

**IN THE MATTER OF ARBITRATION
BETWEEN**

**United Food and Commercial Workers,
Local 1189**

Union

**FMCS Case No.: 150522-55834-8
(Schjenken Discharge)**

and

OPINION AND AWARD

SuperValu,

**A. Ray McCoy
Arbitrator**

Employer

Appearances:

For the Employer

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For the Union

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JURISDICTION

On May 12, 2015, United Food & Commercial Workers Union Local 1189, (hereinafter "Local 1189" or "Union" filed a grievance challenging SuperValu's (hereinafter "Employer") discharge of the Grievant, Ms. Kelsie Schjenken (hereinafter "Grievant"). The Employer terminated the Grievant on May 8, 2015 for falsifying slicer cleaning logs and for directing another employee to falsify slicer cleaning logs. The Union filed a timely grievance. The Parties processed the grievance through the various steps outlined in their collective bargaining agreement. The Union requested arbitration. The Parties notified the undersigned arbitrator of his selection to hear this matter on June 26, 2015. The Parties selected August 25, 2015 for the hearing. The hearing was held on that date at the offices of the Federal Mediation and Conciliation Services, 1300 Godward St. NE, Suite 200, Minneapolis, MN. 55413.

Both sides had a full and fair opportunity to present testimony, examine witnesses and present supporting documentary evidence. A representative of Johnson Reporting provided a transcript of the hearing. At the close of the hearing the Parties elected to exchange briefs rather than provide oral closing arguments. Briefs were exchanged as agreed at the close of business on October 16, 2015. The arbitrator closed the record on that date. The Parties agree the matter is properly before the arbitrator for resolution. All of the evidence provided by the Parties including two joint exhibits, nineteen (19) Employer exhibits, ten (10) Union exhibits as well as the post-hearing briefs and transcript of the proceeding has been fully considered as expressed in the opinion below.

RELEVANT CONTRACT AND POLICY PROVISIONS

This dispute is subject to the provisions of the parties' collective bargaining agreement signed February 12, 2015 and in force and effect through April 2, 2016. (See, Cub Foods and United Food and Commercial workers Union Local #1189, Article 26, p. 36; Hereinafter "Agreement")

ARTICLE 10: DISCHARGE

- (A) No employee shall be discharged except for just cause.
- (B) The properly accredited officers or representatives of the Union and the Employer are authorized to settle any dispute arising out of a discharge. Grievances under Section 15.1 regarding discharge without just cause must be filed in writing with the Employer within fifteen (15) calendar days after the effective date of termination of the employee's employment. Failure to comply with this time requirement will result in the grievance being waived and not submitted to mediation and arbitration under Article 15.
- (C) Warning Notices and Discharge. In all instances of discipline, except where the grounds are sufficient to constitute just cause for immediate discharge, the Employer will give the employee at least one (1) warning notice in writing, with a copy to the Union.

ARTICLE 15.5: LIMITATIONS ON ARBITRATOR:

The arbitrator shall not have the authority to decide questions involving the jurisdiction of any Local, or of the International, or which may in any way affect or change the Union security clause, nor shall the arbitrator have the authority to effect a change in, modify or amend any of the provisions of this Agreement.

ARTICLE 22: MANAGEMENT RIGHTS

The Company's right to manage is retained and preserved except as abridged or modified by the restrictive language of this Agreement.

ISSUE

Did the Employer have just cause to discharge the Grievant and if not what is the appropriate remedy?

POSITIONS OF THE PARTIES

The following is a summary of the Parties' respective positions as largely reflected in their opening statements and post-hearing briefs.

Employer's Position

The Grievant was discharged for directing a subordinate to essentially falsify logs, as well as for her own conduct dealing with falsifying slicer logs. Food safety is of the utmost importance to the Employer. This commitment to food safety is reflected in the words of the Cub Consumer and Associate Food Safety Compliance Policy:

"CUB Retail has strong consumer friendly food safety policies and our futures depend on everyone's strict compliance to insure our customer's trust. CUB Retail cannot and will not tolerate even the slightest disregard for our customer's trust. CUB Retail cannot and will not tolerate even the slightest disregard for our customer's food safety."

State law requires meat slicers be cleaned at least every four hours. The Employer requires employees to record that cleaning on a slicer cleaning log. Incomplete and inaccurate slicer cleaning logs jeopardizes food safety, particularly in the deli department. The accuracy of the cleaning logs is absolutely important, as it allows the Employer to really understand what is happening with each slicer and to know whether the Employer is on track with minimizing bacteria and minimizing risk to customers.

The food safety logs must be contemporaneously filled out. There is no credibility in remembering exactly when a slicer log was cleaned if you do not fill out the safety logs immediately after cleaning the slicers. The credibility of the food safety logs can be compromised and lead to greater food safety risks. The Employer trained deli employees on the daily completion of slicer cleaning logs. The Grievant had extensive training in food safety and was ultimately the one responsible for food safety in the deli. The Grievant holds a Food Manager Certificate that required her to conduct in-house inspections of daily operations, including checking food safety logs for

completion. The Employer made clear to the Grievant that it would not tolerate the slightest disregard of customer food safety.

