

RELEVANT CONTRACT PROVISIONS

The most relevant Contract provisions are: Article 6 – Management Rights and, in particular, Section 3 which provides:

The employee shall observe the rules and regulations established by the Employer, whether printed or posted, not inconsistent with the terms of the Agreement. All rules will be printed and given to each new employee. Furthermore, the rules will be posted in a conspicuous place. The Union agrees that it will exercise due diligence in encouraging and insisting that its members observe such rules and regulations.

and Article 12 – Discipline and Discharge, in particular:

Section 1. Discipline. The Employer has the right to maintain discipline including the right to suspend or discharge employees. Discipline shall be for just cause only.

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Section 7. Posting of Rules. All rules shall be conspicuously posted by time clocks or on employee bulletin boards. The Employer's rules shall not conflict with this Agreement.

BACKGROUND

The issue concerns whether the Employer had just cause to discharge the seven Grievants who failed to correct their Social Security Number (“SSN”) mismatches.

The seven Grievants and their SSN mismatches are as follows:

- Carlos Cordero – Date of birth mismatch
- Cesar Fajardo – Name mismatch
- Mariana Molina – Name mismatch
- Maria Narvarez – Name mismatch
- Guillermina Ruiz – Social Security Number never issued
- Veronica Flores – Name mismatch
- Jose Narvarez – Name mismatch

POSITION OF THE EMPLOYER

The Employer had just cause to discharge the Grievants for the following principal reasons:

- The Employer must have correct SSNs to fulfill its legal duty of properly reporting earnings to the federal government.
- Since 2004, the Employer has required a verified SSN as a condition of new employment.
- The Employer's SSN verification policy, AF-430-03, constitutes a reasonable rule, which the Employer had the contractual authority to unilaterally implement.
- Policy AF-403-03's protocol for addressing SSN mismatches is reasonable and appropriate.

- The Employer offered the Grievants repeated opportunities to correct their SSN mismatches in 2004, 2005, and twice in 2009 before it ultimately discharged them in June 2009.
- The Grievants, who were responsible for correcting their SSN mismatches, failed to correct those mismatches.
- Without valid, verified SSNs, the Grievants could not remain employed by the Employer.

The federal government requires employers to use correct SSNs when reporting employee earnings.

Section 6051 of the Internal Revenue Code (“IRC”), 26 USCA 6051(a)(2), obligates an employer to submit, as a part of the W-2 earnings reporting process, “the name of the employee (and his social security number if wages as defined in Section 3121(a) have been paid).”

Similarly, employers have been required to report employee earnings to the Social Security Administration since 1935. Proper reporting of earnings is premised upon an individual’s social security number ... Those numbers are necessary for proper reporting, and must be valid in all cases at all times, linking the person to the number through proper identification.

The Social Security Administration has explained the requirement for correct SSNs as follows:

THE IMPORTANCE OF CORRECT SSNs

SSA can post employee wages correctly only when employers and submitters report employee wages under the correct name and SSN. Recording names and SSNs correctly is the key to successful processing of annual wage reports. It saves the employer and the administration processing costs and allows SSA to properly credit your employees’ earnings record. Credits to your employees’ earnings record are important in determining their future eligibility and payment of SSA’s retirement, disability and survivor benefits.

Social Security Number Verification Service (SSNVS) Handbook, p. 4 (Social Security Administration, December 2008).

In addition, the IRC, 26 USCA §§ 6721(a)(1) and (2)(B), provides for fines if an employer commits “any failure to include all of the information required to be shown on the return or the inclusion of incorrect information,” including incorrect SSNs:

...such person shall pay a penalty of \$50 for each return with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$250,000.

See Treas. Reg. § 301.6721-1(a) 26 CFR 301.6721-1(a) (“General Rule. A penalty of \$50 is imposed for each information return...with respect to which a failure...occurs...The total amount imposed on any person for all failures during any calendar year with respect to all information returns shall not exceed \$250,000”).¹

¹ Treas. Reg. § 301.6724-1, 26 CFR 301.6724-1, provides for the waiver of the penalty “if the failure is due to reasonable cause and is not due to willful neglect.”

The Internal Revenue Service (“IRS”) encourages employers to resolve SSN mismatches before the issuance of IRS penalty notices:

Employers may use Social Security Administration’s (SSA) SSN verification systems, known as the Social Security Number Verification Service(SSNVS) and the Employee Verification System (EVS), to verify its employees’ names and SSNs, but there is no federal tax requirement (regulation) to do so. These are useful, optional ways for employers to identify potential discrepancies and correct SSNs before receiving penalty notices... Mismatches reported under SSA verification systems are not considered IRS notices and do not trigger any further solicitation requirements under IRS rules for reasonable cause waivers. A mismatch determined by SSA will not necessarily result in any IRS penalty notice and annual solicitation requirements. However, if an employer receives a mismatch response from SSA, the employer may wish to re-solicit the employee’s SSN and try to obtain correct information prior to filing the Form W-2.

