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Re: Smith's Food & Drug Centers -and- UFCW Local 1564
Sylvia Sorrelhorse Termination / Gr. No. 21-00004

Greetings:

I take the liberty of enclosing my Opinion and Award in the above matter. I also submit my bill to be split equally between the parties.

I thank you for considering me for this assignment.

Very truly yours,

George T. Roumell, Jr.

GEORGE T. ROUMELL, JR.

GTR.Jr./bs
Enclosure

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr.

*In the Matter of the
Arbitration Between:*

SMITH'S FOOD & DRUG CENTERS, INC.
DEPARTMENT

Sylvia Sorrelhorse Termination
Gr. No. 21-00004

-and-

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1564

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

FOR SMITH'S FOOD & DRUG CENTERS:

FOR UFCW LOCAL 1564:

Glenn A. Beard, Attorney

James A. Montalbano, Attorney

Introduction

Smith's Food & Drug Centers, Inc. (Smith's Food or Company) operates food supermarkets throughout the state of New Mexico and adjoining western states. United Food and Commercial Workers Local 1564 represents the clerks employed by Smith's in a number of counties in New Mexico, including Store #448 located in Albuquerque, NM.

Sylvia Sorrelhorse, prior to January 7, 2021, had worked for the Company for 12 years, including the last three years at Store #448 where in December 2020 she was a Customer Service Manager. (Tr. 217-218).¹

On the evening of December 23, 2020 at around 7:15 p.m., Ms. Sorrelhorse, in the

¹ "Tr." is a reference to the transcript of the arbitration hearing.

absence of the store manager and assistant store manager, was serving as the closing manager at which time she became involved in an episode with two shoplifters resulting in her being maced by one of the shoplifters as well as two other employees being maced, resulting in Ms. Sorrelhorse and employee Rockei Eelicia de Guerra (RDG) being conveyed to a hospital for treatment. Following an investigation primarily by the Company's Regional Loss Prevention Manager, Phillip Gonzales, who interviewed some witnesses including Ms. Sorrelhorse and reviewed available video tapes as well as witness statements, Ms. Sorrelhorse was notified of her termination on January 7, 2021 for violating Smith's shoplifting policy based upon the December 23, 2020 episode.

A grievance was filed on behalf of Ms. Sorrelhorse challenging her termination as not being for just cause – the standard set forth in the parties' Collective Bargaining Agreement. *See*, Article 4.2.

Issue Presented

Did the Company have just cause to terminate Ms. Sorrelhorse? If not, what is the appropriate remedy?

The Shoplifting Policy

Jeanie Goodrich, for the last five years, has been the Company's District HR Leader. She has worked for the Company for 31 years. Ms. Goodrich identified Company Ex. 2, which is a copy of Smith's "Shoplifting – Authorization to Approach, Confront or Detain" policy which Ms. Sorrelhorse signed on May 8, 2020. Ms. Sorrelhorse previously had signed a similar document on March 8, 2016. According to Ms. Goodrich, the policy has been in effect in the Company "as long as I can remember". (Tr. 106-107). The policy, as set forth in Exhibit 2,

reads in part:

Policy

Shoplifting is the taking or damaging of merchandise and/or property from retailer, without payment (or full payment), with the intention to deprive the retailer of its use or benefit. The Company strongly encourages prevention and deterrence as a method to combat shoplifting.

- Responsibilities of employees: All employees play a part in combating shoplifting by being observant, providing exceptional customer service and reporting suspicious behavior.
- However, no employee is permitted to approach, confront or detain a suspected shoplifter, with the exception of loss prevention employees, store directors and those trained and designated in writing by the store director to do so.
- If you are not a loss prevention employee, store director or other employee authorized in writing by the store director, under no circumstances are you to approach, confront, or detain a suspected shoplifter whether inside or outside the store.
- No employee, including store director, loss prevention employee or other authorized employee may chase suspected shoplifters.
- No employees under the age of 18 may be trained to approach, confront, or detain shoplifters.