The Employer had just cause to discharge the Grievant. The Grievant was aware that falsification of food safety logs was grounds for immediate termination. Prior to making the decision to discharge, the Employer conducted a thorough investigation. The Employer also reviewed the Grievant's history of discipline. The Grievant had a history of disregarding food safety policies, including those requiring daily completion of slicer cleaning logs. The Employer issued a corrective action form to the Grievant for failing to complete the slicer cleaning logs on April 13, 2014.

The Employer's decision to discharge was justified and proper because the Grievant violated an established and recognized work rule regarding food safety. The Grievant knew and understood the Employer's food safety policies and nevertheless chose to violate them.

The Grievant ordered a subordinate to falsify cleaning logs and falsified the cleaning log herself. The Employer's decision is consistent with the contract and reasonable under the circumstances. The Grievant's discharge was certainly not arbitrary and capricious. The Employer conducted a good faith investigation and decided to discharge the Grievant only after that thorough and reasonable investigation.

The Arbitrator should deny the grievance because the Employer has a legal obligation to ensure food safety compliance; employees have an obligation to follow food safety laws and Employer policies; the Grievant was warned about her failure to complete the slicer cleaning logs daily and contemporaneously; the Grievant had extensive training on food safety laws, policies and compliance; the Grievant violated the Employer's food safety policy against falsification of records; the Grievant made an after-the-fact entry to the slicer log for a time when she was not even at the store and could not have known the condition of the slicer.

The Employer is entitled to discipline and discharge employees who risk infecting customers with food borne illnesses. The Employer discharged the Grievant because of her blatant violation of food safety rules. The Employer fired the Grievant

for falsifying slicer cleaning logs and directing a subordinate to do the same. No mitigating factors exist.

Arbitrators recognize that safety records are vital to employers and that employee falsification of safety records is dishonest and makes the discharge of employees engaged in such conduct legitimate. The discharge is even more legitimate because dishonest conduct destroys the Employer's trust in that employee. Arbitrators have consistently upheld discharge decisions where safety policies have been violated in recognition of the fact that safety is a serious and legitimate concern for employers. The arbitrator should defer to the Employer's judgment that it did not act arbitrarily and capriciously with regard to this discharge decision.

The Union failed to establish that the Grievant was treated unfairly. In light of the Grievant's history of discipline, the discharge was not unreasonable or disproportionate. No adequate remedy exists for the Grievant's conduct but discharge. Leniency is the prerogative of the employer rather than the arbitrator. The Employer warned employees that it would maintain a strict and intolerant stand against the slightest disregard of customer food safety.

Union's Position

There is no credible evidence in the record to support the Employer's position that the Grievant falsified cleaning logs. The Employer's case is not credible because none of the critical fact witnesses were called to testify in support of the Employer's decision. The employee, the Grievant is accused of ordering to falsify the slicer cleaning logs was not called to testify. The employee who received the first report of falsification of slicer cleaning logs was not called. Also, the store director who asked the Grievant to check on the completeness of the slicer cleaning logs was not called. The Employer's entire case was presented through hearsay testimony of its investigator, associate relations representative and a safety manager. None of the three witnesses had any first-hand knowledge of the events that led to the accusation that the Grievant falsified slicer cleaning logs.

It is common in this deli department for employees to forget to mark the slicer cleaning log when they clean the slicers. There are undisputed documents showing that

the management explicitly directed the Grievant to make sure that the slicer logs are complete and accurate when employees forget. The store director personally directed the Grievant to go back and make it right when employees forget to fill out the slicer cleaning logs. They are supposed to go back and enter the times that they forgot to do it. If the employee cleans the slicer and forgets to fill out the cleaning log and then the Grievant asks them to go back later and fill in the time that they cleaned the slicer that is not falsifying the logs. That is making the log complete which is what the Grievant was instructed to do by her store director.

An employee used the slicer and cleaned it on April 24, 2014 but failed to complete the slicer cleaning log. The meat and vegetable tray prepared by that employee is the one about which the customer who purchased it complained. It was that complaint that led to the investigation that eventually resulted in the Grievant's discharge. The store director asked the Grievant to check the slicer cleaning logs prior to the Department of Agriculture's visit on April 28, 2014. Following his instruction the Grievant checked the logs and discovered that the employee who prepared the meat and vegetable tray had not completed the slicer cleaning log that day. The Grievant told that employee to go back and fill in the log that she forgot to complete. That was not misconduct. The Grievant did not ask the employee to falsify the slicer cleaning log and did not ask her to fill in times that she had actually not cleaned the slicer.

The Employer typically imposes the lowest level of discipline called "counseling" when an employee fails to complete the slicer cleaning logs. Therefore, the Grievant would have no motivation to require the employee to falsify the slicer cleaning logs. There is no real evidence that the Grievant asked for false information to be entered in the logs. The employee, the Grievant allegedly told to falsify logs did not even say that but instead said that the Grievant asked her to go fill them out. The allegation that the Grievant asked another associate to falsify the slicer cleaning logs is a very specific allegation that the Employer has to prove.

Because the allegation against the Grievant is that she conspired with another employee to submit fraudulent cleaning logs when the State was conducting an

investigation, the Employer has a heightened burden of proof of clear and convincing evidence.