IRS Publication, 1586, Reasonable Cause Reporting and Requirements for Missing and Incorrect Name/TINS (including instructions for Reading CD/DVDs and Magnetic Media), p. 9 (emphasis added).

The Social Security Administration has similarly stated that a “proper use of SSNVS” is to “verify SSNs and names solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement.”

In brief, an employer is both legally required to use correct SSNs for reporting wages and subject to potential IRS fines for reporting wages on incorrect SSNs. Since 2004, the Employer has voluntarily used the SSNVS for all of its employees to identify SSN mismatches and, if possible, to resolve them before receiving IRS penalty notices. The purpose of the Employer’s Policy AF-430-03, which was implemented in 2004, is to resolve identified SSN mismatches to ensure the following goals: the employees receive credit for their earnings for Social Security purposes, the Employer fulfills its legal duty of reporting wages to the IRS on correct SSNs, and the Employer avoids the risk of potential IRS fines. Policy AF-430-03, p. 1 (“...the IRS may impose fines on Sodexo for wages reported on an incorrect Social Security Number (SSN). Therefore it is critical that this information is corrected for both the Company and the employee”).

The Employer has the right to require employees to have valid SSNs as a condition of employment. In the light of an employer’s legal duty to use correct SSNs and its exposure to potential fines for reporting wages on incorrect SSNs, an employer has the right to require that its employees have valid SSNs.

Since 2006, the Employer has required a verified SSN as a condition of new employment. As Tim Scherer, Senior Manager, Payroll Operations, explained this Policy, Sodexo will not hire an individual who has a SSN mismatch unless and until the individual corrects that mismatch.²

In addition, the Employer’s policy, AF-430-03, delineates its procedures for investigating and seeking to resolve SSN mismatches. Policy AF-430-03 also states that an “employee cannot be allowed

² The Employer hired the seven grievant in 2003, before the Employer adopted the current policy that requires a verified SSN before the hiring of an individual.

to work without a valid Social Security Number.” As Valerie Marshall, Senior Director, Human Resources – Corporate and Leisure Services, explained, the Employer, since she joined Sodexo in 2008, has consistently enforced Policy AF-430-03 in the areas for which she is responsible, including the bargaining unit at the General Mills facility. Sodexo has discharged both non-unionized employees, including the seven Grievants, for failing to resolve SSN mismatches, as Ms. Marshall further testified.

Policy AF-430-03 constitutes a reasonable rule. The Employer followed the procedures set forth in AF-430-03 with respect to the seven Grievant’s.

Article 6, Section 1 expansively states the Employer’s management rights: “All management functions and responsibilities which the Employer has not expressly modified or restricted by a specific provision of this Agreement are retained and vested in the Employer.” The unilateral establishment of rules and regulations is one of the Employer’s management rights.

The Employer, under Article 6, has no contractual duty to negotiate rules and regulations, especially a corporate-wide policy such as Policy AF-430-03, with the Union.

There is no evidence that the Union requested to bargain about Policy AF-430-03. The Union did not until now state that the Employer should have negotiated Policy AF-430-03 with the Union. Nor was there any evidence that the Union filed an unfair labor practice charge alleging that the Employer unlawfully failed to bargain about Policy AF-430-03.³

The *Social Security Number Verification Service (SSNVS) Handbook*, p. 5, states the SSA’s position on an employer’s use of SSN mismatch information that is obtained from the SSNVS as follows:

This response is not a basis, in and of itself, to take any adverse action against the employee, such as laying off, suspending, firing or discriminating against the employee.

NOTE: If you rely only on the verification information SSA provides to justify adverse action against a worker, you may violate State and Federal law and be subject to legal consequences.

Under the protocol outlined in Policy AF-430-03, however, the Employer does not engage in any employment action “only” or “in and of itself” on the basis of a SSNVS mismatch report. On the contrary, the Employer’s “Mismatch/Invalid Report Procedure” prescribes a series of steps that the Employer follows after receiving a SSNVS mismatch report and before discharging any employee who has failed to resolve an SSN mismatch, including the seven Grievants. See JT #8, Exhibit A, Mismatch/Invalid Report Procedure.

Those steps consist of the following:

³ In *Aramark*, 355 NLRB No. 11, the National Labor Relations Board rules that the employer unlawfully implemented a SSN no-match policy on a unilateral basis after the union had timely requested and has not waived its right to bargain. *Aramark*, however, is inapposite because UNITE HERE Local 17, unlike the union in *Aramark*, did not request bargaining about the Employer’s Policy AF-430-03.

1. Checking the employee's personnel file and verifying that "all personal information (name, birth date, gender, etc.)" is correct.
2. Correcting any errors in the personnel file.
3. Meeting with the employee "to notify the employee that an error has been found and present the employee with a first letter...asking the employee to correct the problem within 60 days...Managers should allow employees time off to go to the Social Security Administration as needed."
4. Meeting with the employee if the employee "does not produce accurate documentation (or paperwork confirming application for corrected information) by the 'due date'" and, if the "employee presents no satisfactory explanation," presenting "a second letter to the employee giving a final deadline of two weeks and letting the employee know that failure to comply may result in termination."
5. Discussing with Human Resources "whether the employee should be terminated," "if by the 'due date' of the second letter, an employee does not provide either corrected documentation or a satisfactory explanation for the employee's failure to do so...Exceptional circumstances may exist, such as language in a CBA for union employees, which would prohibit the termination."
6. Terminating an employee who completely disregards the first and second Notification Letters and provides no satisfactory explanation for his or her non-compliance.

