IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

between

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 2,

and

SAN FRANCISCO CENTRAL TRAVELODGE® JOINT VENTURE.

RE: Housekeeping Terminations; AAA Case No. 74 300 63 99

OPINION AND AWARD

of

LUELLA E. NELSON, Arbitrator

May 3, 2000
Oakland, CA

This Arbitration arises pursuant to Agreement between HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 2 ("Union"), and SAN FRANCISCO CENTRAL TRAVELODGE® JOINT VENTURE ("Employer"), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on January 21, 2000, in San Francisco, California. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs on or about March 23, 2000.

APPEARANCES:

On behalf of the Union:

Kim C. Wirshing, Esquire, Grievant Officer/Attorney, HERE Local 2, 209 Golden Gate Avenue, San Francisco, CA 94102

On behalf of the Employer:

Allison M. Woodall, Esquire, Hanson Bridgett Marcus Vlahos Rudy LLP, 333 Market Street, 23rd Floor, San Francisco, CA 94105-2173

ISSUE

Was there just cause for the termination of the grievants; and, if not, what is the appropriate remedy?

RELEVANT SECTIONS OF AGREEMENT

SECTION 8. DISCHARGE AND NOTICE TO UNION

Employees may be discharged only for just cause. Examples of just cause may include, but are not limited to: proven inadequate performance, violation of law, failure to comply with this Agreement or proven failure to comply with reasonable Employer rules. ...

FACTS

This case involves seven housekeeping employees who were terminated April 17, 1999.[1] In March of that year, the Employer received a letter from the Social Security Administration (SSA), known as a "no-match letter." The no-match letter stated that more than 10 percent of the Employer's W-2 forms for 1998 showed employee names or Social Security Numbers (SSNs) that did not agree with the SSA's records, and attached a list of 20 non-matching names and SSN's. The no-match letter included the following comments:

Why Accurate Names and SSNs are Important

Accurate names and SSNs are important to you and your employees for several reasons. We use the name and SSN to maintain a record of personal earnings for each of your employees. ... It is most important that these records are correct since we will later use them to decide if the individual can receive Social Security payments and the amount of any payments due.

In addition, the Internal Revenue Service (IRS) uses the information we provide to enforce the tax laws, and they could penalize you or your employees for providing incorrect information. Under the Internal Revenue Service Code, the IRS may charge you a $50 penalty for each time you do not furnish an employee's correct SSN on a wage report. They may also charge the employee a $50 penalty for each time the employee does not furnish his or her correct SSN to his or her employer. The IRS may impose these penalties unless you or the employee can show reasonable cause for not providing the correct information.

What You Should Do

Before your file your next annual wage report, please make sure your employment records and the Forms W-2 you report have your employees' correct names and SSNs. Use the tips below to ensure accuracy.

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[1] Except as otherwise indicated, all dates refer to 1999.

- Ask your employees to check their latest Forms W-2 against their Social Security cards and to inform you of any name or SSN differences on the two. If the Form W-2 is incorrect, correct your records. If the card is incorrect, advise the employee to request a corrected card from the nearest Social Security office.

...

- Direct those who do not have an SSN or have lost their cards to contact their nearest Social Security office to apply for a number or replacement card.

....

General Manager Jake Johns testified he checked the Employer's records on the listed employees. Of those listed, only nine remained employed, including Grievants.[2] Two employees had submitted SSN's that were similar to those on the W-2 forms, but differed slightly due to transposition or other clerical errors. He contacted the SSA by telephone to re-verify the information. However, he was told the information still did not match, and he was advised to tell the employees to have the discrepancies corrected because the Employer could face severe penalties. He testified the person to whom he spoke suggested he also contact the Office of Business Liaison of the Immigration and Naturalization Service (INS) to discuss the situation. According to Johns, when he called that office, Felicia Colvin of the INS advised him to have the employees correct their SSNs because it was a violation of law to continue paying employees with invalid SSNs.