* * *

Consequences

Violations of this policy will lead to disciplinary action up to and including termination.

A reading of the policy clearly prohibits an employee in Ms. Sorrelhorse's position from approaching, confronting or detaining a suspected shoplifter and prohibits all employees from chasing suspected shoplifters.

As noted, Ms. Sorrelhorse signed the acknowledgment that she received the policy and in her testimony acknowledged that she was aware of the policy. (Tr. 220, 238-239, 242). Based

upon the testimony of Ms. Goodrich, a list produced by the Company, the Company has followed the policy of termination for violations of the shoplifting policy although the Union has at times grieved such terminations. (Tr. 110, 144-146). Ms. Goodrich made the decision to discharge Ms. Sorrelhorse. (Tr. 112-114).

Discussion

The starting point in analyzing the facts is to recognize that there were videos depicting what occurred involving Ms. Sorrelhorse and the two shoplifters as well as other employees.

According to the video evidence, at about 7:15 p.m. on December 23, 2020, Ms. Sorrelhorse was observing at the floral section and the deli and then headed toward the liquor section and entered that section. As she did, there were two females who turned out to be the suspected shoplifters – one dressed in red, the other in black. One of the ladies is seen grabbing two bottles off the shelf. Ms. Sorrelhorse is present when the suspected shoplifters are taking down some product. (Tr. 26-28).

Ms. Sorrelhorse is then seen leaving the liquor section and walking around the front end where she is seen speaking to Ashton Ritchie, a high school student who was working as a bagger. Mr. Ritchie gave a written statement to Steven Brown, a Company Asset Protection Specialist, reading in its entirety:

Sylvia asked me to go keep an eye on 2 women who were filling their arms with merchandise. I watched them for about 2 min before they started walking towards the door. Sylvia was right at the door and turned around and the ladies were right in front of her. They made contact and Loretta went out after them as well Sylvia got maced, and Rakeije at the door also got maced. The ladies fled and I called 911.

Mr. Ritchie is seen walking toward the liquor section and entering it after meeting with

Ms. Sorrelhorse and watching the two women. When the ladies leave the liquor section, he turned around watching them as they proceeded to the doors leading to the exit from the store. (Tr. 29-30).

Ms. Sorrelhorse denied that she told Ms. Ritchie to keep an eye on the women, but instead told him to do a store sweep.

Nevertheless, the facts as revealed in the videos suggest that Ms. Sorrelhorse had suspicions about the activities of the women and Mr. Ritchie responded after a conversation with Ms. Sorrelhorse following her visit to the liquor section by going to that section and observing the women. By any analysis of the record, it is clear that the women's activities did raise suspicions on the part of Ms. Sorrelhorse although, as the Company acknowledged, her suspicions and observations violated no Company policy at that point in time. But her actions as described are background to analyzing what next occurred.

There are outer exterior doors to the store, then a foyer and then two interior doors leading in and out of the store. Viewed from the videos, "entry 1" is the right (north) interior door and "entry 2" is the left (south) interior door. (Tr. 32-33). Customers usually come out the south door because the cash registers are on the south side of the building. (Tr. 32). Mr. Gonzales and Ms. Sorrelhorse have different views as to whether the north interior door is used exclusively as an entrance. Maintaining that there was no sign designating the north interior door as an entrance, Mr. Gonzales claimed that customers use the north door both as an entrance and exit whereas Ms. Sorrelhorse maintained that the north door was exclusively used as an entrance and that it was for this reason Ms. Sorrelhorse claims that when the two women approached the north interior door she was attempting to redirect them to the south interior door exit.