The Employer's protocol under Policy AF-430-03 constituted a reasonable means of addressing SSN mismatches.

The Employer first learned in 2004 that the seven Grievants had SSN mismatches. The seven Grievants continued to have SSN mismatches throughout their employment until their termination in June 2009.

Under Policy AF-430-05, the Employer afforded the seven Grievants repeated opportunities to resolve their SSN mismatches in 2004, 2005, and twice in 2009. None of the seven Grievants, however, ever corrected or, evidently, even attempted to correct their SSN mismatches.

In 2004, when the Employer first learned about the seven Grievant's SSN mismatches, it furnished all employees, not only the ones with SSN mismatches, a copy of the Personnel Action Form ("PAF") for the purpose of correcting any errors in their personal information. None of the resulting PAF corrections, however, resolved any of the SSN mismatches.

In September 2004, the Employer then issued the sixty day letter to the seven Grievants, in accordance with Policy AF-430-03. As Robert Horrocks, the then General Manager, testified, he met with the employees, explained what they had to do in order to correct the SSN mismatches, and informed the Union about the letters.

None of the seven Grievants, however, corrected any of the SSN mismatches. Yet the Employer did not issue a fourteen day letter. It took no further action in 2004, although the seven Grievants remained on the quarterly SSN mismatch reports that the Employer received from the SSNVS.

In 2005, the Employer issued a second sixty day letter to the seven Grievants and notified the Union about that letter. In that letter, the Employer states:

Presently, we have not received any documentation from you showing that the issue has been corrected. Nor have we received an explanation as to why it has not been corrected. In fact, we have received no response from you whatsoever.

Notwithstanding your failure to respond to our first letter, we will extend to you an additional 60 days to have this matter corrected. On or before [insert date 60 days from date of this letter], please provide documentation confirming that the issue has been corrected, or a valid explanation as to why it has not been corrected. ... Failure to provide either documentation, or a legitimate explanation, may result in your termination.

None of the seven Grievants, however, corrected the SSN mismatch. The Employer took no further action in 2005, 2006, 2007, or 2008, although the seven Grievants remained on the quarterly SSNVS mismatch reports in 2005, 2006, and 2007 and the weekly SSNVS mismatch reports from January 2008 until June 2009.

In 2009, the Employer's Human Resources Department notified Willenburg about the seven Grievants' SSN mismatches and sent him the sixty day letters for issuance to the seven Grievants. Willenburg met with the employees, issued the sixty day letters, explained that Sodexo expected them to correct the SSN mismatches, and offered to help the employees correct the mismatches, including by accompanying them to the Social Security office or reviewing their documents. Willenburg also sent the letters to the Union.

None of the seven Grievants had any questions or asked Willenburg to accompany him or her to the Social Security office. By the end of the sixty day period, however, none of the seven Grievants had corrected any of the SSN mismatches.

After the end of the sixty day period, Willenburg issued the fourteen day letters to the seven Grievants and also sent them to the Union. Both the fourteen day letter, and particularly Willenburg's oral statements, notified the seven Grievants that failing to resolve the SSN mismatch would result in termination. In addition, he renewed his offer to help the employees by reviewing their documents or accompanying them to the Social Security office.

During the fourteen day period, however, none of the seven Grievants provided any information, corrected any mismatch, or requested any help from Willenburg.

Willenburg testified that a few of the seven Grievants informed him that the Union advised them not to present any additional information to the Employer because they had furnished what the Employer needed at the time of hire in 2003.

The advice of the Union representative, however, provides no justification for the employee's non-action. Their reliance on the Union's advice did not excuse their failure to correct their SSN mismatches.

The seven Grievants now challenge the discharges for their failure to correct their SSN mismatches furnished to the Employer at the time of hire. However, they have "unclean hands" that bar

their claim for relief for the following reason: for nearly five years after the Employer first notified them of the SSN mismatches and before their discharges, they worked for the Employer with incorrect SSNs and failed to correct the SSN mismatches.

The doctrine of “unclean hands” requires that “a party coming into a court of equity must have acted in good faith as to the subject matter of the lawsuit.”

Principle that one who has unclean hands is not entitled to relief in equity...the doctrine has no application unless parties’ wrongdoing has some proximate relation to the subject matter in controversy.

The seven Grievants obtained employment with the Employer in 2003 by using incorrect SSNs and worked for six years with those SSNs. By failing to correct their SSNs from September 2004 through May 2009, the seven Grievants caused their discharges. However, they are seeking an arbitral remedy for those discharges, even though they have “unclean hands.” The Arbitrator should deny the grievance and uphold all seven discharges in their entirety based on their “unclean hands.”