Even though the Employer claimed that food safety is of the utmost importance, it was well established that the deli employees did not always fill out the slicer cleaning logs even with the Grievant's constantly reminding them of that responsibility. Management was well-aware of the Grievant's ongoing struggle to get employees to complete the slicer cleaning logs. The Grievant discussed the problem with her store director. One deli employee said she was not sure if the slicer cleaning logs had ever been done correctly.

The Employer did not impose formal discipline on employees who failed to complete the slicer cleaning logs. One employer witness testified that employees were simply trained, not disciplined. The Union obtained copies of all formal discipline issued for failure to follow food safety protocols at this particular Cub store and the only existing record of formal discipline for failure to fill out the slicer cleaning log was a low-level contact issued to the Grievant on April 13, 2014. The corrective action progression set out in the Employer's Corrective Action Form list "Contact" as the lowest level of formal discipline. The Grievant was issued the discipline and not the employee who actually failed to complete the slicer log. The rationale is the department manager is accountable for the completion of the logs. The Grievant was given an action plan along with the discipline issued on April 13, 2014 that required her to make sure the slicer cleaning log is complete per the food safety policy. The Grievant's store manager also told her that when she finds an incomplete log it is her responsibility to make it right.

The Grievant understood that she was responsible for making sure that employees go back and enter correct information in the logs when they forget. Employees have never been told that they are prohibited from retroactively filling out the log in the event that they forget. The Employer's investigation did not establish that the Grievant asked anyone to falsify the slicer cleaning logs. The employee the Grievant is accused of asking to falsify the cleaning logs told the Employer's investigator that she was told to fill out the slicer logs. The Grievant was also accused of falsifying the slicer cleaning log by signing the log and dating it on a night that she had not been in the

workplace. The Grievant was not given the opportunity to respond to this allegation prior to her termination. The Grievant said she signed the slicer cleaning log retroactively because she knew the slicers were cleaned for the night and the log would have been false if no notification appeared in the log of that cleaning.

After terminating the Grievant, the Union filed its grievance and met with the Employer to discuss the grievance. The Employer claims to have reopened the investigation into the Grievant's conduct following that meeting. The Union did not request that the investigation be reopened but simply pointed out discrepancies in the testimony of the employee the Grievant is accused of asking to falsify the slicer cleaning logs. The Employer conducted three additional investigatory interviews following the Grievant's termination.

The Employer lacked just cause for the discharge decision. The Employer's burden is to prove by clear and convincing evidence that the Grievant committed the alleged misconduct and then to prove discharge is the appropriate and proportionate penalty in light of all relevant factors. The Employer's case suffers from major and fatal credibility issues especially since none of the witnesses with first-hand knowledge of the events were called to testify. The Employer's case is based entirely on hearsay evidence and should not be sustained.

The discipline is unwarranted because while the retroactive completion of the log may constitute a lapse in protocol under the food safety policy warranting some low level of counseling or reminder for the employee that fails to complete the log, retroactive completion is not a form of falsification and does not warrant discharge. The degree of the penalty should be in keeping with the seriousness of the offense. Even to the extent the Grievant's conduct can be considered a failure to follow food safety protocol a far lesser form of discipline should be imposed. If the Employer truly considers retroactive completion of slicer logs to be a form of falsification then that needs to be communicated to employees before anyone is terminated.

The Employer decision to discharge the Grievant for asking another employee to retroactively fill in the logs that she did not complete and for signing her name to the logs on an evening she was not in the workplace is unfair in light of lesser discipline

imposed on an employee for worse conduct. The Employer issued only a one day suspension to an employee who signed someone else's name to the logs rather than his own. The Employer while acknowledging that signing someone else's name is a form of falsification did not move to discharge that employee even though claiming to have a zero-tolerance policy when it comes to violations of food safety policies.

OPINION AND AWARD

The Employer, SuperValu is a national food retailer and food distribution company operating 68 Cub Foods stores in the Twin Cities metro area. (Er. Post-Hearing Brief at p. 2; Hereinafter "Er. PH Br. At ___") The Union, United Food and Commercial Workers Local 1189 is the exclusive representative of all full-time and part-time employees employed in the grocery, produce and meat departments in all present and future stores of the Employer in the St. Paul metropolitan area and vicinity. (See Jt. Ex. 2, Cub Foods and United Food and Commercial Workers Union Local No. 1189, April 6, 2014 through April 2, 2016, p.4)

As held by a long line of arbitrators,¹ the Employer has the burden of proof in discharge cases especially when the collective bargaining agreement imposes a "just cause" standard on an employer's disciplinary decisions. It is also accepted practice that the quantum of proof imposed upon the Employer is the preponderance of the evidence standard. However, it is not uncommon for arbitrators to require a more onerous quantum of proof when an employer discharges an employee or imposes the proverbial "industrial death sentence" wherein the conduct of which the Grievant is accused can also be considered a criminal act.