After Ms. Sorrelhorse is seen speaking with Mr. Ritchie, she then proceeds to the foyer where both she and RDG agree that Ms. Sorrelhorse advised RDG, who was near the north exterior door, as part of her duties in monitoring the number of persons who could come into the store because of Covid-19 restrictions, and advised RDG that she was going to relieve her for a break at 7:30 p.m. After speaking with RDG, Ms. Sorrelhorse turned around and saw the two women approaching, either walking fast or running toward, the north interior door.

The video shows Ms. Sorrelhorse blocking the north interior door that the shoplifters were attempting to go through; that a struggle ensued between Ms. Sorrelhorse and the lady in black holding a bottle of Jack Daniels; that the lady in black dropped some items on the floor and picked them up. Ms. Sorrelhorse ended up in possession of the bottle of Jack Daniels. At this point, the lady in red maced Ms. Sorrelhorse. (Tr. 33-35). Loretta Pacheco, a cashier, who had come running in to the foyer directing RDG to close the outer door, was maced and RDG ended up breathing the fumes from the mace.

On direct examination, Ms. Sorrelhorse stated she did not want to “fall back” so she grabbed the bottle “just for security or for me not to fall back”. (Tr. 226-227). She also testified she grabbed the bottle because she was “spooked” and “scared” and her reflexes kicked in. (Tr. 234, 249). On cross-examination, Ms. Sorrelhorse acknowledged that she looked directly at the women as they approached her and when she saw the bottle she suspected the women were shoplifters. (Tr. 245-246). On cross-examination, Ms. Sorrelhorse further testified:

Q When you saw the bottle, you suspected they were shoplifters?

A Yes, but at the same time they were pushing me back.

Q Okay. Let's - in your statement, I think that's sort of what

you said today in that respect, and your statement says toward the bottom of the page – the first page: “I turned around to my left and seen two females walking toward me real fast,” right?

A Yes.

Q You’re telling us the same thing today?

A Yes.

Q Your testimony is you didn’t expect them to be heading toward the exit at that time?

A The entrance, no.

(Playing video at this time.)

Q Okay. You’re seeing the video, right, ma’am?

A Yes.

Q Okay. Now, we’re back to seeing you at the inner north door, right?

A Yes. The entrance door.

Q All right. Here are the two ladies approaching you, right?

A Yes.

Q Okay. Now, here, you’re looking directly at them, correct?

A Yes.

Q Okay. So this is – this is what you – this is what you described as the ladies running up on you. Do I have that right?

A Yes. And I directed them to the exit door, as you see my hand going out.

Q Okay. And this is – and this is what you described as them running up on you? “Yes”?

A Yes.

Q And your testimony is what's happening here is you just want to get out of the way. That's your testimony, right?

A No.

Q It's not?

A No, directing them to the exit door.

Q Because, actually, you get right into their way, don't you?

A Yes, because I told them there was an exit. That's the entrance. I was directing them to the exit.

Q Okay. And you – we can see right here, you block their path, right?

A I walked up in front of them just to tell them that was the entrance, as you can see my hand. And they told me to - or I told them to exit the other door.

Q Okay. I'm not asking about what you told them or what your arm is doing. I'm asking you about where you put your body.

A Yes, I did.

Q You would agree – yes, you did what?

A I stepped in front of them.

Q Okay. And you would agree if you had stayed where you, they could have walked right by you?

A Yes.

Q And if you had stayed where you were, you wouldn't have been in danger of falling? Correct?

A Yes and no, because I don't know what would have happened still.

Q Okay. So your testimony, then, is that after you moved into their path, you grabbed the bottle that the woman in the black jacket was holding, correct?

A Yes.

Q And that you grabbed on to the bottle to keep yourself from falling down?

A Yes.

Q And so when we – and then, when we see you here, struggling with the bottle, that's you trying to keep from falling down; that's your testimony?

A Yes.

Q And so then you – so when you pulled the bottle away from the woman, were you trying to keep from falling down?

A No.

Q so did you – what were you trying to do then?

A Walk away.

Q You were trying to get the bottle back, right?

A Yes. And because I was maced.

