BEFORE JOHN A. CRISWELL
Neutral Arbitrator

In the matter of an arbitration between:

SMITH'S FOOD AND DRUG STORES, INC.,

Employer,

And

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1564;

Union,

VICTOR VALLEJOS,

Grievant.

ARBITRATOR'S AWARD

The dispute arising by reason of the Employer's (SMITH'S) termination of the GRIEVANT on July 29, 2010, was the subject of an evidentiary hearing conducted before the undersigned arbitrator in Albuquerque, New Mexico on November 16, 2010, at which SMITH'S was represented by Christina A. Adams, Esq., of Rodney, Dickerson, Sloan, Akin & Robb, P.A., and the UNION was represented by Joe Allotta, Esq., the UNION'S general counsel. During the course of that hearing, sworn testimony was taken from four witnesses, each of whom was subjected to cross-examination, and three joint exhibits,[1] five SMITH'S exhibits,

[1] Joint Exhibit 1 is the collective bargaining agreement between the parties. After the completion of the evidentiary hearing, the parties discovered that the document submitted by them was the agreement that was in effect before the date of GRIEVANT'S termination. After that hearing, the parties provided the arbitrator with an electronic copy of the agreement in effect at the time. References to Joint Exhibit 1, therefore, shall be to this electronic copy.

and five UNION exhibits were introduced. A reporter's transcript was made of the testimony presented, and although the UNION was not provided with a copy of that transcript, the arbitrator entered an order requiring that UNION counsel should, upon request, be provided a reasonable opportunity to review the same.

After the completion of the presentation of the evidence, the parties requested, and were granted, the right to file simultaneous post-hearing briefs. Each of these briefs was received by the arbitrator on December 22, 2010, and the hearing was considered to be closed and the case ready for the arbitrator's consideration and decision as of that date.

Based upon the evidence produced at the hearing, the arbitrator's consideration of the credibility and weight of that evidence, the parties' assertions, made both during the course of the evidentiary hearing and in their later post-hearing briefs, and the legal authorities cited by them, as well as certain independent legal research conducted by the arbitrator, he hereby adopts the following findings and conclusions and issues the following AWARD:

I. The Issues

As noted, SMITH'S discharged the GRIEVANT on July 29, 2010. Consequently, the parties have agreed that the grievance here was filed in a timely manner and that the arbitrator has

jurisdiction to render a final and binding decision in this case. They further agree that the issues presented to the arbitrator for resolution are:

a. Did SMITH'S have just cause to discharge GRIEVANT?

b. If not, what should be an appropriate remedy?

II. The Pertinent Provisions

Based upon the parties' respective submissions, it would appear that the following provisions of the described documents are relevant to the arbitrator's consideration of the issues presented:

a. The contract(Jt. Ex. 1):

Section 4.
DISCHARGE AND SUSPENSION

> 4.1 - The Company shall not discharge, nor suspend, nor take disciplinary action as respects any seniority employee without just cause.
>
> 4.2 - In respect to discharge, suspension, or other disciplinary action, the employee shall be given at least one (1) written warning notice of the complaint(s) against such employee, with a copy to the Union affected, except that no warning notice need be given to an employee before he is discharged for cause such as dishonesty, drinking or being under the influence of alcoholic beverages on Company property, failure to perform work as assigned, or recklessness resulting in serious accident while on duty. The employee so notified may be required to sign a receipt of the notice which will in no way be construed to be an admission of any misconduct or agreement with the

contents of such notice. If any employee refuses to date and sign such notice, the employee shall be given an opportunity to contact the Local Union and to comply, and if they still fail to date and sign such notice, they may be suspended until such time as they do date and sign the notice.

(a) Discharge, suspension or other disciplinary action must be by written notice to the employee and the Union involved.

(b) Warning notices shall have no force and effect after six (6) months from date of issue.

(c) Employees suspended pending an investigation will be paid their regularly scheduled hours and appropriate benefits if the Company or an arbitrator determines the suspension was unwarranted and the employee returns to work. (emphasis eupplied)

4.3 - Any employee may request an investigation as to his discharge, suspension, or other disciplinary action. Should such an investigation prove that an injustice has been done an employee, he shall be reinstated, and subject to the facts, he may be compensated at his usual rate of pay while he has been out of work, or otherwise made whole for loss of injury suffered as a result of an unjust discharge, suspension, or other disciplinary action. Appeal from discharge, suspension, or other disciplinary action must be filed under the provisions of Section 15, Grievance and Arbitration.

. . . .

