

**WALTER F. DAUGHERTY**  
ARBITRATION • MEDIATION • FACT-FINDING

October 31, 2011

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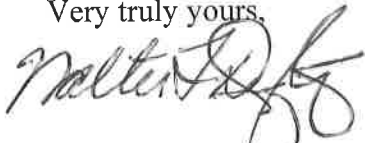
**Re: UFCW Local 1167 -and- Rite Aid  
(Regina Abdelghani – Termination)**

Dear Mr. Wohlner and Ms. Marchant:

I have enclosed my award and statement for services in connection with the above-captioned matter.

Thank you for your courtesy and cooperation.

Very truly yours,



Walter F. Daugherty

**ARBITRATION OPINION AND AWARD**

In the Matter of Arbitration Between: )  
 )  
**RITE AID** )  
 )  
Employer, )  
 ) Regina Abdelghani – Termination  
and )  
 )  
**UNITED FOOD AND COMMERCIAL** )  
**WORKERS UNION LOCAL 1167** )  
 )  
 )  
Union. )  
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**ARBITRATOR**

Walter F. Daugherty

**APPEARANCES**

For the Employer: Anne F. Marchant  
Attorney at Law  
Kelley, Hockel & Klein

For the Union: Jeffrey S. Wohlner  
Attorney at Law  
Wohlner Kaplon Phillips Young & Cutler

## INTRODUCTION

Pursuant to the relevant terms of the parties' collective bargaining agreement, the undersigned was selected as Arbitrator in this dispute. A hearing was held on July 8, 2011 at the Union's office in Bloomington, California. Both parties appeared and were afforded full opportunity to present relevant evidence, examine and cross-examine witnesses, and offer argument. The Grievant was present and was fully and fairly represented by the Union. A verbatim transcript of the proceedings was furnished to the Arbitrator. Post-hearing briefs were filed, the matter standing submitted with the receipt of these briefs on or before September 20, 2011.

## ISSUE

At the commencement of the hearing, the parties stipulated that the matter was properly in arbitration and that the issue for resolution was as follows:

Was the Grievant discharged for good and sufficient cause?

If not, what is the appropriate remedy?

## RELEVANT CONTRACTUAL PROVISIONS

### ARTICLE 4 – DISCIPLINE/VOLUNTARY QUILTS

#### 4.3 DISCIPLINE

4.3.1 Good Cause Non-Probationary employees shall not be discharged except for good and sufficient cause such as dishonesty, insubordination, incompetency, intoxication, unbecoming conduct or failure to perform work as required. Age, sex, creed, or color shall not be grounds for the termination of an otherwise qualified employees.

4.3.2 Warnings Non-probationary employees who are discharged for incompetency or failure to perform work as required (including excessive absenteeism or excessive tardiness) shall first (1<sup>st</sup>) have had two (2) prior warnings in writing within twelve (12) months preceding the discharge of such incompetency or of related or similar failure to perform work as required, with a copy sent to the Union. The employee so notified shall be required to sign such notice, but such signing shall in no way constitute agreement with the contents of such notice.

## BACKGROUND

Regina Abdelghani (“Grievant”) began her Company employment March 27, 1990 as a cashier. She was promoted to the Pharmacy Technician position on November 19, 2000. At all material times, the Grievant worked part-time at Store No. 5469 in Temecula, California until terminated September 20, 2009. The Grievant typically worked Thursday, Friday, and Saturday.

Company policy requires that when a pharmacy prescription is purchased, either at the pharmacy register or at the customer drive-through window, the customer’s signature is to be obtained on either the Document of Pharmaceutical Care (“DPC”) form or the e-signature device at the pharmacy cash register (C. Ex. 3, C. Ex. 4, C. Ex. 5, C. Ex. 6, C. Ex. 7).<sup>1</sup> For drive-through customers, the DPC form is printed inside the pharmacy and delivered through a tube to the waiting customer. The DPC is to be signed and the customer is expected to check a box on the form noting whether the customer was counseled by a pharmacist or counseling was declined (C. Ex. 5, p. 5). This form is then scanned into the pharmacy’s computer system that records the pharmacy prescription transactions.