Q And so – and your testimony, ma'am, is that all of this was an instinct and a reflex?

A Yes.

Q So it was your instinct and your reflex to grab the bottle and tug on it?

A Yes.

Q With someone who you felt was a customer?

A Yes.

Q That was your – and what we saw you do there, grabbing the bottle and pulling it away from the customer, that was – that was what you did because you were spooked and scared is your testimony?

A Yes.

Q You testified that you did not detain the shoplifter. But would you agree that when you – when you struggled with that woman there, it kept her from proceeding out the door? “Yes”?

A Yes.

Q Okay. Let’s talk about the statement, Exhibit 4, please. You’ve got the hard copy, right?

MR. MONTALBANO: Yes.

Q (BY MR. BEARD) I’m sorry?

A Yes.

Q Okay. And just to be clear, you, personally, wrote this statement? I know you weren’t sure, but you personally wrote this statement sometime after December 23rd?

A Yes.

Q And it was sometime before your termination?

A Yes.

Q Okay.

A I was told to date it for December 23d.

Q All right. And that was the date of the incident, correct?

A Yes.

Q Now, if we go to the second page at the top, you say that “The older lady carrying a fifth of Jack Daniels pushed me with the bottle and it so happened it slipped out of her hand

because she had other things in her hand and arms. I just happened to quickly get the Jack Daniels from falling to the floor.” That’s what you wrote then, correct?

A Yes.

Q So as you described it then, you were trying to keep the Jack Daniels from falling to the floor, correct?

A Yes.

Q And what you said today is that you were trying to keep yourself from falling to the floor, right?

A Yes, that, too.

Q Oh, so, now it’s both –

A But I didn’t – but I didn’t – I didn’t write it in this.

Q So the testimony today is you were trying to catch the bottle and keep yourself from falling?

A Yes.

Q Do you agree there’s no mention from keeping yourself from falling in the statement?

A No, I didn’t.
(Tr. 245-251).

In the written statement she gave the Company prior to her discharge, Ms. Sorrelhorse wrote that she was trying to keep the bottle of Jack Daniels from falling, not that she was trying to keep herself from falling. (Tr. 250). Her written statement also contained the statement that she “had no intention of these two ladies walking out”. (Tr. 251). Though Ms. Sorrelhorse testified that she was trying to prevent the shoplifter from exiting the entrance (north) interior door, there is no such claim in her written statement. (Tr. 231).

In explaining what was there to be seen on the video concerning Ms. Sorrelhorse’s claim

that she was not blocking the door, Mr. Gonzales testified “the video closely shows to me that Sylvia was standing at the door when the two shoplifters came toward the door. She then moved to her right to block the door so that they cannot leave.” (Tr. 48).

The women were able to leave the store. As noted, Ms. Sorrelhorse and RDG ended up being taken to a hospital for treatment due to the macing. Loretta Pacheco, who was also maced, did not seek hospital treatment.

Based upon the facts as just analyzed, Sylvia Sorrelhorse violated Smith’s shoplifting policy because, from any perspective as revealed in the videos and reviewing the testimony and statements, she was blocking/detaining the shoplifters and confronting them. Her grabbing of the liquor bottle confirms this. Her explanations concerning the liquor bottle are contradictory.

Ms. Sorrelhorse’s denial testimony is against a background of video evidence showing her in the liquor section observing the shoplifters taking merchandise, then going to Mr. Ritchie and speaking to him, after which he goes to the liquor section where he is observed watching the shoplifters. Her written statement makes no mention of directing the shoplifters to the south interior door or what she referred to as the exit.

The Company, as explained by Ms. Goodrich, has a consistent policy of discharging for violating the shoplifter policy which she has followed in 10 cases. There were two situations occurring after Ms. Sorrelhorse’s discharge where the employees involved were not discharged. In April 2021, at Store 448, Eli Herrera helped a customer hold down a purse snatcher who had a gun. Because there was no company policy prohibiting interactions with purse snatchers that would have supported termination, Mr. Herrera was not terminated but did receive a written warning. (Tr. 74, 137).