In handling this matter, Johns learned the Employer had also received a no-match letter in August 1997, involving eight employees, five of whom were also in the 1999 no-match letter. In addition to notifying the employees of the discrepancy, the Employer had sought assistance from the Union, and had informed the Union the employees would be terminated if correct SSNs were not presented within 30 days. In October 1997, it had contacted the Union's attorney, who responded with a brief letter stating, in part,

> I note that nothing in the IRS' notice requires your local facility to do more than attempt to report the employees' correct names and Social Security Numbers. The Union will assist in that effort.

The Employer responded with a letter disputing the suggestion that its obligations were so limited, and noting the possibility of a fine for reporting incorrect SSNs. It repeated that it "may terminate these employees" if they did not provide correct SSNs. No evidence exists that it took any further action.

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[2] Two of the employees involved are not part of this grievance.

Johns testified he was particularly concerned about the possibility of IRS penalties because of the 1997 no-match letter. He testified later events caused him concern about potential difficulties with the INS.

On April 9, Johns held a staff meeting with the employees named in the no-match letter. He read to them an announcement, reading as follows:

> We have been notified by the Social Security Administration that the following employees Social Security numbers do not match their records. This could be due to several factors, i.e., name changes, marriages, divorce, etc. As a result, these employees must go to their nearest Social Security branch office and correct this discrepancy. The hotel will then require from that employee, a letter from the aforementioned government agency indicating that the problem has been corrected as proof of their eligibility for continued employment. The hotel will extend the employees concerned a period of one week (thru April 16, 1999) to clarify and correct this problem. Anyone unable to provide the necessary documentation will not be allowed to return to work after that date.

A Spanish-speaking head housekeeper also read a Spanish translation of that announcement. Two employees who were not at the meeting were individually read the Spanish notice by the head housekeeper. Johns testified he also assured employees that it should be relatively simple to correct the problem.

CONTACTS WITH THE UNION

On April 12, Johns received a telephone call from Business Representative Chito Cuellar. Cuellar admonished Johns that he had no right to require employees to provide corrected SSNs because the Employer had accepted their SSNs as proof of their eligibility for employment at the time of their hire. Johns testified Cuellar said any discrepancy was the Employer's problem. That day, Johns sent Cuellar a list of the names and SSNs involved. His letter made the following comments:

> ... by federal law, we have the obligation to ensure that these numbers are valid as our company can face severe penalties by the INS if an investigation revealed the company knowingly continued to employ someone without the proper employment eligibility verification requirements.
>
> The above employees had been advised of the problem, and were informed to go to their nearest social security branch office to have it corrected. ... The employees concerned were advised to provide us with the correct information within one week as proof of their eligibility for continued employment.

Thereafter, Union President Mike Casey contacted Area Manager Joe Maddux. According to Maddux, Casey said "you know as well as I do" that the employees could not correct their SSNs, and needed time to find

another job. Maddux reported this information to Johns. Casey denied making this statement, or even knowing the affected employees' names. Instead, he testified he called to protest that any discharge would be without just cause, would deny the employees due process, and would outrage the community. He testified he asked for a delay so the employees could at least consult a lawyer, and informed Maddux there would be no penalties involved if he simply waited to see if any government agency pursued the matter.

On April 15, Johns sent Cuellar a letter declining to extend the deadline for employees to provide a correct SSN. He assured the Union, however, that employees who were "able to come into compliance with the Social Security Administration's requirements" within three months would be rehired. That same day, he received a phone call from the Union's attorney. He testified the attorney threatened the Employer with picketing and a possible lawsuit if it terminated the employees. That same day, Johns faxed to Colvin a description of his recent contacts with the Union and a request for further advice regarding the Employer's obligations. Johns testified he called Colvin later that day, who advised him it was not discrimination to refuse to continue to employ someone who did not have the legal right to work in the first place.

EXPERT TESTIMONY

Attorney Marielena Hincapie has been part of efforts to persuade the SSA to modify its no-match letters to reduce the incidence of employer overreactions to those letters. She testified the SSA encounters non-matching SSN information for approximately 21 million employees annually, of 240 million total employees in the U.S. Social Security payments on behalf of such employees go into a suspense account pending verification of the SSN, and are not available to pay benefits. In the past, the SSA sent notices of discrepancies only to employees. However, it received very little response to those letters, in part because it often sent its letters to the address noted at the time the employee first received a Social Security card.