In this case, the Employer discharged the Grievant for ordering another employee to falsify slicer cleaning logs and for falsifying the slicer cleaning logs herself. (Er. PH Br. at p. 8-9) Falsifying the food safety log is conduct that could lead to public harm. This case essentially began when a customer complained that a meat and cheese tray purchased from the Cub Foods Deli where the Grievant served as deli manager

¹ See e.g. Elkouri & Elkouri How Arbitration Works, 7th Edition, BNA Books, 2012, Chapter 15.

caused several of the customer's guests to get sick. The Employer was obligated to notify the Minnesota Department of Agriculture that members of the public had gotten ill and that the illness might be linked to products sold in its store. In short, the Employer accused the Grievant of conduct that might have resulted in the cover up of safety violations endangering public health. Falsifying documents under the facts of this case would also amount to an attempt to interfere with the State's investigation of a possible public health problem which is clearly conduct that might lead to criminal charges. In the arbitrator's opinion the Employer's reason for discharging the Grievant amounts to conduct that also represents an intentional act of reckless disregard for public health and safety and therefore conduct that can be defined as a criminal act. Accordingly, the arbitrator finds that the Employer must prove that it had just cause to discharge the Grievant by clear and convincing evidence. Under this standard reasonable doubts arising from the Employer's offer of proof should be resolved in favor of the Grievant.

The event that sparked the Employer's interest in examining compliance with its safety procedures at the Forest Lake Cub Foods deli department was a customer complaint on Monday, April 27, 2015 that a number of her guests had fallen ill after consuming a meat and cheese tray she purchased from that deli. On April 28, 2015, the store director met with the customer who came to the store for a refund. The store director signed a statement that included the following:

"I returned to work on Tuesday 4/28/15 and in the morning the customer was in to pick up her refund. I had a brief conversation with her about the alleged illnesses. I later contacted Carolyn Gullikson [the safety manager] for help and advice for reporting the illnesses. She provided me with a list of items to complete. One of the items was to check the slicer logs and get back to her if they were not complete. A short time later I asked Kelsie [the Grievant] to check the slicer logs to see if they were complete." (Er. Ex. 9)

The Employer notified the Minnesota Department of Agriculture on April 28, 2015 of the possibility that the illnesses might be traceable to the meat and cheese tray sold at the Forest Lake store. The Minnesota Department of

Agriculture conducted its investigation on that same day. (Tr. at p. 44) The safety manager testified that she first visited the Forest Lake Cub Food store on April 29, 2015 to begin her investigation. (Tr. 44) The safety manager's investigation was aimed at determining whether the Employer was in compliance with the food code as established by state law. One of the things the safety manager wanted to determine was whether the meat slicers were being cleaned at least every four hours as required by the state's food code.

- Q. So with regard to meat slicers, you testified those have to be cleaned every four hours?
- A. Every four hours at minimum.
- Q. Is that a corporate policy or is that a state law?
- A. No, that's part of the food code. That is a requirement of the food code to manage that bacteria. (Tr. At p. 25)

The safety manager testified that she found the slicer cleaning log in close proximity to the meat slicers when she began her investigation at the Forest Lake store.

- Q. Now you testified that you reviewed the slicer cleaning logs?
- A. Yes. I reviewed the slicer cleaning logs on my visit on April 29th and found they were incomplete on the days leading up to the day we prepared the food for the customer and that means that there were missing entries, that we weren't cleaning the slicers every four hours. (Tr. at p. 44)

The Employer did not discharge the Grievant who served as the deli manager for the failure of deli employees to maintain complete and accurate logs and more importantly for failing to clean the slicers every four hours. The Employer discharged the Grievant for ordering a deli employee to falsify the slicer cleaning logs and for doing so herself. As noted above, following the customer complaint the store director asked the Grievant to check the slicer cleaning logs to see if they were complete. The Grievant checked the logs and discovered there were missing entries. Amy Kelley, a deli employee, prepared the meat and cheese tray for the customer who complained. Kelley also failed to complete the slicer cleaning log that day. (Tr. at p. 151-156) The Grievant asked Kelley to fill in the gaps in the slicer cleaning logs. Kelley decided that she was uncomfortable completing the logs. Rather than go back to the Grievant who served as

the manager of the deli and let her know she was uncomfortable completing the logs, Kelley took her concerns to the assistant deli manager, Michelle LaHood. LaHood encouraged Kelley to report her concerns to the assistant store director.

When the store director received this information he interviewed the Grievant and reported the information he collected during that interview to relevant personnel in the Employer's human resources department. The Employer decided that an investigation needed to be undertaken to determine whether the Grievant violated the safety policy. The Employer sent an investigator to the store to interview, Amy Kelley and others.

Kelley sparked the Employer's investigation into the Grievant's conduct with regard to the slicer logs by telling the assistant deli manager that the Grievant had asked her to fill out the slicer log the morning of the Department of Agriculture's inspection. (Er. Ex. 10) The Investigator summarized Amy Kelley's statement as follows: "She stated Kelsie [the Grievant] had asked her to look through them and fill in any holes in the logs. Amy stated that she completed one and didn't feel it was right, it made her uncomfortable." (Er. Ex. 10)

The other statements proffered by the Employer during the hearing regarding what the Grievant asked Amy Kelley to do are not credible. First, the assistant store director submitted a written statement summarizing his recollection of the first meeting during which the store director confronted the Grievant with the accusation brought by Kelley. The assistant store director's statement reads as follows:

Matt started by informing Kelsie [the Grievant] that an employee had come forward to Assistant Deli Manager Michelle LaHood regarding **forging** of slicer logs. Matt stated that this employee had been asked to **make up** times in the slicer log...Matt proceeded to ask Kelsie if what was brought to his attention was true. Kelsie responded by saying yes. (Emphasis added. Er. Ex. 8)

But the store director did not ask the Grievant if she had asked Amy Kelley to forge the slicer logs as characterized by the assistant store director. According to the

store director he asked the Grievant if she had “asked an associate to go back and fill in the slicer logs.” (Er. Ex. 9) The Grievant answered: “Yes.” (Id.) In other words, she did ask Kelley to go back and fill in the slicer logs.