The Employer had just cause to discharge the seven Grievant’s for the following principal reasons:

First, the Employer has a legal duty to report earnings to the federal government by using correct SSNs. Consequently and necessarily, the Employer has the legal and contractual rights to require the seven Grievants, to have valid SSNs.

Second, Policy AF-430-03’s provision for the termination of an employee who fails to correct a SSN mismatch or to present “a satisfactory explanation for the employee’s failure to do so” by the end of the fourteenth day period constitutes a reasonable and legitimate policy.

Third, with respect to the seven Grievants, the Employer complied with Policy AF-430-03’s reasonable protocol. From September 2004 through May 2009, the seven Grievants had multiple opportunities and ample time to correct their SSN mismatches as a result of the Employer’s use of Policy AF-430-03’s procedures. See Argument, Sections III and IV. None of them, however, corrected the SSN mismatch in response to any of those opportunities.

Fourth, the seven Grievants bore the responsibility of correcting their SSN mismatches. In 2003, they presented incorrect SSNs at the time of hire. However, from September 2004 through May 2009, they failed and refused to correct those mismatches, relying, in part, on the Union’s “unfortunate advice.” See Argument, Sections IV and V.

Fifth, the Employer, by using the reasonable steps prescribed by its protocol before discharging the seven Grievants “did not take action based solely on the no-match letter; employee discharges were based on their failure to perform as required in resolution of the no-match problem.” *Tyson Foods*, 123 LA at 495.

Sixth, given its consistently-enforced Policy AF-430-03, its legal duty to report earnings on correct SSNs, and its right to require valid SSNs as a condition of employment, the Employer had just

cause to discharge the seven Grievants in June 2009 for failing to correct their SSN mismatches. See JT #7, *Tyson Foods*, 123 LA at 495 (“The Company had just cause to discharge all employees represented by the class action grievance for failure to reconcile the mismatch of their social security numbers”).

This case accordingly does not involve their immigration status or their authorization to work in the United States.

The Union’s arguments have no merit. The Union’s counsel, in the opening statement, presented a series of reasons why the Employer allegedly lacked “just cause” for the discharges. None of the Union’s contentions has any merit.

The Union asserted that the Employer’s use of the SSNVS was tainted because the Employer voluntarily used the SSNVS, rather than in response to a governmental inquiry. The Union’s assertion has no merit. To the contrary, the IRS encourages the use of the SSNVS as a means of resolving SSN mismatches before the issuance of IRS penalty notices. Thus, the Employer’s voluntary use of the SSNVS for legitimate business reasons was permissible, even if not legally required. Furthermore, using the SSNVS as part of a proactive effort to identify and to correct SSN mismatches serves the Employer’s legal, business, and human resource objectives of ensuring that earnings are reported on correct SSNs and that employees’ SSN accounts are properly credited with their reported earnings. Also, by voluntarily using the SSNVS, the Employer minimizes the risk of potential IRS penalties.

The Union asserted that the Grievants’ SSN mismatches caused no “harm” to the Employer. This contention was predicated on the absence of IRS penalty notices to date and the potential availability of IRS waivers of future fines for reporting earnings on incorrect SSNs. See Treas. Reg. § 301.6724-1, 26 CFR 301.6724-1. The Union’s position is that permitting the continued employment of employees who have failed to correct SSN mismatches is acceptable because the IRS has not yet issued any penalty notices, and, in any event, even if the IRS issues penalty notices against the Employer in the future, the IRS may waive the fines.

The Union’s “no harm” assertion, however, completely misses the point: the Employer has an affirmative legal duty to report earnings on correct SSNs. Proactively identifying SSN mismatches for the purpose of correcting them promotes the Employer’s fulfillment of that legal duty. Compliance with that legal duty constitutes, in and of itself, a sufficient reason for using the SSNVS and seeking to correct SSN mismatches. Stated alternatively, the Employer has no reason to – and the Union cannot require it to – violate the law by reporting earnings on incorrect SSNs, expose itself to potential IRS fines, employ individuals with uncorrected SSN mismatches, and then need to seek the potential waiver of any IRS fines.

Third, while it acknowledged the “harm” to employees who receive no credit for earnings reported on incorrect SSNs, the Union glossed over the extent of that “harm”: during their entire six years of employment, the seven Grievants received no Social Security credit for any earnings that had been reported on the incorrect SSNs that they furnished in 2003. By discounting the significance of the “harm” to employees, the Union impliedly asserted that Social Security benefits were unimportant to the seven Grievants. That may be the Union’s position, but, in contrast, the Employer’s position is that it has both a legal duty to the federal government and an obligation to its employees to use correct SSNs, in part, so that the employees receive Social Security credit for their earnings.

Fourth, the Union asserted that the Grievant's mismatches caused no problems because, in order to potentially obtain a later waiver of an IRS fine, the Employer acted properly by merely notifying the employees of the mismatches in 2004 and 2005 without taking any further action. Again, however, the Union's analysis would have sufficed to secure a waiver of IRS fines, it would not have solved the problem.

