had satisfactory attendance, a good performance record and "was noted as a hard worker who went out of his way to service customers." *Id.* The supervisor in that case testified that he had never seen any rule or regulation requiring termination for a jailed employee.

Application of the S*aylor* Award to the present case demonstrates that termination was without just cause. Both the present case and the [redacted] case raised the issue of just cause. In both cases, Stop and Shop made a quick decision regarding termination before speaking with the Grievant. [redacted], like [redacted] had an excellent work record over six years with a reputation for being a hard worker. He and [redacted] notified the Company immediately, through relatives, about the existence and extent of incarceration. The length of the present Grievant's incarceration was considerably longer than was [redacted] but it was shorter than the ninety days in the [redacted] Award distinguished by Saylor and about the same amount of time as in the [redacted] Decision also discussed by Saylor. The Union maintains that there was no evidence of operational or reputational

harm in the *Saylor* case or the present case. While [redacted] did not have enough accrued leave to cover his entire incarceration, he had all but two weeks of it and Saylor stated in her decision that an employee should be able to take unpaid time.

Other Arbitrators have found that an Employer cannot justify an automatic termination because an employee was incarcerated. See Simpsons Strong-Tie Co., 1998 WL 35550073 (Grabuskie 1998). There, the termination was found to be arbitrary and capricious. The Union in the present case maintains that the [redacted] termination was also arbitrary and capricious because the Grievant had six years of service; a clean disciplinary record; excellent attendance; he was reported off; he had no previous criminal record other than traffic violations; his time away from work was less than the ten weeks provided to the grievant to attend substance abuse training in the *Brynie* case; the Employer identified no difficulty or expense in filling his shifts; his conviction and incarceration resulted in no harm to the Company or his co-workers; he had a plausible legal defense for his actions which led to his incarceration; and his conviction is on appeal.

The Union argues further that the *Brynie* Award between Stop & Shop and the Local Union involved in the *Saylor* case does not compel a different result here because the issue in that case was not just cause, but what shall be the disposition of the grievance. The case was decided on the leave language under the CBA between the Company and the sister Local. The Grievant in that case was terminated for being on an unexcused absence for a long period of time. Arbitrator Brynie rejected the Company purported *per se* rule barring leaves of absence for incarcerated individuals. She decided the case under the leave of absence provisions in that CBA which are different from those in the present

CBA. Arbitrator Brynie ruled that the Company did not abuse its discretion in failing to grant a leave of absence to the grievant in that case given his third DUI conviction and his absence from work for more than four months.

In the present case, the Union maintains that the Grievant's termination violated the just cause provisions of the applicable CBA (Joint Exhibit #1). The Company never notified the Grievant or his sister or a representative that he would be terminated or suspended pending termination. He was not notified of discipline when the Company actually learned of the incarceration or when he exhausted accrued leave or even when the Company finally terminated him. He was not actually terminated until September 1, 2018 and the Company had granted his use of accrued sick, personal and vacation leave which covered all but two weeks of his sixty day incarceration. If he had been notified that he was suspended pending termination, he would have been placed on unpaid leave on September 1 and upon his return to work after September 14, he could have discussed the pending discipline with the Company and the Union. The Union maintains that HRBP [redacted] testified at the present arbitration that the Company's practice is to place an employee on suspension pending discharge in order to allow the Company to gather information and consider evidence and argument from the employee before making any final decision. She did not explain why the Employer unilaterally terminated [redacted] while he was incarcerated other than to say that the Company does not hold positions open for incarcerated employees. She offered no written support for this policy which has already been found unsubstantiated by Arbitrators Saylor and Brynie. Such a policy was not communicated to the Union or to the Grievant. If he learned that the Company had such a policy or that he was going to be terminated, perhaps he would have called the

Company directly from jail and pled his case. On the present facts, he is not to be blamed for not calling because he had his sister come into the Store during the first and second weeks of his incarceration to explain his situation to the Managers. The Company's lack of due process for him and its rush to judgment were without just cause.

[redacted] was highly regarded by his supervisors as demonstrated by the fact that Store Manager [redacted] wrote a supportive letter for him which he presented at Court. His six years of fine work with the Company equals the time worked by the grievant who was reinstated by Arbitrator Saylor. The Union argues that [redacted] incarceration did not hurt production or morale. It did not occur during a particularly busy time (or the Company did not prove that it did). There was no evidence presented at arbitration that the incarceration was demoralizing to co-workers or that his reinstatement would have jeopardized safety or security for co-workers. His incarceration did not result in any adverse notoriety for Stop and Shop.

For these reasons, the Union concludes that the Arbitrator should conclude that the termination lacked just cause. Alternatively, the Arbitrator is asked to find that the Employer violated the leave provisions of the CBA by not granting the Grievant unpaid time off after September 1 so that he could return to work and discuss any discipline with the Union and the Company. Under either theory, the Arbitrator is asked to make the Grievant whole, including but not limited to reinstatement and lost wages and benefits and all other necessary and proper relief. The Arbitrator is requested to retain jurisdiction for sixty days should there be any dispute about compliance.