Section 15.
GRIEVANCE AND ARBITRATION

15.1 - The Union or any employee in the Bargaining Unit who has any dispute or disagreement of any kind or character arising out of or in any way involving the interpretation or application of this Agreement, shall submit such dispute or disagreement for resolution under the procedures and in the manner set forth in this Section.

15.2 - The dispute or disagreement shall be submitted to the following:

. . . .

(c) Step 3. If the dispute is not settled to the satisfaction of the UNION, or the Employer representative does not respond within the fourteen (14) day limit, the UNION may request arbitration.

15.3 - The decision of the arbitrator shall be final and binding upon each party; however, the arbitrator shall not have the power to add to, subtract from or in any way modify the terms of this Agreement, and shall limit his decision strictly to an interpretation of the language of this Agreement. In the event an arbitrator awards back pay, he shall reduce such award by all earnings, including unemployment compensation received by the aggrieved party during the period of the award. The expenses of the arbitrator shall be shared equally between the Employer and the Union. (emphasis supplied)

b. Employer Handbook (Co. Ex.1):

DISCIPLINARY ACTION:

Smith's expects all employees to perform their job duties to the highest professional and business standards at all time, and will not tolerate inappropriate or insubordinate conduct. **Smith's therefore reserves the right, in all instances, to impose discipline, up to and including discharge, with or without prior notice.** While common sense is the best guide for determining whether conduct is appropriate, employees with questions concerning the permissibility of any action are responsible for contacting a supervisor, in advance for clarification.

For your information, the following are some violations which may result in immediate

termination regardless of the quality of work. **The violations listed are not all inclusive.**

Violations that usually result in immediate termination include:

1. Dishonesty or theft from the company, another employee, a vendor, or customer. Conviction of a felony or conviction of a misdemeanor involving "moral turpitude."

2. Serious and outrageous violations of Smith's sexual harassment policy or other discriminatory practices.

3. Violation of Smith's free time policy.

4. Violating Smith's Drug and Alcohol Policy; or failing to successfully complete any prescribed probation period.

5. Failing to successfully complete any other probation period.

6. Intentional harm to another person or to property or intentional disarming, bypassing, or failing to use any safety device associated with store equipment.

7. Possession of illegal weapons, firearms or illegal drugs on company premises, in company vehicles, or at company functions.

The following violations could also result in termination, at the discretion of management. The violations listed are not inclusive.

. . . .

25. Any other violations of company policy - whether stated in this handbook or elsewhere. (emphasis supplied)

EMPLOYEE PURCHASES:

We appreciate our employees as customers and hope you will want to make Smith's your favorite place to shop. For your own protection, please adhere to the following rules. Violations of these rules may result in dismissal.

1. All merchandise must be paid for prior to consumption or use. Always attach your sales slip to the purchase if you are going to consume or use it on company premises.

. . . .

Purchases made during or at the end of your shift should be removed from the store immediately. At no time may merchandise be stored in lockers, back rooms, coolers, or other concealed areas prior to or after purchase. (All emphasis supplied)

c. Memorandum re: Employee Purchases and Grazing Policy (Co. Ex. 4)

EMPLOYEE PURCHASES AND GRAZING POLICY

1. All merchandise must be paid for prior to consumption or use. Always attach your sales slip to the purchase if you are going to consume it or use it on company premises.

. . . .

9. No employee may purchase products that are outdated or have aged beyond the expiration or "use by" date. Such product may not be sold to anyone, whether an employee or customer. (emphasis supplied)

III. The Evidence

With some possible, rather minor, exceptions, the events leading up to GRIEVANT'S termination are substantially undisputed.

GRIEVANT was initially hired by SMITH'S in June 1987 as an apprentice meat cutter, became a journeyman and was promoted to the position of market manager, a unit position but apparently with some supervisory functions in the meat department, in 2000. He has served in that position, except for one temporary period when he chose to act as a journeyman, since that time. Based upon the job evaluations for him that were placed in the record (Un. Ex. 4), his performance has never been rated as less than good, and on occasions, he has received "above average" and "outstanding" evaluations from his supervisors.

Among GRIEVANT'S responsibilities as meat market manager, which he was assigned at the time of his discharge, was the overall operation of the meat market of the store to which he was assigned. This included the receipt of products from the warehouse, the storage of the same in the cooler, and the arrangement of the products in the display case. It is apparently true that virtually every product received by the store has an "expiration" or "do not use after" date. SMITH'S policy, which the testimony established is rather strictly enforced, is to reduce the price of any product that has not

been sold on the day prior to this "out of date" date, and to remove the product from any shelf or display on the morning of this date. The price reductions are made in accordance with schedules adopted by SMITH'S, which are accessed by hand held computers. Likewise, when a product is removed from sale, either because it has become outdated, has been damaged or spoiled, or cannot be sold for some other reason, a computer entry (called "scanning") is made by the employee removing the product, so that SMITH'S can keep an accurate record of its inventory and losses.