In either February or March 2021, Victoria Noche at Store 427 violated the shoplifting policy but Regional management was not notified of the incident until two months later in May 2021. Because there was not timely notice which, in the view of Ms. Goodrich and Elbert Cordova, Division Associate Relations Manager, any forthcoming discipline would be untimely and as such contrary to the just cause standard. (Tr. 118-119, 146-147). Though the Union argued that there was no time limit in the CBA supporting such a position, there is arbitral authority that would suggest that untimely discipline violates the just cause standard. As matters turned out, Ms. Noche was given a documented warning and the Store Director was issued a form of a warning.

Based on the above explanations, neither the Herrera nor the Noche situations represent deviation from the Company's enforcement by termination of its shoplifter policy if proven by the facts and absent any viable mitigating factor.

In Ms. Sorrelhorse's case, the facts have been established as discussed above. The question is whether the actions of Loretta Pachero in this situation and the Company's reaction to her actions represented a mitigating factor in determining whether there was just cause to discharge Ms. Sorrelhorse.

Mr. Gonzales begins his January 3, 2021 investigative report with the sentence: "On December 23, 2020, at approximately 7:15 p.m. at Smith's Store #448, there was a physical altercation between two Associates, Loretta Pachero and CMS Sorrelhorse and two unknown female subjects attempting to shoplift liquor."

This statement suggests that Ms. Pachero may also have been violating the Company's shoplifter policy if she was involved in the altercation with the two shoplifters. There is also the

written statement of Mr. Ritchie wherein he wrote referring to the two suspects: "Loretta went out after them." However, Mr. Ritchie, a high school student was never interviewed to determine his meaning of this statement.

RDG testified that after speaking with Ms. Sorrelhorse concerning her relief, she was standing in the foyer near the north exterior door when Loretta Pachero came running up to her yelling "close the fucking door". RDG complied and closed the door. (Tr. 171, 198). After RDG closed and locked the north exterior door, she testified that she saw Loretta Pachero stooped down and touch the shoe of what she believed was that of one of the suspects which was stuck in the track of the automatic door, at which time Ms. Pachero was maced and the fumes reached RDG. (Tr. 207-208). RDG gave a written statement to the Company which in part read:

I locked the door then I stretched – then I started to approach Loretta about 3 feet from her when I saw a woman with a pink hoody three-quarters out of the exit door, stop – stoop to position with – stopped – in a stopped position with a foot on the track of the automatic door which was trying to close and open. Loretta got sprayed and the draft of the air carried over to as which covered my person, affected my clothes, inhaled air, went into my mouth, lungs and throat. I was affected by the draft of the air room exit site.

RDG maintained that Ms. Pachero was chasing the perpetrators and that "this was way before the mace". (Tr. 177). Ms. Pachero did not testify, but did provide the Company with the following statement:

To Whom it may concern:
On Wed Dec. 23 about 7'ish I turned around, I saw some commotion in the lobby. I noticed Sylvia was getting mazed [sic]. When I saw her getting mazed [sic] I was concerned for customers and told Rocki to close the door (entrance door). I got mazed [sic], but not as much as Sylvia & Rocki. I rinsed off and went back to work.

RDG's testimony as well as her written statement present a confusing record when

compared with the written statement of Ms. Pachero and the videos. RDG seems to have the macing occurring after she was told to lock the door. Ms. Pachero never told RDG the reason for closing the exterior door, but claims in her statement it was for the purpose of protecting the customers from the mace which could have been a reference to the macing of Ms. Sorrelhorse. Nevertheless, the record is far from clear on this point.