According to Hincapie, recent Congressional pressures have persuaded the SSA to take more steps to correct discrepancies, including sending no-match letters to employers. However, she testified, employers have not known how to respond to such notices. Some have ignored them, some have given them to employees, and some have used them as a basis for adverse actions. As a result of concerns raised by employee

advocates, the SSA has, *inter alia,* agreed to change its no-match letters to employers to warn specifically against firing employees based on the mismatch. The SSA has also agreed to send no-match letters to employees in care of their employers, to be opened by the employee only.

According to Hincapie, if an employer calls the SSA to update information in response to a no-match letter, SSA regulations permit its personnel only to inform the employer when an employee name and SSN match. If they do not match, because of privacy concerns, SSA personnel are not permitted to give that information; instead, they are to tell the employer to refer the employee to the local SSA office.

Hincapie testified employees are not responsible for providing additional information to their employers if, in fact, there is no problem with the SSN provided. She testified that mismatches are a matter of concern only between the employees and the SSA. She further testified that employees whose SSN has been accurately reported, but who nonetheless are mismatches, have no avenue by which they may verify the SSA database. She testified the SSA attempts to "force" such files through its database to determine whether, for example, the problem is a cultural difference with name usage or spelling. Files that cannot be corrected in this manner fall back into the suspense file. She testified she did not believe the SSA gives any notice of whether it has been able to correct a discrepancy through this process.

The SSA publishes the *Reporter*, which it denominates "A Newsletter for Employers." Hincapie testified this newsletter is sent on a quarterly basis to employers. The Fall 1999 issue included a brief discussion of mismatched SSNs, including the following remarks:

> Some employers may take action against an employee based on the information in the notices. The notice of a mismatched name or number in an employer's wage report does not imply that the employee intentionally provided incorrect information and should not be a basis for adverse action against the employee. If an employer transfers, lays off, terminates or otherwise takes action against an employee based on information contained in the notice, the employer may violate the laws of the United States and be subject to prosecution or other legal consequences.

Hincapie testified the IRS fines employers for mismatches only where it has information that the employer has provided a mismatched number for fraudulent purposes to gain a tax advantage, and that it has not fined employers who provided SSN information given to them by employees.

According to Hincapie, the INS has been very clear in stating that notice of a mismatch, by itself, does not give reason for an employer to seek to re-verify that an employee is authorized to work.

In July 1999, the Immigrant Rights Commission of the City and County of San Francisco passed a resolution regarding the use of no-match letters, reading as follows:

> Whereas, the Social Security Administration has sent to certain employers located in the city and county of San Francisco so called Ano [sic] match letters indicating that an employee's name and social security as reported by the employer do not match; and
>
> Whereas, these letters have resulted in the intimidation of named employees attempting to assert their workplace rights and in the termination from employment of San Francisco workers, many of whom have been employed for many years; and
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> Whereas, the impact on these workers has been substantial both economically and psychologically; and
>
> Whereas, these letters are purportedly advisory and meant to inform the workers and insure that their earnings are properly credited so that will [sic] they will be entitled to collect Social Security monies at the appropriate time; and
>
> Whereas, these letters do not mandate that the employers terminate the workers involved but only that the employers verify that they have reported accurate information, or advise the workers to contact Social Security; and
>
> Whereas, these letters do not indicate that the named workers are undocumented or are otherwise precluded from continuing in their jobs; and
>
> Whereas, there is no penalty for employers based on the Ano-match [sic] letters warranting a need to terminate workers named in these letters; and
>
> Whereas, most discrepancies between social security and employer records are due to marriage, divorce, clerical errors or name changes; and
>
> Whereas, many immigrants adopt English language names after coming to the United States; and
>
> Whereas, English romanizations of non-English names may use several spellings of an individual's name; and
>
> Whereas, the Social Security Administration is not an enforcement agency but rather a service agency charged with providing benefits to our nation's workforce;
>
> Therefore, be it
>
> RESOLVED, That the Mayor and Board of Supervisors are urged to demand that the Social Security Administration address all Ano [sic] match letters directly to the employee at the

employee's residence or to the employee in care of the employer A [sic] marked personal & confidential to be opened only by the employee; and be it

FURTHER RESOLVED, That the Mayor and Board of Supervisors are urged to demand that all Ano [sic] match letters include language informing employees of their rights under the law and under the 1986 Immigration Reform and Control Act.