According to GRIEVANT'S uncontradicted testimony, products that are in plastic or other sealed containers continue to be quite edible for at least 30 days after the expiration date on the package. And, the evidence is that SMITH donates at least some of its out-dated products to a charitable institution for the feeding of the poor. However, the evidence does not indicate whether the products to be donated are disposed of differently from those that are not to be subject to a donation.

The evidence is that, at least generally, meat products, which are out-dated and removed from the display for sale to customers, are placed in a container referred to as the "bone barrel," which is apparently a rather large receptacle. Then, once a week this container is emptied by an independent company that SMITH'S pays to collect and dispose of these items.

The credible evidence is that the items placed in the bone barrel cannot be sold, and therefore, no longer have any value to SMITH'S itself, although their prior value may be used in some way in the calculation of bonuses for the store manager and the meat market manager.

As noted above, SMITH'S has adopted an employee handbook that requires that "all merchandise" must be paid for prior to consumption and that, if the product is going to be consumed on the premises, the sales receipt must be attached.(Co. Ex. 1). In addition, it has issued a separate memorandum (Co. Ex. 4), which repeats this prohibition and which also provides that outdated products may not be purchased by an employee and "may not be sold to anyone, whether an employee or customer." According to SMITH'S, this later prohibition is intended to prohibit any employee from consuming any out-dated product.

SMITH'S testimony was that any violation of this policy has, in the past, resulted in termination of the employee, without regard to the employee's length of service or other considerations. Indeed, SMITH'S Human Resources Coordinator (Parr) testified that, over the course of the past three years, SMITH'S has discharged some 40 employees for violating this policy.

However, except for a single incident, the nature of the policy violation engaged in by any of these other employees was

not disclosed, nor did SMITH'S present any evidence that any of these discharges, with the one possible exception, were of employees subject to any collective bargaining agreement requiring, as the pertinent agreement does, "just case" for discipline. Likewise, it did not present any evidence that, prior to the instant grievance, the UNION was made aware of this practice.

The one incident that was specifically referred to apparently did involve an employee subject to the pertinent agreement.[2] There, a meat market manager ordered several "party trays," but when they were received by him, he placed them in the rear of the cooler and never put them in the display case for sale, even though another meat market employee asked if they should be displayed. After these items became outdated, this employee was discovered eating from one such tray, and the evidence established that he had intended to use the other trays for a private party he was hosting at his home.

The incident leading to GRIEVANT'S discharge resulted from his use of an out-dated package of sausages for a part of the breakfasts for him and at least two other employees.

According to GRIEVANT, whom I find to be credible, the products received by the meat market of which he was in charge

[2] I sustained the UNION'S objection to evidence of incidents involving other employees, but it did not object to testimony referring to this incident. It is based upon this lack of objection that I infer that this was an employee who was subject to the parties' agreement..

are typically those that he has previously ordered. On occasion, however, there are instances in which the warehouse which services his market becomes backed up with a product whose expiration date is approaching. In these instances, the warehouse, to reduce its backlog, sends the products, referred to as "plus out" products, to the various retail stores.

He testified that, just a few days before July 11, 2010, his market received such an "plus out" shipment of "Farmer John's Classic Pork Links" sausages. The packages noted that the July 11 date was the date that the product should be used or frozen. Without contradiction, GRIEVANT testified that SMITH'S policy prohibits the freezing of any product after its expiration date.

Upon the receipt of this product, GRIEVANT decided that, because this item did not sell well and its expiration date was quite near (GRIEVANT estimated that it was received only two days before that date), he would not "deal with the problem". He said that he simply placed the product at the rear of the cooler and left it there. He acknowledged that he should not have done this; he should have displayed at least some of the sausage packages, but he simply did not want to do so because it was such a poor seller.

At some point after the product's expiration date of July 11, GRIEVANT removed the box of sausages from the cooler and

placed it in the bone barrel. The testimony did not establish when this occurred, but because GRIEVANT testified that the bone barrel is emptied by the third party contractor on a weekly basis, I infer that this box was placed in the barrel at least sometime after July 22. GRIEVANT also testified that he made the computer entry showing its removal from sales status at the time it was placed in the bone barrel.