The Union's "no harm" argument amounts to condonation of the reporting of earnings on incorrect SSNs which would be both irresponsible and lawless.

Fifth, the Union's assertion that the discharges were "unnecessary" is wrong. It does not follow from the fact that IRC does not compel an employer to discharge an employee with an uncorrected SSN mismatch that the Employer had no reason to discharge the seven Grievants. Aside from the risk of potential IRS fines, the Employer had legitimate business reasons for discharging the Grievants. It is a condition of employment to have a valid SSN, and for Sodexo, reporting wages on correct SSNs is a legal duty. Because the Employer can, and does, require an employee to have a valid SSN as a condition of employment, terminating employees who fail to satisfy that condition of employment is necessary.

Sixth, the Union's position is that the voluntary use of the SSNVS and the resulting efforts to correct SSN mismatches were not legally required to obtain an IRS waiver of fines. The Union's assertion has no merit. This view ignores the broader issue of the Employer's legal duty to report earnings on correct SSNs, its obligation to its employees to ensure that they receive Social Security credit for their earnings, and, as a condition of employment, the employees' need to have valid SSNs. The Employer's use of the SSNVS to correct SSN mismatches had significance independent of whether the Employer had done so to obtain an IRS waiver of future fines.

Seventh, the Union claims that it was merely a "good idea" to have accurate SSNs which borders on the absurd. Having accurate SSNs is more than just a "good idea." It is a legal requirement for the Employer and a condition of employment for employees.

Contrary to the Union's insinuation, the Grievants who had SSN mismatches were not entitled to remain employed in perpetuity simply because the Employer hired them with flawed SSNs in 2003. The Employer properly discharged them in June 2009, nearly five years after having failed to correct the mismatches.

The Arbitrator should uphold the discharge and deny the grievance in its entirety. The fact that the Grievants have not corrected their SSN mismatches precludes their reinstatement. Without valid SSNs, they simply cannot work for Sodexo, Inc. To order their reinstatement would amount to ordering the Employer to violate its legal duty to report earnings on correct SSNs and would violate public policy. For that reason, no disciplinary penalty other than discharge is feasible.

The Grievants' length of services does not militate in favor of their reinstatement. When "there is sufficient evidence...to substantiate a termination, then seniority alone is insufficient to preserve that position." By failing to correct their SSN mismatches, the seven Grievants simply failed to protect their jobs.

The fact that they obtained their employment in 2003 with incorrect SSN tainted their seniority.

A reduction of these discharges would be inappropriate because the Employer did not act in an unfair, arbitrary, capricious, or discriminatory manner. To the contrary, the Employer acted appropriately and reasonably by complying with Policy AF-430-03's procedures and affording the Grievants repeated opportunities over a nearly five year period to correct their SSN mismatches.

POSITION OF THE UNION

Sodexo did not have just cause to discharge the Grievants. It is important to note that the Company unilaterally initiated the inquiries to the Social Security Administration to verify employee names and Social Security Numbers. The Company was not requesting these employees to correct alleged SSN discrepancies because of any inquiries received from SSA or any inquiry received from the Internal Revenue Service or any other agency. The Company is not required by any law, regulation, or the Collective Bargaining Agreement to investigate the accuracy of SSNs.

The fact that the SSNs for these employees did not match the data in SSA's records had not caused the Company any problems during the years the Grievants were employed. Furthermore, uncorrected mismatches could not have caused the Company any legal problems with SSA or IRS. Even if the Company had been affirmatively informed by SSA or IRS of mismatches, the Company was not legally obligated to discharge employees who failed to correct the problems. Both SSA and IRS set forth procedures for employers to follow when mismatches were uncorrected and these procedures do not require that employees with uncorrected discrepancies should be terminated. Indeed, both SSA and IRS emphasize that an employer may not terminate employees because of a no-match notification. The IRS has simple "safe harbor" procedures for employers to follow if they receive IRS notification of mismatches which will completely insulate the employer from liability when mismatches go uncorrected.

The Company-promulgated SSN no-match policy AF-430-03 is not binding on the Union or the employees since it was unilaterally promulgated and not even revealed to the Union until the time of these terminations. Pursuant to the Contract, this policy cannot be enforced against the employees since it was not given to the employees or posted as required by CBA. Article 6, Section 3; Article 12; Section 7. Further, it is inconsistent with the Contract insofar as it required discharge of employees who fail to correct SSN discrepancies.

The Company claims that it has the right to require employees to correct SSN discrepancies upon pain of termination. However, the continuation of these discrepancies poses no significant risk to the Company's legitimate interests. The Company was not put in any legal or financial jeopardy if it did not require correction of the discrepancies. The only parties potentially harmed by not resolving discrepancies are the employees themselves who risk not receiving credits toward future social security benefits. Once employees are informed of the discrepancies, it is up to each of them to decide whether to attempt to correct the situation. If, for whatever reason, employees decide to take no action, they cannot be fired for such decision.