INFORMATION FROM THE CHAMBER OF COMMERCE

The California Chamber of Commerce publishes a Labor Law Update. An article in the April 1999 issue discusses the circumstances under which employers are required to audit I-9 forms. A portion of that article was submitted in evidence. One paragraph discusses "unauthorized employees," as follows:

> When it is discovered that an employee is not authorized to work in the United States, employers may give the employee an opportunity to present suitable documentation and make appropriate changes to the I-9 form. If the employee is unable to provide suitable documents, employment of this person should end. Employers that do not end employment with unauthorized employees are subject to criminal penalties and/or civil penalties. Penalties range from $100 to $10,000 for each unauthorized alien and from six months to five years imprisonment.

POSITION OF EMPLOYER

The Employer has the burden of proof. In cases involving failure to comply with reasonable rules, arbitrators apply a preponderance of evidence standard. The Employer has shown ample just cause for Grievants' termination for their failure to cooperate in providing correct SSNs.

The Agreement permits termination for just cause, including "violation of law" and "failure to comply with reasonable Employer rules." It permits the Employer to establish reasonable rules that do not conflict with the Agreement.

Federal law requires employees to have valid SSNs. Employers may be fined for information reporting errors in the amount of $150 per error, with a maximum fine per calendar year of $100,000. Grievants received notice of the discrepancies in their SSNs and were given an opportunity to correct them. They refused to cooperate with the Employer's request. They did not provide the Employer with information to show they had corrected, or attempted to correct, the discrepancy in their SSNs. In a similar case, an arbitrator upheld a discharge for failing to comply with a request for a valid paper Social Security card.

The requirement that Grievants correct the discrepancies was reasonable. Grievants had ample notice of the problems. Five of them had received notice in 1997 of the need to correct the discrepancies. They took no steps to correct the problem, as evidenced by the fact that the Employer received an identical notice almost two years later for them. One week was ample time to address and correct the discrepancies. They simply had to present themselves at the local SSA office and complete a Form SS-5; the forms are also available at post offices. The SSA verbally confirmed with Johns that it would be easy to correct the problem, and Johns relayed that information to Grievants.

The Employer was justifiably concerned about possible penalties. Both SSA notices stated the IRS could fine the Employer for providing incorrect information. The Employer was particularly concerned after the second notice, because it could not show reasonable cause for reporting incorrect information after getting the first notice.

In addressing the issue of the discrepant SSNs, the Employer became aware of circumstances raising a question about Grievants' work authorization, raising a concern over possible INS fines. The concerns did not exist when the Employer received the no-match letter, and were not based on the no-match letter. However, other factors led to a serious concern on this point. The SSA told Johns the numbers were invalid, and on its own initiative referred him to the INS. The Union immediately focused on immigration status, and argued the Employer had no recourse because it had accepted Grievants' cards during the I-9 process. These factors raised concern that the problem with the SSNs indicated a problem with their work authorization. This was confirmed when the Union president told management that they both knew the employees could not correct the problem. Also, the employees made no efforts to correct their SSNs, even though their jobs were in jeopardy. They also made no attempt to get their jobs back after termination by showing they had corrected or were trying to correct the problem.

Unauthorized workers cannot obtain or correct their SSN. Grievants' resistance to correcting the discrepancies reasonably caused the Employer to infer they could not do so because their SSNs were invalid in the first instance. These were sufficient facts and circumstances independent of the SSA notice to provide

constructive knowledge that Grievants were unauthorized to work. The requirement that they provide proof of correction of their SSNs was reasonable and appropriate.

Grievants presented no evidence to refute the circumstances giving rise to the just cause determination. Their only rebuttal of the Employer's evidence was to dispute Casey's statement that they could not correct their SSNs. They were at the hearing, but did not testify. Cuellar was also present, but did not testify. The Arbitrator should draw an adverse inference.

