

IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy)	
)	
Between)	
)	
RITE AID CORPORATION,)	
)	
Employer,)	OPINION AND AWARD
)	
and)	FRANK SILVER,
)	Arbitrator
UNITED FOOD & COMMERCIAL WORKERS)	
UNION, LOCAL 770,)	
)	
Union.)	November 7, 2011
)	
RE: Claudia Sandoval termination)	
_____)	

This dispute arises under the Collective Bargaining Agreement between the above-named parties. Pursuant to the terms of the Agreement, this Arbitrator was selected to hear the evidence and to determine the issues.

A hearing was conducted on August 31, 2011 in Los Angeles, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Counsel for both parties filed post-hearing briefs and the matter was submitted for decision.

APPEARANCES:

On behalf of the Employer: Laura J. Clark, Kelly, Hockel & Klein, P.C., San Francisco, CA

On behalf of the Union: Michael D. Four and Gening Liao, Schwartz, Steinsapir, Dohrmann & Sommers LLP, Los Angeles, CA

ISSUE

Was the termination of the Grievant, Claudia Sandoval, for just cause? If not, what is the appropriate remedy?

FACTS

The Grievant was hired as a cashier at Store #5434 on July 2, 2007. Within a few months, she was promoted to shift supervisor, and she continued to work in that classification until she was terminated on October 7, 2010.

As a shift supervisor, the Grievant opened the store or closed it, depending on whether she worked an early shift (7:00 a.m. to 3 p.m.) or late shift (12:30 p.m. to 10:00 p.m.) She balanced the registers and the safe, and she assisted on the front-end registers if needed. She reported to the store manager or assistant store manager, who worked between 9:00 a.m. and 5:00 or 6:00 p.m. (Tr. 49). During times when neither manager was present, she was in charge of the entire store, except that the pharmacy manager supervised the pharmacy. There was a pharmacy manager present until the pharmacy closed at 10:00 p.m., since he or she had the key and alarm code (Tr. 56). The Grievant testified that she never gave customers their prescriptions, relieved pharmacy cashiers, or counted the money in the pharmacy registers. However she verified the amount of money from the pharmacy at the end of the day, and she picked up money from the pharmacy when there was too much money in the registers (Tr. 36).

On September 28, 2010, the Company learned that the Grievant was on the list maintained by the federal Office of Inspector General (OIG) of persons excluded from participating in Medicare and MediCal programs as a result of her conviction for a Social Security related fraud conviction. Regional director of loss prevention Dexter Mason interviewed the Grievant the following day. The Grievant acknowledged that she was on probation as a result of a fraud or theft conviction based on her having continued to receive federal payments as her mother's caregiver after her mother had died. She was making restitution payments, and she confirmed that she had been placed on the OIG exclusion list. Mason took no further action at the time of the interview, but he asked the Grievant to obtain a letter from her probation officer regarding the status of her probation.

Mason met again with the Grievant on October 7, and he informed her of the decision made by Company management to terminate her based on the fact that she was on the OIG exclusion list. He stated that her continued employment would result in the Company's being unable to participate in Medicare/MediCal programs, and could subject the Company to civil penalties.

POSITIONS OF THE PARTIES

The Company

The Company argues that the Grievant was properly terminated since her continued employment would put the entire company at risk for civil penalties and loss of Medicare and MediCal reimbursements. Under Section 1128A(a)(6) of the Social Security Act civil monetary penalties may be imposed upon any entity that employs an individual to provide items or services that are covered by a Federal health care program, if the entity knows or should know of the individual's exclusion. As stated in the OIG Advisory Bulletin (Co. Ex. 8), an entity that receives Federal health care funding may only employ an excluded individual in limited situations, i.e.

Company's position

“where the provider is both able to pay the individual exclusively with private funds or from other non-federal funding sources, and where the services furnished by the excluded individual relate solely to non-federal program patients.” (Co. Ex. 8, p. 3.) As shown on the OIG website, another pharmacy recently settled claim with OIG for employing excluded individuals by paying substantial monetary penalties.

The Company had constructive knowledge that the Grievant was on the exclusion list, and verified that exclusion in her interview. It could not afford to pay the civil penalties or lose its contracts to provide pharmaceutical products under Federal health care programs.

The Grievant’s testimony shows that she provided administrative and supervisory services related to the pharmacy by verifying the money from the pharmacy register and picking up excess cash from the pharmacy registers. She managed the store in the absence of the store manager or assistant, and she supervised the front-end clerks who were pulled to work in the pharmacy. As the merchandising supervisor, she was “responsible as the manager on duty to run the total store.” (Co. Ex. 10.) Even if, as she testified, she has never actually performed a void or a refund in the pharmacy, she indirectly provided administrative services by having responsibility for the pharmacy’s cash. The Company reasonably expected her to be available to perform managerial functions in the absence of the store manager, assistant store manager, or pharmacy manager.

The Company pays its employees with funds received from all sources, and does not earmark certain non-healthcare provided funds from which to pay individuals on the OIG exclusion list. It cannot reasonably be expected to track non-healthcare related funds solely for that purpose. The Company would be placed at risk for substantial loss of revenue and penalties by employing someone, such as the Grievant, who has been placed on the exclusion list resulting from a felony

fraud or grand theft conviction.

For these reasons, the Company argues that the grievance should be denied.