DISCUSSION AND DECISION

The stipulated issue in the present case is just cause. Several of the cases cited by the Employer were decided under leave of absence language in the respective CBAs. See, for example, the *Brynie* decision, AAA Case No. 01-07-0001-3410 (2018). In that case, the issue actually was: "What shall be the resolution of this grievance." Arbitrator Brynie went on to decide the case under the leave of absence provision in that contract which gave discretion to the Employer. She rejected the Company's purported *per se* rule barring leaves of absence for incarcerated individuals. She ruled that the Company did not abuse its discretion in failing to grant a leave of absence to the Grievant in that case given his third DUI conviction and his absence from work for more than four months.

Other Arbitrators have reached similar results under leave of absence provisions in the applicable CBAs. In Dunlop Tire Corp, 106 BNA LA 84 (Teple 1995), the Arbitrator upheld the denial of leave because the leave provision in the CBA was discretionary with the Employer. The termination was upheld on that basis. Similarly, in Sasol North America Inc., 119 BNA LA 591 (Bowers 2004), the Arbitrator found that the Company did not err in not permitting a leave of absence for an employee who was convicted of a third drunk driving offense.

In the present case, the issue is just cause. If we consider prior cases involving incarcerated employees who were terminated where the issue was just cause, we find that they all turn on their facts. Some of the factors which have been considered include:

> the contract language, the length of confinement, the cause of the confinement, the grievant's previous work record, the effect of the absence on production and upon employee morale, and whether or not the underlying conduct occurred on company property or during working hours. Safeway Stores, Inc. and UFCW, Local 120 (Silver 1995, p. 4).

In the *Saylor* case between Stop and Shop and another Local, AAA Case No. 11 300 00079 06 (2006), the Arbitrator determined that the Company lacked just cause to terminate a meat cutter whose failure to appear for six consecutive shifts was as a result of incarceration. The Grievant, [redacted] had sufficient accrued leave to cover the absence. He had worked six years for the Company, had satisfactory attendance, a good performance record and "was noted as a hard worker who went out of his way to service customers." *Id.* The supervisor in that case testified that he had never seen a rule or regulation requiring termination for a jailed employee.

Application of the *Saylor* Award to the present case demonstrates that termination was without just cause. Both Arbitrators Brynie and Saylor rejected Stop and Shop's purported *per se* rule requiring termination of an incarcerated employee. In both the *Saylor* and the present case, the Company made a quick decision on termination before speaking with the Grievant. [redacted], like [redacted], had a good work record over six years and was a hard worker. He and [redacted] notified the Company immediately, through relatives, about the existence and extent of incarceration. The length of the present Grievant's incarceration was considerably longer than was [redacted], but it was shorter than the ninety days in the [redacted] Award distinguished by Saylor and about the same amount of time as in the [redacted] Decision also discussed by Saylor. While [redacted] did not have enough leave to cover his entire incarceration, he had all but two weeks of it. Saylor stated in her decision that an employee should be able to take unpaid time.

The present Arbitrator finds that the Employer lacked just cause to terminate [redacted]. The Company never notified the Grievant or his sister or a representative that

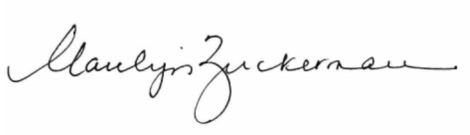
he would be terminated or suspended pending termination. He was not notified of discipline when the Company actually learned of the incarceration or when he exhausted accrued leave or even when the Company terminated him on September 1. His sister had gone to the Store during the first and second weeks of his incarceration to tell the Managers that he was in jail and for how long. The Company knew how to reach her and did so to tell her that FMLA did not apply to his situation. His accrued leave and personal time were extended to him on a week to week basis from July 17 until on or about September 1. He was not told to request a leave of absence. How would he have known to request a leave unless someone from the Company told him to do so? Why would he have requested a leave when he was effectively given a leave by Store Manager [redacted]?

She did nothing wrong under the circumstance. Never having been faced with the situation of an incarcerated employee, she began to extend leave to him and when she did not hear back from HR on her question as to whether she should continue the leave week to week, she did what she thought was appropriate and continued to extend time to him. He thought that his time was being covered until he could get back to work. If he or his sister were notified that he was suspended pending discharge, perhaps he would have called the Employer directly from jail and pled his case to save his job. If he were suspended pending discharge, he also would have been placed on unpaid leave on September 1 and he could have discussed his work status with the Employer on his return to work after September 14. On the present facts, he is not to be blamed for not calling because he had his sister come into the Store right away to explain his circumstance. He

thought that his absence was being covered by leave and he would return to work after his release from jail on September 14.

Since [redacted] was led to believe that he had an approved leave and since he was never notified otherwise or that he was suspended pending termination, the Employer lacked just cause to terminate him. The Employer's rush to judgment on September 1 as soon as his leave ran out was also unduly harsh given his good work record, lack of disciplinary history, and the fact that he had two weeks left before he could return to work. While Stop and Shop stores are always busy and shifts need to be filled, there was no specific evidence submitted of any operational harm to the good reputation of the Company due to the Grievant's absence. The conduct which led to the incarceration did not occur at work, was not related to work and did not involve any of his co-workers.

The Employer therefore lacked just cause for the termination of [redacted]. The grievance is upheld. The Grievant is to be reinstated to his position as Meat Cutter at the Westborough, MA store with back pay and benefits to September 1, 2018 less any interim earnings. The Arbitrator retains jurisdiction for sixty days should there be any issues with compliance.



May 22, 2019

Marilyn Zuckerman