Since it is abundantly clear from Kelley’s statement that while she expressed feeling uncomfortable she did not use the terms “forge” or “make up” in describing the Grievant’s instructions, the assistant store director’s characterization cannot be credited as a factual statement and must be disregarded. Likewise, the assistant store director, Michelle LaHood, in her written statement, said: “Amy brought to my attention...that Kelsie asked her to **forge** slicer logs.” (Emphasis added. Er. Ex. 12) Again, it is abundantly clear from Kelley’s statement that she did not report being instructed to forge the slicer logs. Ms. LaHood’s statement likewise lacks credibility and must be disregarded.

The store director’s initial interview of the Grievant as described by the assistant store director and the assistant deli manager is characteristic of the Employer’s investigation. Namely the investigation into whether the Grievant engaged in misconduct was biased. First of all, to introduce “forgery” as if it were a factual allegation against the Grievant and as if it had actually taken place implies that the Employer reached a conclusion regarding the Grievant’s conduct prior to meeting with her.

The Employer’s associate relations representative responsible for coaching and advising managers on higher level disciplines such as suspensions and terminations testified that she reviewed all of the evidence collected during the investigation and decided that termination was appropriate. (Tr. 107) The associate relations representative testified that the decision to discharge was based on two reasons. “One, is Kelsie [the Grievant] directed an employee, Amy Kelley to falsify the slicer logs.” (Tr. at 108) However, nothing in the statements submitted to the associate relations representative supports the conclusion that the Grievant asked Kelley to falsify the cleaning logs. It is quite reasonable to conclude that the Grievant simply asked Kelley to

fill in the missing log entries that she did not fill in on the days and times that she used and cleaned the slicer. Only Amy Kelley was present when the Grievant instructed her to fill in the logs. The Employer chose not to call Amy Kelley as a witness. The written statement provided by Kelley does not say that the Grievant asked her to falsify or forge the logs. The associate relations representative could not bring herself to simply acknowledge that the Grievant's conduct was mischaracterized by the assistant store director and the assistant deli manager.

- Q. I guess, first of all, you agree that it's important that Matt Bohnen as the store director giving a statement accurately write down the questions and responses that he gave and received in this meeting, right?
- A. Yes.
- Q. So when Matt Bohnen writes I told Kelsie it was brought to my attention that Kelsie had asked an associate to go back and fill in the logs, you would agree that you're going to trust Matt that he wrote what he actually asked her, he's not going to misrepresent his question?
- A. Yes.
- Q. But Marty Bowers who is apparently in the same meeting, here's how he writes it, in the middle of the first paragraph he's now recording what Matt asked Kelsie in the meeting. This is his version of it. Matt started by informing Kelsie that an employee had come forward to Assistant Deli Manager Michele LaHood regarding forging of slicer logs. Okay? He writes forging. So Matt Bohnen says go back and fill in. Marty Bowers hears forging, right?
- A. Yes.
- Q. Do you see the difference? You would agree there's a difference, right?
- A. **I see the distinction you're trying to make.** (Emphasis added. Tr. 121)

Bias was also shown by the Employer's refusal to explore the Grievant's written statement that she was told by the store director and assistant store director to make sure to fix those slicer cleaning logs that were not properly completed by the deli employees.

The store director chose not to provide that initial written statement provided by the Grievant to the associate relations representative responsible for determining whether discharge was appropriate. He did, however, include the Grievant's statement in his written summary of that initial meeting. He wrote that the Grievant said: "In the past I have been told to make the logs right and that is what I did this time." (Er. Ex. 9)

Rather than investigate the meaning of the Grievant's response and throw it in the mix of evidence to be considered, the Employer decided that the Grievant's statement was irrelevant. The arbitrator finds that the statement was most relevant to understanding the Grievant's motivation for asking Kelley to go back and complete the missing log entries. Asking the Grievant to rewrite the statement because it was "vague" and "brief" did not undermine its relevance. (Er. Ex. 9) It is unclear why the store director insisted the Grievant rewrite the statement to "provide more specifics." (Id.) It is curious that the store director as well as the associate relations representative found the very brief and specific statement to lack meaning sufficient enough to warrant further exploration. If the Grievant was actually instructed to make sure the logs were completed even retroactively then that would have been most relevant to the Employer's deliberations. However, the associate relations representative testified that she knew of the Grievant's statement.

- Q. Okay. You testified about a written statement from Kelsie Schjenken?
- A. I did not review a written statement.
- Q. I just want to be clear, there wasn't a written statement from Kelsie Schjenken?
- A. In the statement, Marty's statement, as you can see, I did review the statement that Kelsie had written. The statement was very short and lacked details and an explanation for what had happened due to the statement being written poorly. Matt asked – has asked Kelsie to write another statement. In Matt's statement he actually quoted what is said, but I didn't see it. (Tr. at p. 124)

Since the Employer argued that even retroactively completing the logs is a form of falsification its investigation should have included an examination of whether its store

director and assistant store director had encouraged retroactive completion of the logs. The associate relations representative testified about the extent to which she followed up on the Grievant's statement.