Tammy Murphy Sant, the Pharmacy District Manager, testified that she had performed a routine audit at the Temecula store on July 15 and August 3, 2009. According to Sant, this audit showed that a “large amount” of transactions were processed using the “patient refused to sign” option (RT, p. 57). Sant said that she the reviewed the “Signature Capture Metrics” reports and the Grievant’s Kronos time card records for the period July 10 through August 31, 2009. This review showed that 5,603 prescriptions were filled during this period and that the Grievant had worked 21 of the 53 days from July 10 through August 31, 2009 (C. Ex. 11). On the days the

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<sup>1</sup>Company and Joint exhibits are referenced as “C. Ex. \_\_” and “J. Ex. \_\_,” respectively.

Grievant worked, 2202 prescriptions were filled for which the patient refused to sign option was selected 506 times. On the 32 days that the Grievant did not work, 3401 prescriptions were filled with the patient refused to sign option being selected on four occasions (C. Ex. 8 and C. Ex. 11). Sant said that the patient refused to sign option was selected instead of having the customer complete the DPC form at the drive-through window or use the e-signature device at the pharmacy cash register (RT, pp. 69-70).

Sant testified further that after completing her review of the relevant records she contacted Human Resources and was advised that she should meet with the Grievant. Sant met with the Grievant on September 3, 2009 in the manager's office at the Temecula store. According to Sant, she asked the Grievant to describe the procedures for both a pharmacy cash register prescription transaction and a drive-through transaction. The Grievant, said Sant, correctly described both procedures (RT, p. 72). In response to questioning about the use of the patient refused to sign option, Sant said that the Grievant first denied selecting this option. After being shown the report showing the use of this option, Sant stated that the Grievant then acknowledged having chosen that option and that she had done so to "get the customers through the drive-through faster" (RT, pp. 73-74). Near the end of the meeting, the Grievant prepared a written statement that she gave to Sant (C. Ex. 10). In her statement, the Grievant wrote:

My procedure when ringing up a customer and letting that person leave with out signing was the wrong way to go. I should know better than that. Maybe I wanted to get down [sic] with the customer faster. I didn't know this happened so many times. But I know I can do better from now on. This will not happen anymore and I'll do the procedures that I'm supposed to do.

Sant described the Grievant as "emotional" during most of the meeting and said that at the close of the meeting she had advised the Grievant that she would discuss the matter with her

supervisor and Human Resources and would inform her of the decision (RT, pp. 78, 88). Sant said that it was the unanimous decision of higher-level management and Human Resources to terminate the Grievant (RT, pp. 78-80). The Grievant worked for three weeks following this meeting until notified of her discharge on September 20, 2009.

The Grievant testified that the patient refusals to sign that Sant discussed at the September 3, 2009 meeting concerned “counseling the customer” and that sometimes the DPC form would be returned unsigned via the delivery tube at the drive-through window (RT, pp. 135-136). The Grievant acknowledged that while a patient could refuse counseling they were required to sign for the prescription and that she had elected not to get every signature by taking a shortcut (RT, p.152). She also acknowledged telling Sant during the September 3, 2009 meeting that she had been choosing the patient refused to sign option at the beginning of the transaction and knew this was not the proper procedure (RT, pp. 150-151). According to the Grievant, there were occasions on which she had began work some three or more hours after the pharmacy was opened and her identification number had been used to open a register and complete transactions (RT, pp. 123-124).<sup>2</sup>

As previously noted, the Grievant was terminated effective September 20, 2009. This action culminated in the arbitration held before the undersigned.

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<sup>2</sup>The Grievant said that her identification number was composed of a three-digit code and the last four digits of her social security number and that this identification number was attached to a cash register in the pharmacy and the drive-through register (RT, pp. 120-121). Sant, however, testified that she had never seen the three-digit identification number or a social security number posted on a register at any Company store (RT, p. 107).

## OPINION

The review in arbitration of an employer's discipline decision involves the consideration of three elements: 1) the existence and knowledge of an applicable rule of conduct; 2) whether the alleged violation(s) of the applicable rule were proven and 3) whether if proven or admitted the penalty assessed was appropriate in view of any attendant mitigating and exacerbating factors.