There is no legal requirement for an Employer to check Social Security Numbers provided by employees and no requirement to discharge employees for uncorrected mismatches. Social Security Number Verification Service (SSNVS) is a service by the Social Security Administration to allow employers to verify names and Social Security Numbers of employees against SSA records. It is a service which employers may voluntarily elect to use. The service may be used “solely to ensure that the records of current or former employees are correct for the purpose of completing Internal Revenue Service (IRS) Form W-2 (Wage and Tax Statement).” Social Security Number Verification Service Handbook p. 4. If an employer runs names and SSNs through the SSNVS and names and SSNs do not match SSA records, SSA cautions:

- This response does not imply that you or your employee intentional provided incorrect information about the employee’s name or SSN.
- This response does not make any statement about your employee’s immigration status.
- This response is not a basis, in and of itself, to take any adverse action against the employee, such as laying off, suspending, firing or discriminating against the employee.
Id. at 5.

SSA gives explicit instructions as to what an employer should do when an SSN fails to verify. SSA instructs employers to follow these steps:

1. Check the employer’s records for typographical errors.
2. If the employment records match what was submitted, the employer should then ask the employee to check his/her Social Security Card and inform the employer if there is any difference between the card and the employer’s records.
3. If the employer’s records and employee’s Social Security Card match, the employer should ask the employee to check with the local SSA office to resolve the issue.
4. If the employee is unable to provide a valid SSN, the employer should document its efforts to obtain the correct information and retain the records for at least three years.

Id. at 22. Note that SSA does not advise employers to fire employees unable to provide a valid SSN.

On its website, under “Employer Filing Instructions & Information,” SSA posts “Restrictions on using SSNVS.” This statement strongly warns employers against using SSNVS to take punitive action against an employee whose SSN does not match, as follows:

Do not use SSNVS to take punitive action against an employee whose name and Social Security Number do not match Social Security’s records...A mismatch does not make any statement about an employee’s immigration status and is not a basis, in and of itself, for taking any adverse action against an employee. Doing so could subject you to anti-discrimination or labor law sanctions.

The Company argues that it did not terminate the Grievant’s solely because of receipt of mismatch information, but rather because the Grievants declined to provide corrected information. However, it is clear from the instructions in the SSNVS Handbook and from the restrictions posted on the SSA website that an employer using SSNVS cannot terminate an employee because a mismatch

exists and continues to exist after the employer goes through the employee notification procedure set forth in the Handbook.

One of the claims underlying the Company's SSA mismatch policy is that Sodexo may be liable for IRS fines for reporting wages on an incorrect Social Security Number. This assertion is repeated in the Employer's letters to the Grievants. This claim is false. An employer who receives an SSN penalty notice from the IRS and who then fails to take any steps to ask that the employee address the no-match can be fined. However, if the employer takes the simple steps under the IRS "safe harbor" regulations, it faces no liability.

The IRS sets out the requirements and procedures employers must follow in soliciting SSNs from employees in its publication *Reasonable Cause Regulations and Requirements for Missing and Incorrect Name/TINs*. The most important, and generally only, action an employer must take is to solicit an employee's SSN at the time the employee begins work and obtain a Form W-4 from the employee. The employer must then use the number provided on the W-4 on employees' Form W-2s. The employer never needs to do anything further unless, in a subsequent year, the employer receives another IRS notice that an employee's number is incorrect. Then, by December 31st of the subsequent year, the employer must make a second solicitation of the employee for the correct number.

If the employer receives additional IRS notices based on the missing or incorrect SSN of the employee after having made two annual solicitations, the employer is not required to make further solicitations. The employer's initial and two annual solicitations demonstrate that s/he has acted in a responsible manner before and after the failure, and will establish reasonable cause under the regulations.

Note: For purposes of establishing reasonable cause in connection with the penalty provisions, it is the solicitation of the employee's correct SSN that is important.

In the present case, the Company received absolutely no notice or inquiry from the IRS. Even if the Company had received IRS notices regarding the Grievants, its pre-termination actions would have completely immunized it from IRS sanctions. The Company requested and obtained social security numbers on W-4s when each of the Grievants was originally employed. When the employer discovered the mismatches in 2004, it requested that the employees provide corrected numbers, satisfying the first annual solicitation requirement. When the Company again received the same information in 2005, it again solicited corrected numbers from the employees, satisfying the requirement to make a second annual solicitation. In short, as of 2005, Sodexo had satisfied all of the IRS requirements for waiver of penalties. Nothing more needed to be done.

Finally, even if the Company had received IRS notices, the IRS publication itself states: "Employers should not use the receipt of an IRS notice as grounds for employee termination."

Sodexo cannot apply its Policy on SSN no matches, AF-430-03, to discipline these employees because it was never given to the employees, in direct violation of Article 6, Section 3, and Article 12, Section 7.

Even if Sodexo had complied with these provisions, the Policy itself recognizes that union contracts may prohibit the Company from terminating employees who fail to correct mismatches. The Policy states: “Exceptional circumstances may exist, such as language in a CBA for union employees, which would prevent the termination.” The disciplinary “just cause” provisions of Contract Art. 12 prohibit the discharge of the Grievants.