No grievant came forward to say there was no problem with their SSN, or that the problem was due to a name or marital status change and was being corrected, or that the discrepancy had been resolved. No grievant testified he or she was legally authorized to work. The absence of such testimony gives rise to the presumption that their SSNs were invalid, the problems could not be fixed, and they were not legally authorized to work. Their failure to rebut these presumptions supports the reasonableness of the termination.

The expert witness testimony did not contradict or undermine the just cause determination. Hincapie's opinion about the appropriate response to a no-match letter is belied by the law and evidence, and should not be credited since Grievants were not terminated solely because of the no-match letter.

Hincapie's testimony about the no-match letter contradicted the plain language of that notice. The notice not only instructed the Employer to notify Grievants of the problem; it directed it to make sure its employment records and Forms W-2 had the correct names and SSNs, and provided instructions on how to obtain correct information. It also warned of fines for reporting incorrect information.

Hincapie's testimony also contradicted the language of the IRS and SSA code and regulations. Under an agreement with the IRS, the SSA identifies reporting errors and untimely filed forms for IRS penalty assessment action. It reports mismatches to the IRS. The IRS may fine employers for reporting incorrect information, regardless of whether the employer had prior knowledge the information was incorrect. Hincapie acknowledged she did not know what the IRS did with information about reporting errors, nor did she know its rate of enforcement of penalties against employers for reporting errors. She acknowledged she would not counsel an employer to ignore the warnings in the no-match letter regarding possible penalties.

The Employer should not be penalized for being cautious in these circumstances. It had the prerogative to operate its business in compliance with the law, and to impose reasonable obligations on its employees to meet those objectives.

The Union's evidence regarding Hincapie's advocacy work against the SSA no-match letters is irrelevant to this case. Hincapie admits she is not an unbiased expert witnesses. She counseled the Union that the Employer should do nothing about the no-match letters, and she led picketing to protest the Employer's actions. Her work is exclusively on behalf of employees.

The Immigrant Rights Commission resolution should not be credited. It was passed well after these terminations. It contains factual and legal errors. The Commission is an advocacy group, and thus entitled to even less deference than administrative agencies. The Union also has presented insufficient evidence of a generally known community standard. In fact, its evidence is to the contrary. Hincapie acknowledged employers frequently terminate employees based solely on the receipt of a no-match letter. Here, the Employer acted not just because of the no-match letter, but because the employees took no action on the Employer's reasonable request.

The termination decision was not based solely or erroneously on concern about Grievants' immigration status. The Employer did not interpret the no-match letter to mean Grievants were not authorized to work. It had legitimate concerns, discussed above. The concern was not the sole or even the primary basis for the terminations. It did not terminate Grievants because it believed they were undocumented. It terminated them because it made a reasonable request with which they failed to comply. They had every opportunity to keep their jobs, and it desired that they would. They had the opportunity to return after termination if they provided evidence they had addressed the problem. They never took advantage of these opportunities. They lost their jobs through their own inaction. The termination should be upheld.

POSITION OF THE UNION

The Employer has the burden of proof that, at the time the termination decision was made, it had evidence that Grievants were not legally allowed to work, and that its investigation was impartial and

complete. Although the Employer claims it did not believe the no-match letters allowed or required it to terminate Grievants, it used circular logic to go ahead and do so.

No match letters do not provide just cause for termination. They do not indicate anywhere that the Employer should terminate or otherwise discipline employees. They are for informational purposes only. The no-match letter was a reminder, and the only obligation the Employer had was to ask employees to check their latest W-2 for differences. None of the tips for employers instructed or required termination. The letter included a number to call for information. Johns called this number; allegedly was told the numbers did not match the names he supplied; was advised to contact INS; and was told by INS that employees would have to have their SSNs corrected. However, he was not told to terminate Grievants. The narrow circumstances under which SSA is allowed to do more than advise an employer to have employees contact a SSA field office were not present here.

SSA regulations do not require the Employer to terminate Grievants. The SSA and IRS newsletter describes employers' obligation not to take adverse action, including termination, based on receipt of a no-match letter. This is precisely the Union's fundamental argument in this case.