Turning to the first element of this three-prong arbitral inquiry, review of the documentary evidence and the Grievant's testimony demonstrates that the Company has established and promulgated specific policies requiring a customer's signature in a prescription transaction. This requirement is applicable to both drive-through transactions where the signature is obtained on the DPC form and transactions done at the pharmacy's cash registers, where the customer signs electronically (C. Ex. 1 and C. Ex. 3). These signature requirements are included in Company policies regarding "Register Transactions for Prescription Orders" and "Pharmacy Workflow," which both prescribe disciplinary action "up to and including termination" for employee noncompliance (C. Ex. 6 and C. Ex. 7). It is noted further that the Grievant received training on August 6, 2006 and February 4, 2007 that addressed the requirement that a customer signature was to be obtained on all prescriptions. And the Grievant herself acknowledged that Company policy required that she obtain customer signatures when prescription medications are received. The evidence is thus more than sufficient to establish that the Company had enacted policies regarding customer signatures in prescription transactions and that the Grievant was aware of these policies and the disciplinary consequences for her noncompliance.

The Union asserts that the Grievant's failure to obtain customer signatures was not an act such to obviate the language of Section 4.3.2 of the collective bargaining agreement requiring two prior written warnings within a 12-month period before a discharge may be effected. These written warnings are a contractually imposed condition precedent for discharges involving "incompetency or failure to perform work as required." Incompetency or failure to perform work as required may be attributable to a myriad of factors, including an employee's lack of knowledge or skills needed to do the work or a misunderstanding as to the work requirements. The Arbitrator is persuaded, however, that the Grievant's actions of choosing the patient refused to sign option were more than mere incompetency or failure to perform work as required. For the Grievant's decision to ignore the clear policy requiring a customer's signature on a prescription transaction manifested a conscious and deliberate disregard for a policy of which she was fully aware and knew how to follow.<sup>3</sup> The Grievant's alleged misconduct therefore amounted to the falsification of Company records and an act of fraud or dishonesty. As such, the Company was not required to have given the Grievant the two written warnings during the prior 12-month period before it could impose discharge here.

The Union argues that in charging the Grievant with fraud and dishonesty and the falsification of records the evidence proffered in such regard must prove her misconduct beyond a reasonable doubt, citing to various published awards for this proposition. The question of the appropriate standard of proof to be applied in cases implicating allegations of dishonesty has been the topic of substantial arbitral discussion and arbitrators are less than unanimous in their

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<sup>3</sup>The evidence is undisputed that the patient refused to sign option does not mean that the customer had refused counseling by a pharmacist concerning the prescription (RT, pp. 111-1120).

views in such regard. This Arbitrator has considered the cases cited by the Union in support of its position regarding the heightened standard of proof to be applied here and has reviewed numerous published awards in such regard where most often no standard of proof was specified by the arbitrator. The absence of any such articulation suggests that these arbitrators viewed the question as one of the employer presenting evidence sufficient to establish that the alleged misconduct in fact occurred. This Arbitrator concurs with this approach and believes that the appropriate standard is that the Company here must establish to the undersigned's satisfaction that the Grievant engaged in the misconduct as alleged and that such comprised good and sufficient cause for discharge.

As to the Union's contention that the Company must establish that the Grievant had the specific intent to commit the improper acts as alleged, the Arbitrator has reviewed the cases cited by the Union, particularly Arbitrator Estes' award in *Teamsters Local 166 and San Bernardino Steel Company* (Estes, 1991). There, the Arbitrator modified a discharge for falsification of time card records when the evidence failed to persuade that the grievant had the requisite intent to falsify his time card entry. This decision was grounded in the fact that the Grievant had filled out his time card at the start of his shift but had left before his scheduled quitting time without changing his time card entry to reflect his early departure (Estes award at p. 11). The facts here, however, are clearly distinguishable, for the falsification of Company records occurred when the Grievant chose the patient refused to sign option knowing full well that the customers had not so refused. Whether or not specific intent is a required element to prove the Company's case, the Grievant's actions as hereinabove described are sufficient to manifest the intent to falsify the Company records at issue.

The Company submitted the “Signature Capture Metrics” records for the period July 10, 2009 through August 31, 2009 (C. Ex. 8) and the Grievant’s Kronos time card records for this period (C. Ex. 9). These records show that 5,603 prescriptions were filled during this period and that the Grievant had worked 21 of the 53 days the pharmacy was opened from July 10 through August 31, 2009. On the days the Grievant worked, 2202 prescriptions were filled for which the patient refused to sign option was selected 506 times. For the 32 days the Grievant did not work, 3401 prescriptions were filled with the patient refused to sign option being selected on four occasions. On a percentage basis, on the days worked by the Grievant the patient refused to sign option was selected for 22.98 percent of the prescription transactions whereas on the days she did not work the patient refused to sign option was selected for only 0.18 percent of the transactions (C. Ex. 11). In the Arbitrator’s opinion, this significant statistical disparity comprises powerful circumstantial evidence inculcating the Grievant in the falsification of Company records as charged.