Q. Did anyone follow-up with Kelsie's claim that she had been told to make the logs right?

A. I followed up and I even asked Kelsie what did that mean in the grievance meeting. (Tr. at p. 125)

Of course, the grievance meeting took place after the discharge decision had already been made and carried out. The associate relations representative went on to testify as follows:

Q. I followed up on that and that piece was -- it was called into question but it wasn't critical after looking at the whole case. (Tr. at p. 126)

In the arbitrator's opinion this was in fact a critical question that should have been sufficiently explored during the investigative process and not after the decision was made. This is abundantly clear given the Employer's position that retroactively completing the logs is falsification. Not exploring that key question leads the arbitrator to conclude that the investigation was fundamentally flawed.

Regarding retroactive completion of the slicer cleaning logs, the arbitrator finds that the Employer failed to prove that its safety policy and procedures prohibited deli employees from retroactively completing the logs. The safety manager testified that the safety policy does not in fact prohibit retroactive completion of the slicer cleaning logs.

Q. We looked at some training documents. In any of those training documents does it say that employees can't go back and fill in the slicer logs if they forget?

A. I don't know that it specifically says that, no.

Q. Because you testified that that's falsification?

A. Yes--

Q. ---to do that and employees could be terminated for that?

A. Yes.

- Q. But you're saying you're not aware that they are ever specifically told they can't go back if they forget?
- A. No, I can't say they are specifically told. (Tr. at p. 52)

The Employer's safety manager's testimony might lead one to believe that it was of the utmost importance that both the cleaning of the slicers and the immediate recording of the cleaning time was at the heart of its' safety policy.

- Q. Is the accuracy of the cleaning logs important?
- A. Absolutely.
- Q. Why?
- A. Because it allows us to really understand what is happening with that slicer and if we are on track with minimizing that bacteria to make sure that we are within compliance of the four hours required in the –not just to meet the requirements of the food code, but to minimize that bacteria, minimize the risk to our customer.
- Q. With regard to the cleaning logs, fair to say that an employee is supposed to complete that log every time they clean it?
- A. Yes.
- Q. Let's say they forget to write down in the log that they cleaned the slicer and they go a day or two days without filling out the log, is there a problem if they go back and they fill-in a time for when they cleaned the log, two days after the fact, three days after the fact?
- A. Well, yes. In a busy deli environment there's no credibility in remembering exactly when you cleaned the slicer on a specific day or two or three days ago with all the activity and I mentioned the number of slicers that we have in the department. It would bring into question the credibility of our log if we weren't -- you know, if we weren't ensuring that we were writing it down at the time." (Tr. 26-27)

However, the Employer's policy as noted above does not prohibit retroactive completion of the slicer cleaning logs nor does it even state that the log must be completed immediately after cleaning. Rather the slicer log form in effect at the time of these events states that the meat and cheese slicers "MUST be torn down completely every FOUR (4) Hours or LESS." (See e.g. U. Ex. 2) It also instructs the deli employees to record the time and the employee's signature. It also states that if a slicer is not

used to record "N/A." (Id; See also, Er. Ex. 4) During at least one training call regarding deli food safety, the Employer did inform the Grievant and other deli managers participating in that training call that the slicer log book "must be maintained daily and slicers cleaned every four hours when in use." (See Er. Ex. 5) Even that statement, however, does not prohibit an employee from waiting until the end of the shift before filling out the cleaning log for cleanings that took place earlier in the day.

The arbitrator must conclude that even if the Grievant instructed Amy Kelley to retroactively complete the slicer logs that the Employer did not prove such conduct was in fact prohibited by its policies and procedures. If anything, it appears that the Employer may have created an environment in which retroactive completion of the logs was more the rule than the exception.

The Employer disciplined the Grievant for failing to secure completion of the slicer logs by deli employees. (Er. Ex. 15) The Employer did not discipline the deli employees who actually failed to complete the slicer cleaning logs, however. The arbitrator accepts the Grievant's uncontested testimony that she was instructed by the store director to make sure the logs were completed and if they were found to be incomplete that she was responsible as deli manager to make them right. The Employer could have called the store director to shed light on this issue but chose not to call him as a witness. As stated above, given the clear and convincing burden imposed upon the Employer, reasonable doubts will be resolved in favor of the Grievant.

The Grievant, as deli manager, was faced with the threat of discipline if her deli employees failed to complete the slicer logs. Under threat of future discipline and instructions by her store director to make sure they were completed, it is not surprising that the Grievant would ask Amy Kelley to retroactively complete the logs. Because the Employer failed to demonstrate that its policy and procedures prohibit retroactive completion of the logs, the arbitrator finds that retroactive completion is not only not prohibited but it was reasonable for the Grievant when asked by her store director to

check the logs for completion that she was being ordered to make sure they were in fact complete.