INS law did not require termination based on the no-match letter. The Employer erroneously relied on a Chamber of Commerce periodical discussing an employer's responsibility after an I-9 audit. The no-match letter was not an I-9 audit; it was from the SSA, not the INS. When the Employer checked the I-9's, it found no evidence to conclude there was anything unlawful about them. The INS does not require, and the Employer cannot demand, reverification of qualifying documents except in limited circumstances not present here. The Employer used the no-match letter to claim there was something wrong with Grievants' documents. This is circular and ultimately wrong, and cannot be the basis for termination. Any information gleaned from the I-9 forms after the terminations is irrelevant to the decision to terminate. Just weeks before this arbitration, the Employer still was not sure it had just cause to terminate Grievants. Although the Employer claimed to be principally concerned with fines from the IRS, it sought to have the INS, rather than the IRS, answer its questions.

The IRS regulations did not require termination. The Employer claimed it was concerned about IRS penalties, but made no attempt to contact the IRS. Had it done so, it would have found no-match letters could not be used, without more, to impose IRS penalties.

The Arbitrator should discredit Maddux' testimony regarding Casey's alleged admission that Grievants were unable to correct their records. Casey rebutted this surprise testimony. He would not have known Grievants' immigration status, and he denied making the comment attributed to him.

The public policy of San Francisco is to demand that no-match letters be confidentially delivered to employees and not used for other than informational purposes. In passing its resolution, the Immigrant Rights Commission heard testimony from workers whose employers overreacted to such letters. Thus, employees are not alone in their struggle to deal with these bureaucratically-created nightmares.

The 1997 no-match letter is time barred by the Agreement. The Agreement bars discipline that is not issued in a timely manner; discharges require notice to the Union within two days. The 1997 letter did not result in the assessment of penalties, and did not require termination of employees. Documents on this point are relevant only to state of mind because they are hearsay.

This is likely a case of first impression for the Arbitrator. The basic tenets of just cause dictate the result. None of the matters relied on by the Employer are evidence of wrongdoing by Grievants. Grievants should be returned to work and made whole. The Employer should be ordered to cease and desist from using SSA no-match letters to terminate or otherwise discipline employees.

OPINION

As the parties recognize, the Employer bears the burden of proof in this matter. To sustain that burden, it must show that it terminated Grievants for just cause. In this regard, it is bound by the grounds upon which it relied at the time of the discharge decision. The Employer does not allege that Grievants engaged in workplace misconduct or violated the law. The only basis for their termination was the alleged refusal to comply with "reasonable Employer rules."

The initial inquiry here is whether the order to secure a letter from the SSA "indicating that the problem has been corrected" was a reasonable rule.[3] For a rule to be reasonable, one critical component is that it must be possible for an employee to comply. The requirement here was on shaky ground. Unlike the Employer's brief, the notice to employees did not suggest that it was sufficient for them to have evidence that they had *attempted* to correct the discrepancy; it required them to secure a letter from the SSA showing they had *corrected* the discrepancy. No evidence exists that the Employer ascertained whether the SSA would issue such letters, much less whether that agency would do so within a week. The no-match letter did not suggest that such letters existed, nor do the statutes or regulations cited by the Employer. Further, Hincapie testified without contradiction that it may be impossible to correct a discrepancy for reasons unrelated to either the validity of the SSN or the employee's work authorization status. The rule promulgated by the Employer did not allow for such practical impediments, and thus was unreasonable.

The Employer understandably had concerns regarding tax or immigration liabilities. However, it was the Employer's obligation to ascertain the likelihood that it would be subjected to those liabilities before taking adverse employment action based on those concerns. Put another way, the Employer could not place on its employees the burden of securing legal advice to rebut the Employer's lay opinion regarding its legal obligations. The Employer offered no expert testimony from practitioners in these legal fields, nor is there evidence that it sought such expert advice at the time this dispute arose (nor, for that matter, that it at any time sought advice from the IRS, whose penalties were the basis for initially directing employees to provide proof that they had corrected the discrepancy). Instead, in its brief, it cites some of the federal statutes and regulations regarding reporting of SSNs.