The evidence fails to disclose the date that GRIEVANT "scanned" the items into the computer. According to the loss prevention manager, GRIEVANT, in his interview with him, said that he had scanned the item earlier that morning. The HR coordinator, who was also present at the time of this interview with GRIEVANT, testified that she was not sure whether he said he had scanned it that day or the day before. And, the scanning report for the meat market for the period July 24 through July 29 does not show that the product was scanned during this period, although there may be some question whether the item was carried as a meat product or as a grocery product for inventory purposes. Such characterization would affect where the record of its scanning would be found. In any event, even if GRIEVANT is assigned the foulest of motives, there is no reasonable explanation why he would not have scanned the product when he placed it in the bone barrel

On the morning of July 29, GRIEVANT came to work at about 7:30 and worked until about 9:30 when another employee in the meat department, Steve Martinez, came to him, said that he and several others were going to have breakfast, and invited GRIEVANT to join them. According to GRIEVANT, without thinking, he grabbed a package of the sausages from the bone barrel and gave them to Martinez, who took them, together with eggs that he had purchased and a receipt for those eggs, to the bakery and asked if the bakery employee could cook them. She agreed to do so, allegedly without noticing that the receipt was for the eggs only, and in addition, she offered to contribute some biscuits that she had brought from home.

GRIEVANT, Martinez, this bakery employee, and perhaps one other employee, then went to the backroom and began eating these items for breakfast.

At about this time, SMITH'S loss prevention manager, Mueller, came to the store to conduct various inspections, and when he saw the employees eating, he asked them for receipts.[3] He ultimately recovered the receipt for the eggs, and he became convinced that the bakery employee's biscuits did not come from the store. And, in interviewing GRIEVANT, he was told by him how he had obtained the sausages from the bone barrel. He also

[3] GRIEVANT asserts that he had finished eating and was walking out when Mueller appeared and that Mueller, contrary to Mueller's testimony, never saw him eating. Because GRIEVANT admits eating the breakfast, this issue is irrelevant, except as it bears on credibility.

invited both Mueller and the HR coordinator to go to the bone barrel to retrieve the packages from whence the sausages came. Both declined to do so. However, after this meeting, one of the UNION representatives, who was also present at this interview, did go to the bone barrel and retrieve these packages, and their photographs were introduced as UNION Exhibits 2 and 3. Consistent with GRIEVANT'S testimony, the expiration date on these exhibits was July 11.

After hearing GRIEVANT'S explanation, Parr told him either that she was terminating him or that she was recommending that he be terminated, and that, in the meanwhile, he would be suspended.[4] Because he could not imagine that what he did was such a big deal, GRIEVANT said, "You've got to be kidding!" GRIEVANT testified that, in response, Parr assured him that she was "not going to get you for stealing. I'm going to get you for breaking company policy."

Parr did not deny this description of her comments to GRIEVANT, and at the time of the hearing, while she alleged that GRIEVANT was "dishonest," she admitted that she never made such an allegation to him prior to the hearing. According to her, GRIEVANT'S dishonesty was his implied representation to Martinez and the bakery employee that he had paid for the sausages.

[4] Both GRIEVANT and one of the UNION representatives present testified that Parr never mentioned a suspension, but that she said he was terminated. Again, because GRIEVANT was, in fact, terminated, effective as of the date of this interview, the inconsistency is irrelevant, except as it may bear upon Parr's credibility.

However, neither of these employees was called as a witness to confirm that they were misled in such a manner by GRIEVANT. Further, GRIEVANT'S sworn testimony makes clear that Martinez was aware of the origin of the sausages and that of the fact that they had not been purchased when GRIEVANT gave them to Martinez to take to the bakery.

In addition, after this meeting, Martinez was issued a warning letter (Un. Ex. 5), which appears to allege that he had eaten both the sausages and the biscuits, that neither had a receipt, and that this was a violation "of our employees purchase and grazing policies." Such a warning would have justified only if Martinez knew that GRIEVANT had not paid for the sausages -- a conclusion consistent with GRIEVANT'S testimony respecting Martinez's knowledge of their origin. But, if Martinez had been aware of their origin, which would be the only legitimate basis for the warning letter, it would mean both that his culpability in this instance would be only marginally different from GRIEVANT'S and that SMITH'S has not uniformly discharged employees who have violated the pertinent policy.

Finally, it is undisputed that, at the time of GRIEVANT'S termination, he had not been issued any warning notice at any previous time. It is also undisputed that SMITH'S has never placed its reasons for terminating GRIEVANT in writing, although

the UNION'S grievance specifically noted this omission. (Jt. Ex. 2).