The Employer argued that it had zero-tolerance for violations of its food safety policy and procedures. However, that zero-tolerance policy was likewise not proven by the Employer. The Employer knew that the slicers were not being cleaned every four hours each day. There were days when the deli employees could not meet that requirement and the Employer did not discipline anyone. The deli employees certainly knew that the slicers were not being broken down and cleaned every four hours and were not shy about admitting the same when interviewed by the Employer. The investigator wrote that Lori Stevens, a deli associate, reported that “current scheduling won’t allow it (the slicer) to be stripped down every 4 hours to be completely cleaned, but it does get sanitized and wiped down in that time.” (Er. Ex. 19)

Michelle LaHood confirmed as much during her investigatory interview. The investigator’s summary of his interview with LaHood includes the following: “Michelle stated the slicers are not being stripped apart and cleaned every 3-4 hours as they should be, due to not having the help back there in the department to get that done.” (Er. Ex. 11) In short, the record evidence suggests that the Employer tolerated an atmosphere in which its stated safety policy and procedures were routinely violated or even ignored by deli employees with little or no consequences.

It is notable that the safety manager, on her visit to the store, discovered the logs were incomplete. She did not report the violation to human resources. She also concluded that the slicers were not being cleaned every four hours as required by the safety policy and state law.

Yes. I reviewed the slicer cleaning logs on my visit on April 29th and found they were incomplete on the days leading up to the day we prepared the food for the customer and that means that there were missing entries, that we weren’t cleaning the slicers every four hours. (Tr. at p. 44)

Rather than report this violation, the safety manager decided to work with the deli team.

"I worked with the deli team and walked the department with the store director and the assistant store directors, and I came back the next day to follow-up on --- the Minnesota Department of Ag had been in the prior day. I had just missed them and I wanted the opportunity to work with Kelsie, [the Grievant] so I did come in on the--walked the store again on the 30th." (Tr. at. p. 46)

The only thing the safety manager did in addition to "working with the deli team" was to organize a follow up conference call with the store director, district manager, the director of operations, the two assistant store directors and the Grievant " regarding the standards that were not being met and that potentially could have lead to the customer complaint and we needed to get our deli to standard." (Tr. at p. 50)

What is clear from the hearing and exhibits introduced into evidence is that the Employer did not have a zero tolerance policy at all but actually tolerated an environment in which deli employees routinely failed to clean slicers every four hours and also failed to complete the slicer cleaning logs. A most telling indication of this is that no deli employees were disciplined for failure to complete the slicer cleaning logs in the Forest Lake Store but some were disciplined for failure to complete the food temperature logs.

The types of discipline issued by the Employer to deli employees who failed to complete temperature logs as required by the safety policy and procedures is also instructive as to both the zero-tolerance policy and the issue of whether retroactive completion of food safety logs was encouraged.

For example, the lowest level of discipline the Employer issues is what is called a "contact." A contact appears to be a form of coaching of the employee on expectations but is less than a written warning. Most of the employees who failed to complete temperature logs received a contact or written warning. One employee who failed to complete the temperature logs properly on five nearly consecutive days was only given a contact. (U. Ex. 9) Another deli employee was given a written warning even though she failed to complete the temperature log for just one day. (U. Ex. 6)

Another deli employee was given a contact even though charged with filling out the temperature log with information that was clearly false. The store director issuing the discipline wrote: "He also filled out the hot case marking it "done for the night" at times that did not make any sense. For example chicken tenders were last recorded at 2:20pm. And zings at 1:45 pm. Temp logs and holding logs are to be used throughout the entire day and **filled out in their entirety having no blank spaces.**" (Emphasis added, U. Ex. 7) This employee, in other words, was given a mere contact or coaching for falsifying the temperature and holding logs.

That same employee was later given a one-day suspension for not following through on filling out the holding logs completely and insubordination. (U. Ex. 8) The store director wrote: "Logs must be filled out in entirety and to policy standards at all times. (Id.) So this deli employee who entered false information, continued to ignore the procedures for completing temperature logs and was insubordinate received only a one-day suspension under the Employer's zero tolerance approach to enforcement of its safety policy.

Even more damaging to the Employer's position that it maintains a zero-tolerance policy for safety violations is the discipline issued to a deli employee who actually signed another employee's name to the temperature log. (U. Ex. 4) The corrective action form includes the following statement by the store director: "Kevin also did not sign his name to the sheet for 10/22/13, another associates name was signed instead of his own. ...Signing other people's names will not be tolerated." (Id.)

However, at the hearing, the safety manager testified that doing so would be falsification.

- Q. You testified earlier your definition of falsification and I want to be clear what that encompasses. It's a simple question. If you sign someone else's name, that's falsification, right?
- A. Yes. It's a signature line. (Tr. at p. 57)

So, here again, the Employer's claimed zero-tolerance policy turns out to be more than tolerant and even lenient. It is worth noting that the Employer only issued discipline to deli employees who failed to follow procedures with regard to the temperature logs but not with the slicer cleaning logs. One significant difference stands out in the Employer's safety procedures distinguishing its concern regarding the temperature logs. The Employer required the store director and assistant store director to sign off on the temperature logs each day. That simple requirement meant that someone with disciplinary authority could evaluate whether the safety procedures were being followed and respond appropriately with the full force and authority as the representative of the Employer.