Sodexo never bargained with the Union over its unilateral decision to start enforcing the Policy in a manner which could result in termination. The NLRB has recently held that adoption and changes in manner of enforcement of Social Security no-match policies are mandatory subjects of bargaining over which an employer must bargain with the union before implementing. *Aramark Educational Services*, 359 NLRB No. 11 (2010). The ALJ decision, adopted by the NLRB, states:

Respondents have made a significant change in their policy regarding no match letters, and further, their total about face in their enforcement of the policy by itself requires notice and bargaining on request of the affected Union. A change from lax enforcement to more stringent enforcement must be bargained over.

Not only did Sodexo have the obligation to bargain with the Union over its Policy and its enforcement, but also that Sodexo could not impose this new condition of continued employment without the Union’s agreement. Without the Union’s consent, any new requirement for employees’ continued employment, not required by law, is a violation of the just cause provision. There was no legal reason and not significant business reason for the Company to insist that the Grievants correct the SSN discrepancies upon pain of termination.

The Company claims that the action it took in terminating the employees had nothing to do with any concern that the Grievants were undocumented. The Company is basing its entire position on the fact that it obtained no-match information, that it told the Grievants to correct the discrepancies, and that the Grievants declined to do so. As set forth above, there was absolutely no legal requirement under either SSA or IRS procedures for the Company to terminate the Grievants. Both SSA and IRS promulgated procedures instruct that the Company should not terminate employees under these circumstances. Of this case even the Company’s own internal and unpromulgated no-match policy recognizes that the Company may be prohibited from terminating employees under these circumstances where there is a union contract. The Company’s sudden conclusion in 2009 that it had an inherent right to insist that employees in this bargaining unit correct mismatches was simply wrong.

DISCUSSION AND OPINION

Review of a discharge for just cause case properly begins with a clear identification of the grounds upon which the employer relied in the making of the decision to terminate the Grievants’ employment. In the present matter, Sodexo states that the Grievants remain in violation of its Policy AF-430-03 which it claims to constitute a reasonable rule necessary for the Company to meet its legal duty to use correct SSNs to properly report employee earnings to the Federal Government.

This somewhat convoluted statement of the Company’s position can be reduced to its essential proof requirement by observing that if, in fact and in law, Sodexo has a legal duty to secure correct

SSNs from its employees in order to properly report their earnings to the IRS, it necessarily follows that its enforcement of Policy AF-430-03 constitutes an eminently reasonable rule – and one the Company would be justified by enforcing by discharging those who fail to comply with the Policy’s requirements.

The Union’s position can be summed up as arguing that while IRS may state that employers have a legal obligation to attempt to correct SSN mismatches, the law unequivocally states that they cannot take disciplinary action against employees who fail to comply with directives to do so. From this premise the Union contends that Company Policy AF-430-03 is merely an attempt to circumvent rather than comply with the law.

Sodexo argues that these considerations are separable – that the Company has not terminated these Grievants merely because they have failed to correct their mismatched SSNs but, rather, because they have burdened the Company with exposure to potential fines from the IRS for failure to report earnings that match employee SSNs, in addition to unknowable possibilities of adverse action by immigration authorities and, further, the actual administrative costs of repeated attempts to bring the Grievant into compliance with Policy AF-430-03.

Comment: The issue of what constitutes a reasonable rule in industrial and labor relations practice has been well settled and consistently applied by arbitrators. That settled concept advises that in order for a work rule to be considered reasonable, thereby within the authority of the employer to promulgate and enforce, it must be related to the safe and efficient operation of the business. The work rule under review, herein, fails to satisfy that definition and test of reasonableness.

Certainly, if the Grievants’ refusal to correct the SSN mismatches were to expose Sodexo to potential fines from IRS or adverse actions from INS the requirement that the Grievants correct their SSN mismatches would be eminently reasonable. Sodexo has not shown that it actually faces such adverse consequences. In support of its contention that the Company faces potential adverse actions from the IRS including fines for failure to have the SSN mismatches corrected, Sodexo cites 26 USCA §§ 6721(a)(1) and (2)(B) which provides for fines if an employer commits “any failure to include all of the information required to be shown on the return or the exclusion of incorrect information “including SSNs:”

...such person shall pay a penalty of \$50 for each return with respect to which such a failure occurs, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$250,000.

See also Treas. Reg. § 301.6721(a) (General Rule).

The flaw in the Company’s assertion that it potentially faces some future fines or other adverse action arises from the absence of any evidence that Federal authorities have ever taken such dire actions against any other employer for similar reporting of employee SSN mismatches. Unless and until Sodexo can show that the threat of such adverse impact is real, the claim that the Grievants’ non-compliance with management’s directives to correct their SSN mismatches remains entirely speculative.

What this finding means, of course, is that when and if the Company can show that it faces a significant and genuine threat of an IRS non-compliance fine, Sodexo has every right to defend against

being so victimized by the failure of others, despite its manifest efforts to comply with its reporting obligations to IRS. Such defense against a legitimate threat would cause Policy AF-430-03 to come within the ambit of a reasonable rule with its concomitant enforcement penalty of termination. The matter of whether or not such enforcement violated law would then fall to the courts or agency of competent jurisdiction.