IV. The Parties' Assertions

SMITH'S asserts that its written policy prohibits employees from consuming products that are outdated. This policy, it says, is fully justified on several grounds -- to protect the health of employees by preventing the consumption of old food products and to prevent a dishonest employee from concealing a product until its expiration date has been reached and then taking it for personal use. And, it asserts that the UNION has never challenged the reasonableness of this policy.

Further, it asserts that it has uniformly enforced this policy by discharging any employee who has been found to have violated it. Indeed, it claims to have discharged some 40 employees over the past three years for violating its written policy on "Employee Purchases and Grazing Policy." And, it asserts that, due to the small margin of profits that large grocery chains can earn in the present market place, an employee's violation of this policy is sufficiently serious so as to warrant the industrial "capital punishment" of termination, irrespective of any past service of the employee or the particular factual circumstances of a particular case. It has consistently considered any violation of this policy to

constitute "just cause" for discharge.[5]

In contrast to these assertions, the UNION argues, first, that SMITH'S did not comply with the explicit provision of the contract, which adopts a progressive discipline system, requiring the issuance of a warning notice in all cases, but for the most serious, specifically designated offenses. It argues that, here, the evidence does not establish that GRIEVANT'S actions fell within the narrow type of offenses that would warrant any discipline more serious than a warning notice, particularly considering his long years of service

Further, even if SMITH'S asserts that GRIEVANT'S actions here constituted a serious violation, so that no previous warning notice was necessary, nevertheless, it violated the agreement by failing to place its reasons for GRIEVANT'S discharge in writing, as required by that agreement.

Finally, it asserts that, quite aside from any consideration of the foregoing, the actions of GRIEVANT do not constitute just cause for his termination under any reasonable concept of that term. It asks, therefore, that I vacate GRIEVANT'S termination and require his reinstatement with full back pay and benefits, together with interest on such back pay.

[5] SMITH'S also asserts that the arbitrator should require proof of the existence of just cause for GRIEVANT'S termination by use of the preponderance of the evidence standard and should not require a higher standard of proof. However, the UNION does not suggest that a higher standard should be applied here; hence, this issue is moot.

V. Analysis

Before considering the issues presented within the specific factual circumstances presented here, it would be most appropriate to resolve the questions as to what legal effect, generally, the contract provisions, as well as the provisions of the written policies adopted by SMITH'S, were intended to, and do in fact, have.

a. The contract

First, it is clear that section 4.2 of the parties' agreement adopts a rather typical "warning notice" system. Under such a system, no employee may be suspended or discharged, with exceptions for more certain more serious types of offenses, unless he or she has been issued a previous warning notice. Here, the contract provides for only four such exceptions: "dishonesty, drinking or being under the influence of alcoholic beverages on Company property, failure to perform work as assigned, or recklessness resulting in serious accident while on duty." Further, such a warning notice is to be in effect for only six months, after which it "shall have no force or effect."

Here, then, the only assertion that would cause GRIEVANT'S actions to fall within one of the exceptions to the warning notice system is SMITH'S claim that he was "dishonest." Hence, unless the preponderance of the evidence convinces me that GRIEVANT was "dishonest," I am bound to rescind his discharge

and to require that only a written warning notice be issued to him. Under section 15.3 of the agreement, I do "not have the power to add to, subtract from or in any way modify the terms" of the agreement. See Ferry Corp. and Set Screw Co., 120 LA 619 (Cohen, 2004).

Further, the parties' agreement also specifically provides that: "Discharge, suspension or other disciplinary action must be by written notice to the employee and the Union involved." (emphasis supplied) This, again, is a very common provision in a collective bargaining agreement, and it is not simply a technical, unimportant procedural step to be followed or ignored at will. On the contrary, it is an integral part of what has been described as "industrial due process." An employee under a contract such as this is entitled to be informed of the exact reason he or she is being disciplined, so that he or she may determine whether the discipline should be grieved and, if so, the nature of the evidence that may be presented against him or her and the nature of the investigation that the employee and the union should conduct.

Requiring an employer to specify the reason for discipline assures that the employer cannot later rely on a reason for the discipline that was not communicated to the employee at the time that discipline was imposed. For example, N. Brand, ed., "Discipline and Discharge in Arbitration" (ABA, 2003) at page

43, says this (citing numerous arbitration decisions):

> Any reason the employer intends to rely on for a discharge must be either stated in writing or communicated to the employee, unless special grounds exist that excuse the failure to present the reasons for management's actions at the time discipline is imposed. Surprise and lack of adequate notice about the basis for disciplinary action generally prejudices the union and the employee in investigating the charges and preparing a defense. [T]he discharge * * * must stand or fall upon the reason given at the time of discharge. The employer may not give the reasons for the discharge and then alter or add to them at the arbitration hearing.