The Union points out that the Company’s records do not identify the patient refused to sign selections that may have occurred while the pharmacy was open but the Grievant had not arrived at work, was on her lunch break, or left before the pharmacy had closed.<sup>4</sup> It further notes that at times the Grievant’s shift overlapped with another Pharmacy Technician and/or the Pharmacist. The Union asserts that the Company records therefore do not comprise adequate proof that all the 506 patient refused to sign incidents were attributable to the Grievant or that the

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<sup>4</sup>Sant acknowledged that these records do not show the times at which the prescription transactions took place (RT, pp. 106-107).

other pharmacy employees may not have selected this option. As such, argues the Union, the Grievant's discharge comprises unfair and disparate treatment.

The Union's position as summarized above has been considered. However, as pointed out by the Company, one would expect that if other pharmacy employees were selecting the patient refused to sign option that this practice would be reflected in the records for those days the Grievant did not work. The relevant records show that for those 32 such days the patient refused to sign option was selected for only four of some 3,400 prescription transactions, a statistically infinitesimal amount. Moreover, review of the relevant records discloses that the Grievant never worked on any of the 30 days when there was no patient refused to sign prescription transactions. Again, while the Union's argument is acknowledged, the evidence as discussed, albeit circumstantial, is more than sufficient to establish that the Grievant was solely responsible for selecting the patient refused to sign option as reported in the Company records for the period July 10 through August 31, 2009.

The relevant Company policies are clear and the Grievant understood these policies and the disciplinary consequences of her failure to comply with their dictates. To either expedite the processing of prescription transactions or for another unexplained reason, the Grievant chose to ignore this policy and selected the patient refused to sign option at the start of some 500 transactions when no such refusal had been made. In so doing, the Grievant falsified Company records and effectively short circuited the process by which a DPC form was generated for drive-through customers to sign or the screen sequence including the e-signature screen for the customer to sign at the pharmacy register was displayed. Given the Grievant's cavalier and wholesale disregard for the relevant Company policy, the Company was not required to wait until

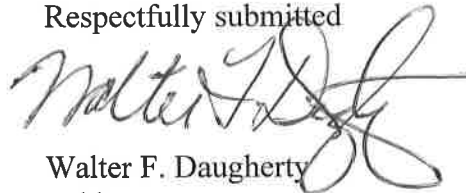
it had experienced actual harm before it could discipline the Grievant for her serious and repeated policy violations. In such regard, it is noted, as pointed out by the Company, that these policies were enacted to comply with Federal and State laws, to comply with HIPPA requirements, and to provide proof of the prescription sale in case of an insurance audit (RT, pp. 24-25, 27-28). Thus, the Company policies requiring that a signature be obtained for a prescription transaction were enacted for legitimate operational concerns and are reasonable as written.

As previously discussed and concluded, the Company has met its burden of establishing that the Grievant falsified Company records by selecting the patient refused to sign option when customers had not refused to sign for their prescriptions. She had received training and knew the parameters of the Company policies but on some 500 occasions deliberately chose to ignore these policies and falsely selected the patient refused to sign option thereby creating a false record in such regard. The deliberate falsification of Company records, particularly with the frequency engaged in by the Grievant, is frequently acknowledged by arbitrators as comprising sufficient grounds for summary discharge. Here, the Company policies provide for disciplinary action up to and including termination for such proven misconduct. The Grievant's some 19 years of Company service are noted as was her contriteness as expressed at the hearing. However, given the seriousness of her misconduct – the falsification of Company records – and the willful component and sheer frequency of her violations of Company policies, it cannot be said that the Grievant's discharge was arbitrary, capricious, or discriminatory. The Grievant was therefore discharged for the contractually mandated good and sufficient cause.

## AWARD

It is the award of the undersigned neutral Arbitrator that the Grievant was discharged for good and sufficient cause. The grievance is therefore denied. It is further awarded that the Union is the losing party and is directed to pay the cost of the Arbitrator as provided in Article 16.5.3 of the collective bargaining agreement.

Respectfully submitted



Walter F. Daugherty  
Arbitrator

Dated:           October 31, 2011  
                    Los Angeles, California