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[3] There is room for some doubt as to whether this order was a "rule" at all, in the contractual sense. Employers generally have the right to promulgate and enforce rules to maintain discipline and efficiency, direct the conduct of the workforce, or protect health and safety. With limited exceptions, they do not have the right to regulate employees' conduct and relationships outside the workplace. This "rule" related to conduct outside the workplace, involving the employees' relationship to a government agency. However, for purposes of this discussion, it will be assumed that this order was at least arguably a "rule" within the meaning of the Agreement.

Practice in a legal field lends an understanding of how regulations and statutes are actually applied that is not shared by non-practitioners. As the Arbitrator indicated at the hearing, she is not an expert on immigration law; she also is not an expert on tax law. Further, the parties have not stipulated to the application of the Arbitrator's own inexpert analysis to the statutes and regulations in those fields. While she has reviewed the cited statutes and regulations, as well as other related provisions, the Arbitrator will not venture to assess the Employer's exposure under either immigration or tax law.[4] The Employer simply has not shown that it would have been subject to penalties by either the IRS or the INS for continuing to employ Grievants; it has only shown that it may have been worried about possible penalties. Such worries, without verification of its obligations, were an insufficient basis for terminating Grievants.

Some of the inferences suggested by the Employer are not supported by the necessary logical or evidentiary underpinnings. In this regard, the fact that the SSA referred the Employer to the INS does not, by itself, suggest the SSA believed Grievants were unauthorized to work. The SSA's employer newsletter seeks to dissuade employers from using no-match letters as a basis for adverse actions. It is unlikely that SSA policy was to suggest to an employer that a discrepancy in SSNs was a basis for concluding the employee was unauthorized to work. A more plausible explanation is that the SSA office does not discuss immigration law, but instead refers inquiring employers to the appropriate office. The INS' explication of the Employer's obligation not to employ undocumented workers was irrelevant unless Grievants were undocumented. However, the Employer's review of its I-9 files revealed documents that, on their face, appeared valid, and no evidence exists that the inquiry with the INS revealed conflicting information.

Similarly, the presumptions suggested by the Employer from the fact that Grievants and Cuellar did not testify are unsupported. Testimony that their SSNs were valid, or that they were authorized to work,

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[4] The Arbitrator notes, however, that 26 USC §§ 6721 and 6723, cited in support of the Employer's argument that "employers may be fined for reporting incorrect information, *regardless of whether the employer had prior knowledge that the information provided was erroneous*," do not include the italicized language. Consistent with the no-match letter, 26 USC §6724 provides that penalties will not be assessed where the failure is "due to reasonable cause and not to willful neglect."

would only be relevant if the Employer demonstrated a reasonable basis to believe their SSNs were invalid (as opposed to merely mismatched) or that they were unauthorized to work. Absent such proof, drawing the inference suggested by the Employer would improperly shift the burden of proof to Grievants.

The 1997 no-match letter cuts both ways. The fact that five of the Grievants continued to be employed two years later, despite their uncorrected SSNs, reflects that the Employer took no steps at that time to discharge employees based on either the no-match letter or its instructions to employees pursuant to that letter. The fact that their SSNs remained mismatched does not establish that the employees took no action to correct them; it only proves that correction did not occur. While one could speculate regarding the reasons why that correction did not occur, such speculation does not amount to just cause.

Similarly, even if the Arbitrator were to credit Maddux' account of his conversation with Casey, that conversation does not establish a reasonable belief that Grievants were not authorized to work. Maddux did not inquire into Casey's reasons for believing Grievants could not correct their SSNs. This conversation therefore was insufficient reason to believe the problem was with their work authorization status rather than, e.g., the kinds of database difficulties described by Hincapie.

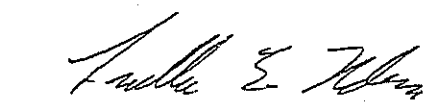
For all the above reasons, it is concluded that there was no just cause for Grievants' termination. The Employer therefore shall reinstate Grievants and make them whole.

AWARD

1. There was not just cause for the termination of the grievants.

2. As a remedy, the grievants shall be reinstated to their prior positions and made whole for the loss of wages and benefits occasioned by their termination, less interim earnings.

3. The Arbitrator retains jurisdiction over the remedy portion of this Award and any disputes arising therefrom.



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