I can confidently direct such action knowing that it is highly unlikely that any fine will ever be assessed against Sodexo by the IRS for not achieving correction of the Grievants' SSN mismatches. The dispositive fact remains that the Company fully met its legal reporting duty to the IRS by using the SSNVS to identify the SSN mismatches and then by persistent efforts short of the impermissible disciplinary action taken against the seven Grievants to secure their compliance with its Policy AF-430-03.

It must be noted in this regard that the SSA in the Fall 1999 issue of its official publication the Reporter includes the following advise in an article entitled "A Newsletter to Employers":

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.

Sodexo argues, however, that even the seeking of a waiver of IRS fines for continuing to file earnings reports on SSN mismatches constitutes a burden and, further, implies that such waiver may not be granted. This assertion lacks merit. The likelihood of IRS adverse action against Sodexo would only likely result from information the agency possesses that the Company has purposely provided mismatched numbers to seek some kind of fraudulent tax advantage. Nothing in the facts on record in this case suggests anything other than persistent efforts by Sodexo to meet the exact letters of the law – as management understands applicable tax law.

In view of these efforts, it simply defies reason that the IRS could or would pursue adverse action against Sodexo. Since the linchpin of the Company's argument in support of its "reasonable rule" position consists of the supposed threat of adverse IRS action for failure to correct the mismatches, once the idea of such threat vanishes it follows that the reasonable rule position crumbles.

Indeed, the composite argument that the terminations go beyond mere noncompliance by the Grievants with Sodexo policy to include collateral costs and burdens amounts to nothing more than a creative artifice. Sodexo, in its brief, states the obvious:

Before the expiration of the fourteen day period, Willenburg notified the customer, General Mills, of the Employer's intention to discharge the employees if they did not correct the SSN mismatches. General Mills supported that decision.

After the expiration of the fourteen day period, the Employer, in accordance with Policy AF-430-03, discharged the seven Grievants because of their failure to correct their SSN matches. Each termination notice stated as follows:

Employee was identified as having mismatched social security information.

On 2/27/09 the employee received a letter informing them the information needed to be corrected within 60 days.

On 5/14/09 the employee received an additional letter informing them that the mismatch information has not been corrected. In that letter it informed the employee that this information must be correct within 14 days or the employee would be terminated. We have now exceeded the 14 days and no action has been taken by the employee to correct.
JT #7

In the group meeting at which the discharges were announced, Mr. Willenburg asked if any of the employees could correct their mismatches. There was no response from any of the seven grievants. That silence confirmed that none of them either had corrected or would correct their SSN mismatches.

These straightforward statements of the grounds for discharge obviate any need to review the collateral grounds belatedly mentioned to buttress the Company's justification for the discharges – as such these “add ons” lack merit. None of the mentioned collateral costs or burdens approach the just cause level to support any significant level of discipline much less termination.

This review ought not close without comment on the dilemma these SSN mismatches pose for the Company. On the one hand it is required by law to file accurate employee earnings report to the IRS and on the other are denied the ultimate enforcement power of discharge to effect compliance by employees. As remarked by one of the arbitrators in this case, employers are “damned if they do and damned if they don't.”

There remains other complex aspects of this dilemma, however, largely lost in the tangle of the nation's immigration problem. While it may seem misguided for workers like these seven Grievants to refuse offers to help them straighten out their mismatches accompanied by reassurances that by doing so they face no jeopardy. The truth is that there may be abundant good reason in the minds of such workers, who often are a short step from abject poverty, to fear the power of government. This fear often takes on substance from their own experience of oppressive governments in their countries of origin.

Further, some of these kinds of workers, legally in the US, have nonetheless, not understood what it meant to get a valid Social Security Card when they joined the workforce. Having passed perhaps through a series of marginal jobs without a valid card, they fear that the legal consequences of being caught in using some fictitious SSN given to an employer along the line.

Regardless of the reason, the law on point protects them from discharge for not correcting their SSN mismatches and also protects employers who fully meet their legal obligation for the accuracy of

their employee earnings. That legal obligation according to the record in this case, is contained in essence within the four corners of the following IRC notice to employers:

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 those penalties unless you or the employer can show reasonable cause for not providing the correct information.

What You Should Do

Before you 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:

- 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.

Having fully met in deed and in spirit this lawful advice, Sodexo lacks just cause to discharge the Grievants.

DECISION

Based on the foregoing findings and conclusions, the grievance is hereby sustained.

- Accordingly, Sodexo is directed to promptly reinstate all seven named Grievants to their former positions.
- They shall be made whole for all backpay and benefits lost as a result of their discharge without cause.
- The Arbitrator retains jurisdiction in this matter for ninety (90) workdays from date of this Award issuance for the sole purpose of resolving any disputes over remedy.

March 23, 2010
Date

John J. Flagler, Arbitrator