See, also, University of Florida, 106 LA 510 (Norlan, 1996).

And, this is the purpose for a contractual requirement that the reason for discharge be placed in written form at the time of discharge.

Brand, supra, at page 44, quotes Arbitrator Howlett in Calumet & Hecla, Inc., 40 LA 660-663, as follows:

> The notice procedure was included in the contract for a reason; and there is good reason for it. If the basis for suspension or discharge is known to the Union, the Union representatives may be able to take action resulting in an employee's correction of irresponsible behavior * * *. Unless the Union is notified, it does not have the knowledge provided by contract essential for performance of one of its functions as employee representative. * * * 'Due process,' like rain, is for the just and unjust alike.

For other similar decisions, see Jefferson Smurfit Corp, 99 LA 290 (Feldman, 1992); Purina Mills, 98 LA 511 (Jacobs, 1992); Harry Davis Moulding Co., 82 LA 1024 (Fish, 1984).

Finally, the contract here is clear that no discipline may be imposed except for "just cause." And while this concept of "just cause" clearly prohibits some nearly mechanical application of a unilaterally-adopted discipline policy, arbitrators have, nevertheless, struggled to place a more definite definition upon the term. There are, of course, the famous "seven questions" to be answered to determine whether just cause exists that Arbitrator Carroll Daugherty set forth in Greif Bros. Cooperage Corp., 42 LA 555 (Daugherty, 1964). These include a consideration whether the procedures used by the employer were fair, i.e., whether the employee was provided with industrial due process.

Absent the issue whether the disciplined employee was treated substantially the same as other similarly situated employees or whether other due process considerations are present, it is normally considered that at least two important considerations are: (1) Whether the "punishment fits the crime," i.e., whether the employee's act or omission reasonably warrants the degree of discipline imposed, see Columbia Aluminum Co., 102 LA 274 (Henner, 1993); see generally, Brand, supra, at 87 ("Beyond basic principles of progressive discipline, arbitrators believe the degree of discipline should be proportionate to the seriousness of the offense.") and (2) the nature of the employee's past work record. See Elkouri and

Elkouri, "How Arbitration Works" (ABA, 6th Ed. 2003), pp. 983-990. ("Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. * * * * In many cases, arbitrators have reduced penalties in consideration of the employee's long, good past record.")

b. SMITH'S written policies

In addition to the foregoing contract provisions, the arbitrator must also consider the meaning to be placed upon the provisions of SMITH'S written policies.

First, its "Employee Purchases and Grazing Policy" has two provisions that may be involved here. First, policy No. 1 provides that: "All merchandise must be paid for prior to consumption or use." (emphasis supplied) It also requires that a sales slip must be attached to the item purchased. At least with respect to items that are for sale, this provision is clear on its face.

The same may not be said for policy No. 9, which provides that: "No employee may purchase products that are outdated or have aged beyond the expiration or 'use by' date. Such product may not be sold to anyone, whether an employee or a customer."

(emphasis supplied)

SMITH'S asserts that, because policy No. 1 requires that "[a]ll merchandise" be paid for and policy No. 9 prohibits the sale of outdated "products," read together these provisions prohibit the consumption of outdated products.

While I don't disagree that these two provisions could be interpreted in such a manner, it seems equally clear to me that policy No. 9 could also be interpreted as prohibiting only the "sale" of "products" without referring to their consumption, and that policy No. 1, by its reference to the "sale" of "merchandise," refers only to items offered for sale. And, nothing was placed in the evidence to demonstrate that there was anything furnished to SMITH'S employees that provided notice to them of its interpretation of policy No. 9.

In addition, SMITH'S written policy respecting discipline of employees raises serious questions.

First, the statement that SMITH'S "reserves the right, in all instances, to impose discipline, up to and including discharge, with or without prior notice" (emphasis supplied) is, on its face, inconsistent with sections 4.1 and 4.2 of the parties' contract.

Further, while this written policy properly notes that "dishonesty or theft" may normally result in immediate termination, it also notes that a violation of SMITH'S "sexual

harassment policy," "free time policy," and "Drug and Alcohol Policy," may also have this result. Strangely, this "immediate termination" provision does not refer to SMITH'S Employee Purchases and Grazing Policy. Rather, the succeeding provision, which makes termination a matter of discretion in each case, refers to "other violations of company policy -- whether stated in this handbook or elsewhere."