Contrast that simple requirement with the slicer cleaning logs that did not require the store director or assistant store director to sign off each day. It was the deli manager's responsibility to make sure the deli employees were in compliance. The Grievant, as deli manager, did not have disciplinary authority as does the store director and assistant store director. Here again, the Employer's own practices can be viewed as creating an atmosphere in which employees felt the slicer cleaning logs were actually less important than the temperature logs. But, it is clear to see that failure to complete the temperature logs did not lead to serious discipline even when that failure involved signing someone else's name or falsification. Given that there was no true zero-tolerance policy in place and no prohibition against retroactively completing the slicer safety logs, it appears perfectly reasonable that the Grievant should ask Amy Kelley to go back and fill in the holes in the log. Amy Kelley, the employee who complained about the Grievant's instruction to her to retroactively complete the logs said: "the slicers are being cleaned properly, they are just not being logged properly." Ms. Kelley also said she doesn't know if they've ever been done correctly." (Er. Ex. 10)

It is against this back drop that the Grievant's conduct in signing the slicer log in a time slot during which she was not in the workplace must be examined.

Q. I just want to ask you a couple more things. At Tab 14 this is a document that Ashley Jordan testified about and she said that they

went through the time records and the cleaning logs and noticed that you marked 9:30 for cleaning of slicer one and two on April 25th, but you didn't actually work at that time?

A. Right.

Q. According to Ms. Jordan that's falsification as well. How do you respond to that?

A. The document would have been false if it wasn't recorded because the slicer was cleaned for the night. That's the time that the deli closes and we clean the slicers for the end of the night and then the next day, Sunday, they were cleaned and they were opened. So they had to have been cleaned.

Q. Why did you mark 9:30 and mark your name there?

A. Because I could tell that they were clean the next day.

Q. Even though you weren't working at that time?

A. Right.

Q. An in your head was that falsification? Did you think you were falsifying that record?

A. No.

Q. Why not?

A. I wouldn't falsify a record. I was making sure that it was complete because there was a hole.

Q. And had you been directed by management to ensure that he slicer logs are complete?

A. Right. (Tr. at p. 169)

To be clear the backdrop or context here is one in which the Employer demonstrated to the Grievant that even though she did not personally fail to complete the slicer log, it would hold her responsible for the deli employees' failure to do so. The discipline she received for that very reason could not have been far from the front of her mind on the day that her store director asked her to check the logs for completion which happened to be the very day that the

Department of Agriculture was in the store to determine if the deli department might be the source of the illness experienced by the customers guests who consumed the meat and cheese tray prepared by deli employee, Amy Kelley.

The Employer did not explain why it was so urgent to check the logs for completion on the very day that the Department of Agriculture was in the store to conduct its investigation. The safety manager did not explain why she directed the store director to check the slicer logs when he first informed her of the customer complaint. It was obviously too late to do anything about it since the Employer maintains that retroactively completing the logs would be falsification.

The arbitrator finds it reasonable for the Grievant to conclude under the circumstances that existed on April 28, 2015 that she was being asked to go back and make sure the slicer logs were filled in or complete but not being asked to make things up or falsify the logs. It is reasonable to conclude that the Grievant 's decision to fill in the slicer log for the evening when she was not in the workplace was simply reasoning based on her experience of the cleaning procedures at closing time and her observations of those machines the following morning that the machines were in fact cleaned the night before. In any event, the arbitrator finds it was not unreasonable for the Grievant to interpret her store manager's instruction given all the facts and background that he wanted to make sure those logs were in fact completely filled in. Here again, the Employer could have called those directly involved to testify such as the store director, assistant store director, assistant deli manager, Amy Kelley and other deli employees but chose not to do so. In short, the Employer did not provide sufficient evidence to support the just cause requirement imposed upon it by the Parties' Agreement.

Conclusion

The arbitrator finds that the Employer failed to prove and especially failed to prove by clear and convincing evidence that the Grievant ordered another employee to falsify the meat slicer logs. As explained above, the Employer's investigation was not thorough and more importantly it was flawed by the failure to get at a key question. Had the Grievant been told in the past to retroactively complete the slicer logs when deli employees failed to do so? The arbitrator also finds that the Grievant's intent was not to falsify the logs when she made the entry in the log on a night that she wasn't in the workplace. But that the Grievant reasonably assumed she was acting on a direct instruction from her supervisor to make sure the logs were complete.

The arbitrator is mindful of the concern expressed by the Employer in its post-hearing brief that "...an employer's decision to terminate an employee should only be overturned if it was so wrong as to constitute an abuse of discretion." (Er. PH Brief at p. 13) The arbitrator concludes that the Employer's decision was in fact an abuse of discretion and should be overturned. The Employer created a work environment wherein some employees' violations of safety procedures were ignored. Placed the burden on the Grievant to enforce a policy without providing her with sufficient resources and without clarification that retroactive completion of the logs were prohibited. The Employer then discharged the Grievant for conduct she clearly did not engage in, namely instructing another employee to falsify slicer cleaning logs. It is therefore reasonable to conclude based on all of the evidence presented that the decision to discharge was arbitrary and an abuse of discretion. Here, the Employer simply failed to satisfy the just cause provisions imposed upon it by the Parties' Agreement.

AWARD

The grievance is sustained. The Employer shall reinstate the Grievant immediately, return her to her position as deli manager, and compensate her for all wages and benefits lost as a result of the wrongful discharge. In short, the Grievant shall be made whole in every respect. The arbitrator retains jurisdiction for the purpose of assisting the parties with implementation of this award.

Respectfully submitted,

A. Ray McCoy

A. Ray McCoy
Arbitrator

November 30, 2015