Then Mr. Gonzales, after reviewing the frames of the videos one by one, concluded that as Ms. Pachero was proceeding to go into the store after being maced, accidentally bumped the shoulder of one suspect who was going in the opposite direction seeking to leave the store. (Tr. 39-44). Thus, Mr. Gonzales determined that there was no physical altercation between Ms. Pachero and the shoplifters, distinguishing her situation from that of Ms. Sorrelhorse as to whom he concluded there was a physical altercation. (Tr. 43-44).

Yet, Mr. Gonzales acknowledged that RDG saw what happened involving Ms. Pachero and that the one suspect was trying to walk out the south side exterior door. (Tr. 73, 79). Though on cross-examination it was noted that RDG in her statement did not reference a touching or the chasing of the perpetrator, RDG in her written statement did reference a woman with a pink hoody with her foot in the track of the door which lends credence to RDG's testimony that Ms. Pachero was involved in some chasing and possible detaining contrary to the shoplifter policy. In the opinion of this Arbitrator, this analysis is buttressed by the fact that Ms. Pachero was maced in her face which seemingly would not have occurred if Ms. Pachero was not engaged in some contact with the suspect at the time of the macing.

Mr. Gonzales did note that the video cameras did not capture the area where Ms. Pachero claimed the foot incident occurred in a two second time period and that he was familiar with the

area and concluded that such an event could not occur as claimed by Ms. Pachero. This was a fast moving situation suggesting that her description of the events could have occurred as claimed and, despite Mr. Gonzales' claim as to the area, there is the fact that Ms. Pachero was maced in her face at the time of the claimed contact with at least the shoe.

There is also the proposition that Mr. Ritchie in his statement wrote that "Loretta went out after them". Mr. Gonzales suggested: "To me, that's not necessarily saying she went out chasing them. He left – she left the store after they did." This is an assumption on the part of Mr. Gonzales and without interviewing Mr. Ritchie, who seemingly would be available during the Christmas holidays as an employee of the store, the Company has no way of knowing what Mr. Ritchie intended to convey by his statement which could be interpreted that Ms. Pachero was engaged in a chase.

The bottom line is that there were two employees at Store 448 on December 23, 2020 who engaged in violating the Company's shoplifter policy, namely, Ms. Sorrelhorse and Ms. Pachero, one gets discharged, the other receives a five day suspension. There is no question, to repeat, absent mitigating factors, that the Company makes a strong case supporting termination for violating the shoplifter policy, given proof of consistent application. Here, there was the mitigating factor of disparate treatment between two employees involved in the same policy violation.

There could be some distinction supporting a difference in treatment in that Ms. Pachero has been employed by the Company for 35 years as compared to Ms. Sorrelhorse's 12 years of employment. Likewise, an argument can be made that Ms. Sorrelhorse's confrontation with the suspects was more objectionable. Yet, such a wide discrepancy in the penalty in this situation

involving two employees creates a disparate treatment contrary to the reasonableness concept behind the just cause standard. For this reason, Ms. Sorrelhorse is entitled to reinstatement to the position and hours she had at Store 448 prior to her discharge with discipline to correct her behavior in regard to the shoplifter policy. However, Ms. Sorrelhorse, because, based on this Arbitrator's analysis of her testimony that she was not being truthful as to her statements concerning her appearance and observation at the liquor section, her directions to Mr. Ritchie and her explanations concerning the Jack Daniels, she will not be awarded with any back pay or benefits after some discipline as untruthfulness cannot support any monetary award, but will be reinstated as set forth above. The Award that follows is based on the above analysis.

A W A R D

The grievance of Sylvia Sorrelhorse is granted in that she shall be reinstated to the position of a Customer Service Manager at Store 448 with the hours she had prior to her discharge but her reinstatement shall be without any back pay or benefits, but she shall be granted seniority credit for the time she was off. Her time off shall be considered a disciplinary suspension for violating the Company's shoplifter policy.

George T. Roumell, Jr.
GEORGE T. ROUMELL, JR.
Arbitrator

May 10, 2022