And, while the testimony is unchallenged that SMITH'S has uniformly discharged employees for violating this latter policy, no evidence was presented that would allow a finding or conclusion that, prior to the proceedings on the instant grievance, either the UNION or GRIEVANT was made aware of this unilaterally-adopted practice.

c. The application of these provisions here

It is quite clear to me that SMITH'S violated an important provision of the parties' agreement by failing to place in writing the precise reasons for GRIEVANT'S termination. And, this failure was aggravated by SMITH'S attempt at the hearing to justify this termination on grounds not previously disclosed.

GRIEVANT testified, without contradiction, that, at the interview where he was terminated (or suspended), he was specifically informed that he was not being terminated for theft, but simply for violating the Employee Purchases and

Grazing Policy. And SMITH'S Human Relations Coordinator conceded that, at no time prior to the arbitration hearing itself, did she accuse GRIEVANT of dishonesty.

Of course, neither the contract provision nor SMITH'S own unilaterally-adopted disciplinary policy provides for immediate termination for violation of the policy referred to. And, under the contract, such a policy violation would call simply for a warning notice. Because there was no prior warning notice in effect for GRIEVANT, a discharge for this purpose would clearly violate the agreement.

SMITH'S seems to argue, however, that its unilateral practice of terminating employees for violating the pertinent policy has somehow superseded the express terms of this contract. I disagree.

First, as the UNION points out, it is quite questionable whether a unilateral practice by an employer can ever supersede the express terms an agreement, particularly where, as here, there are limits placed upon an arbitrator's power to amend or modify the agreement; I cannot add to, subtract from, or modify its terms. See, e.g., ADM Mining Co., 2004 WL3328896 (Di Falco 2006).

Even if I were to conclude that a past practice could modify the express terms of this agreement, however, I could do so only if it were established that the UNION was aware of and

acquiesced in this practice. And, there was not an iota of evidence presented to establish that this was so.

As I have noted, SMITH'S written policy provided no notice that any violation of its purchase and grazing policy would lead to an immediate discharge. On the contrary, its written policy on discipline would lead to the conclusion that, while a violation of several other policies might lead to this result, a violation of the pertinent policy is not included within this list.

I accept the testimony that SMITH'S has discharged some 40 employees for violating the purchase and grazing policy. However, there is not an iota of evidence that the UNION was, prior to the instant grievance, aware of these discharges, except in one instance. And, in that case, the actions of the employee were egregious. Indeed, based upon the description of his actions, it is clear that he had entered into a plan to deliberately steal from SMITH'S. Under the circumstances described, therefore, SMITH'S would have had just cause to terminate him, whether or not it had previously promulgated its written policy on employee purchases.

Apparently, the other 39 discharged employees were not covered by the parties' agreement, so there is no basis upon which to infer that the UNION was aware of any of them. In addition, SMITH'S did not attempt to describe, via an offer of

proof or otherwise, the circumstances surrounding any of these other terminations, so it is impossible to determine whether any of those circumstances were more similar to the factual circumstances presented here or to those that accompanied the other employee's theft of outdated products.

Finally, the only possible basis that SMITH'S had for disciplining Steve Martinez was its conclusion that he had violated its policy with respect to the consumption of outdated products. Indeed, the warning notice issued to him specifically alleged that his actions were "violations of our employee purchase and grazing policies." (Un. Ex. 5). Yet, he was not terminated; he was simply given a warning notice. Based on SMITH'S actions in that case, it would appear that the policy of discharging any employee who violated that policy has not been uniformly applied.

Even if the UNION had notice of SMITH'S practice, and even if such past practice could supersede the unambiguous provisions of this agreement that require just cause for discipline, the UNION was not obligated to object to any policy or practice in the abstract. It is only when the policy or practice is applied in such a manner as to result in adverse action to a unit employee that the UNION is obligated to assert that the policy or practice is unreasonable. See, Elkouri and Elkouri, supra, at page 768 ("A union does not waive its right to contest a work

rule if it waits until the rule has bee applied or enforced."), citing Mayflower Vehicle System, 114 LA 1249, 1256 (Frankiewicz, 2000). And, as I have concluded, the circumstances surrounding the other employee's discharge would have provided no basis for a challenge to the reasonableness of the policy; that case involved a deliberate theft.

It should be noted that the UNION has not argued that the substantive provisions of SMITH'S Employee Purchases and Grazing policy are unreasonable or otherwise invalid. It argues only that SMITH'S alleged unwritten policy of discharging an employee for any violation of these provisions is unreasonable.

As we have seen, an employer must give the employee and the union specific reasons for the discharge at the time of that discharge (even if the contract does not require that those reasons be reduced to writing.) Further, an employer cannot at the arbitration hearing rely upon a ground for the discipline that was not asserted at the time of the imposition of that discipline.