The Union

The Union argues that the Company has not shown that the Grievant's continued employment would subject it to loss of funding and/or penalties under OIG regulations. As stated in the OIG Advisory Bulletin (Co. Ex. 8), an excluded individual may be employed if he or she (1) is paid through non-federal funding sources, and (2) furnishes services unrelated to federal program patients. The Company has not sustained its burden of proof that either criteria has been met.

The Company's sole witness was loss prevention manager Dexter Mason who has no background in the Company's payroll or accounting functions and no direct knowledge of store operations. He had no knowledge of how Medicare or MediCal reimbursements are handled, except that it occurs at the corporate level. The Company provided no evidence that the Grievant's wages contain funds from any federal healthcare sources.

Under SSA § 1128, the Company is prohibited from seeking federal payment for services provided by or at the direction of an excluded individual, "including administrative and management services or salary." Examples of administrative services provided by the OIG include processing of claims for payment, and related functions, none of which were ever performed by the Grievant. The Company has provided no evidence of tasks performed by the Grievant for which it might seek reimbursement under any healthcare program.

The Company also failed to show that the Grievant was paid through federal funding sources, as opposed to non-federal funds. Mason had no direct knowledge of the Grievant's duties as shift supervisor at Store #5434, nor did he ask her about her duties to understand her involvement with

the pharmacy. She testified that her duties did not relate to the administration or management of the pharmacy, or providing any pharmacy services. Her tasks of picking up money from the pharmacy till, verifying the amount of money from the pharmacy and transferring it to the safe, were not tasks for which the Company sought reimbursement from any healthcare program. This store has two pharmacy managers, one of whom must be present for the pharmacy to operate. Even if the Grievant were the *de facto* store manager in the absence of the store manager or assistant, she would never be required to assist in the pharmacy because a pharmacy manager would always be present.

For these reasons, the Union argues that the Company has failed to meet its burden of proof that the termination was for just cause, and the Grievant should be reinstated and made whole.

DISCUSSION

The issue presented in this grievance is unusual, since this Arbitrator is being asked to apply the contractual just cause standard in light of an entirely separate set of legal standards: Social Security Act §1128A and administrative regulations and guidelines adopted by the Office of Inspector General of the U.S. Department of Health and Human Services. Although it is necessary to consider the effect of the Grievant's having been placed on the OIG exclusion list as a result of her conviction for Social Security benefit fraud, it is the OIG which has the authority to determine whether to impose civil penalties and/or disqualification from receiving Medicare or MediCal payments if she continues to be employed by the Company.

As stated in the OIG Advisory Bulletin relied upon by the Company:

“Thus, a provider or entity that receives Federal health care funding may only employ an excluded individual in limited situations. Those situations would include instances where the provider is both able to pay the individual exclusively with private funds or from other non-federal funding sources, and where the services furnished by the excluded individual relate solely to non-federal program patients.” (Co. Ex. 8.)

Under this guideline, two criteria must be met to avoid penalties by employing an excluded individual: (1) the individual must be paid exclusively from non-federal funding sources, and (2) the services provided by the individual must relate solely to non-federal program patients. The record contains no direct evidence as to the first criterion, since accounting and payroll are handled at the corporate level, and the Company's witness, loss prevention manager Dexter Mason did not know the details as to how these functions are carried out. Nevertheless, it is quite unlikely that the Company would meet its payroll from funds in which Medicare/MediCal reimbursements are segregated from other sources of income. Although the Union argues that the Company failed to meet its burden of proof on this point, this would be a fairly technical point on which to make a finding by application of burden of proof. It must be assumed that the Company's payroll is met by funds which include Medicare/MediCal payments.

The more critical issue is whether the Grievant, as a shift supervisor, performed services which did not relate to providing prescriptions to Medicare/MediCal customers in the pharmacy. The evidence shows that in Store #5434, a shift supervisor, such as the Grievant, had very limited responsibility with respect to pharmacy operations. She did not relieve pharmacy employees in providing prescriptions to customers or in ringing up sales on the pharmacy register. Although she was in charge of the store when she worked evenings after the store manager and assistant manager were no longer present, the pharmacy was directly managed by a pharmacy manager until the store closed at 10:00 p.m. Her only direct contact with pharmacy operations, as shown by the evidence, was in picking up money from the pharmacy when its registers had too much cash, and in verifying the count of pharmacy funds at the end of the day before transferring the money to the safe.

The Union makes a strong argument that the Grievant's responsibility for pharmacy

operations was so limited that the services she provided related solely to non-federal healthcare program customers. Nevertheless, as previously noted, it is the OIG which has the authority to impose civil penalties and deny federal healthcare funding due to employment of an excluded individual. This Arbitrator cannot make that determination nor reliably predict what the OIG would do if the Grievant were reinstated to employment. The fact is that the Grievant, by having been convicted of Social Security fraud and being placed on the OIG exclusion list, put the Company in jeopardy of substantial monetary penalties under federal law. Although the Union characterizes the circumstances leading to the Grievant's conviction as a "mistake," the mistake consisted of engaging in serious criminal conduct for which she was placed on five years probation and required to make restitution, in addition to being placed on the exclusion list. It cannot be concluded that the Company was required by the just cause standard to take the risk that the OIG would not impose monetary penalties and withdrawal of federal reimbursements if she continued to be employed. In these circumstances, the Company's decision to terminate complied with just cause. Therefore, the termination must be allowed to stand.

AWARD

The termination of the Grievant was for just cause. The grievance is denied.

Dated: December 7, 2011


Frank Silver, Arbitrator