Here, however, SMITH'S obviously recognized that the reason given to GRIEVANT at the time of his termination, i.e., a violation of the pertinent policy, would not support his discharge under the contract. Hence, at the time of the hearing in this case, SMITH'S claimed that the reason for GRIEVANT'S termination was that he was dishonest, even though such ground

had not been previously asserted. But, the claim was not made that his dishonesty consisted simply of the use of the outdated sausages.

Rather, at the hearing, it was asserted that his dishonesty was evidenced by his representation to the other employees, who were eating breakfast, that he had paid for those sausages. Aside from this being a uniquely imaginative approach to the question of dishonesty, SMITH'S witness was unable to specify whether GRIEVANT'S representations were made either expressly or impliedly.

As I have previously concluded, SMITH'S committed an egregious violation of section 4.2(a) of the contract by failing to provide written notice to the GRIEVANT and the UNION, specifying the reason for his termination. And, that violation was aggravated by its attempt to change the basis for the discharge from a charge of a simple policy violation to an assertion of dishonesty. Under such circumstances, I would normally simply refuse even to consider this latter assertion.

However, here, I can dispose of this assertion on substantive grounds, because SMITH'S failed to produce even an iota of credible evidence to support its tardy assertion that the GRIEVANT misrepresented the nature of the product he provided. Neither Steve Martinez nor any other employee was called to testify to any claimed misrepresentation by the

GRIEVANT.

The only credible evidence came from the sworn testimony of GRIEVANT, who said that Martinez was present when he took the sausages out of the bone barrel and gave them to him to take to the bakery. As I have previously concluded, this testimony is supported by SMITH'S own action in issuing a warning notice to Martinez.

We are left, then, with a situation in which a 23-year, good or outstanding employee has been discharged for a momentary lapse of judgment which purported to violate a written policy that, on its face, may lead to some confusion.[6] Given all of the circumstances here, I would have concluded that SMITH'S lacked just cause to discharge the GRIEVANT, even if there were no "special" discharge provision in this contract.

However, here, the parties have agreed that no employee will be discharged without the existence of a previously issued warning notice, except where the employee has been dishonest, has been drinking or under the influence on the job, has failed to perform work as assigned, or has been so reckless that a serious accident has occurred. The evidence here demonstrates that the GRIEVANT was not guilty of any of these defalcations.

Given the foregoing findings, therefore, I must adopt the

[6] Although I find the written policy to be somewhat confusing, I also recognize that, from the beginning, the GRIEVANT has admitted that he knew what he did was wrong. The policy's lack of specificity, therefore, is rather irrelevant in this case.

following ultimate conclusions:

i. Section 4.2(a) of the parties' agreement specifically requires SMITH'S to discipline an employee only by means of a written notice that specifies the reasons for such discipline. Absent extraordinary or exceptional circumstances, no different reasons other than those set forth in the written notice may later be asserted to justify such discipline.

ii. SMITH'S wholly failed to comply with this provision and this failure, alone and without more, might well provide the basis for setting aside any discipline imposed.

iii. The contract also provides that, except in specific instances, no employee may be discharged, unless he or she has previously been issued a written warning notice. The evidence here establishes that GRIEVANT had not been issued a previous warning notice and that none of the exceptions to the warning notice requirement exists here.

iv. For the dereliction of which the GRIEVANT was admittedly guilty, SMITH'S could discipline him by the issuance of a written warning notice, which notice would have remained in effect for six (6) months, or until January 29, 2011.

VI. Award

Based upon the foregoing considerations, I hereby order, direct, and award that:

a. The GRIEVANT'S discharge is vacated, and in lieu thereof, he shall be issued a written warning notice, which shall expire on January 29, 2011.

b. No later than January 24, 2011, SMITH'S shall reinstate the GRIEVANT to his former position as meat market manager with no loss of pay, benefits or seniority.

c. Within 30 calendar days of the issuance of this award, SMITH'S shall pay to GRIEVANT the amount GRIEVANT would have earned had he not been discharged, less any interim earnings and less any unemployment benefits received by him (except that, if the payment under this award will result in the GRIEVANT'S liability to repay any such unemployment benefits, SMITH'S shall assume such repayment liability), plus interest upon the net sum, payable at the per annum rate that the laws of the State of New Mexico would call for in a case where a rate of interest is not previously agreed upon. Such interest shall be simple interest on a per annum basis.

d. The undersigned arbitrator shall retain jurisdiction over this dispute only for the purpose of resolving any further dispute between the parties respecting the enforcement or implementation of this award.

Done this 6th day of January, 2011.

JOHN A. CRISWELL,
ARBITRATOR