

**BEFORE  
PATRICK HALTER  
ARBITRATOR**

IN THE MATTER OF ARBITRATION )  
 )  
 between )  
 )  
 Local 2505, American Federation of )  
 Government Employees, AFL-CIO )  
 )  
 and )  
 )  
 Social Security Administration, )  
 Area V, District Office, )  
 McAlester, Oklahoma. )

Case No. DF-2005-R-0055  
Contract Interpretation

For AFGE:

Ralph C. de Juliis  
Executive Vice President  
Local 2505  
4750 South Garnett Road  
Tulsa, OK 74146  
918-641-2400  
Ralph.Dejuliis@ssa.gov

For SSA:

Mary F. Lin, Esq.  
Region VI  
Office of General Counsel  
1301 Young Street, Suite 430  
Dallas, TX 75202-5433  
214-767-6154  
Mary.Lin@ssa.gov

**Award Summary**

The union-management grievance is properly before the arbitrator. The grievant was terminated for exercising a statutory right to engage in protected activity; the Agency violated Articles 1, 2, 3 and 30. Grievant is reinstated with a make whole remedy. All other alleged violations are denied and dismissed.

*Patrick Halter 10.20.06*

\_\_\_\_\_  
Patrick Halter

### **Background**

On October 26, 2005, and May 3 and 4, 2006, a hearing was conducted in the referenced case in McAlester, Oklahoma. The undersigned was appointed by the parties to serve as arbitrator pursuant to the terms and conditions in the 2000 National Agreement.

Representing Local 2505, American Federation of Government Employees (AFGE, Local or Union), was Ralph C. de Juliis, Executive Vice President, Local 2505; he was assisted by Carol A. Lewis, Claims Representative, McAlester Office. Representing the Social Security Administration, Area V, District Office (SSA or Agency) was Mary F. Lin, Esq.; she was assisted by Helene Jones, Labor and Employee Relations Specialist, Regional Office, Dallas, Texas.

Advocates presented various motions in addition to opening statements; they called witnesses for testimony that was subjected to cross-examination, redirect, and recross; and they submitted documentary evidence. The record in this proceeding closed on September 6, 2006, with the arbitrator's receipt of the parties' timely filed post-hearing briefs.

The parties agreed to an extension of time beyond the initial 30 days after the record closed for the arbitrator to render this award.

### **Issues**

The parties did not stipulate to the issues for arbitration. When the parties do not agree upon the issues the "arbitrator shall determine the issue or issues to be heard" (Article 25, Section 1).

The issues are:

Is the grievance filed and processed in accordance with Article 24?

If the grievance is filed appropriately under Article 24, is termination of a probationary employee subject to arbitration under the National Agreement?

If the termination is subject to arbitration, did the Agency comply with Articles 1, 2, 3, 16, 21, 22, 24, 30, and 33?

If the Agency did not comply with the National Agreement, what is the remedy?

## **Relevant National Agreement and Statutory Provisions**

### 2000 National Agreement

#### Recognition and Coverage

- Article 1: Governing Laws and Regulations
- Article 2: Union Rights and Responsibilities
- Article 3: Employee Rights
- Article 16: Training and Career Development
- Article 21: Performance
- Article 22: Within-Grade Increases
- Article 24: Grievance Procedure
- Article 30: Official Time
- Article 33: Temporary, Probationary, Part-Time Permanent and Seasonal Employees

### Statutes

- 5 U.S.C. 71
- 5 U.S.C. 2301, 2302

## **Findings**

On **June 27, 2004**, grievant Melanie D. Dinwiddie entered on duty as a Title II Social Insurance Specialist, Claims Representative, GS-0105-07, at the SSA's office in McAlester, Oklahoma. She was hired from the Outstanding Scholar Program and appointed as a career-conditional employee. Grievant's appointment included a one year probationary period that commenced with her entry-on-duty date. [Jt. Exh. 5]

Upon entering on duty at the McAlester office, grievant participated in new employee orientation and completed a 4-week core training course by interactive video designed for new hires with no prior exposure to social security. Grievant also processed some applications for social security cards and medical redeterminations.

From **August 2004 through early October 2004**, grievant matriculated through a 9-week training course in Dallas covering a variety of Title II claims, issues, and processes. Part of that extended training in Dallas included the core training course she had completed by interactive video in McAlester. During her training in Dallas grievant received the award for "most polite."

On **October 8, 2004**, grievant returned to McAlester whereupon she was assigned a mentor - - Kathy B. Marshall, Assistant District Manager (ADM), and grievant's first line supervisor. In her role as mentor, the ADM reviewed grievant's case work, answered questions, provided "write backs" on processed claims, rendered interpretative guidance, referenced policies and manuals applicable to claims, and provided an adjudicatory checklist for grievant's use in double-checking that appropriate documentation and

information had been obtained to justify payment of a claim. When ADM Marshall was not available grievant could seek assistance, as needed, from other employees.

In **January 2005** ADM Marshall was assigned duties related to Medicare Part D; she did not have time available to continue in her role as mentor to the grievant although she continued to serve as grievant's first line supervisor. Rhonda Hull was designated as grievant's mentor. Hull arrived at the McAlester office in late October or early November 2004 from the SSA's office in Pasadena, Texas, where she had been a full-time mentor.

At the time of this switch in mentor, grievant had been processing claims for about three months (October through December 2004). As of January 2005 all of grievant's caseload - - which was approximately 80 percent of the caseload carried by experienced claims representatives in the office - - was subject to 100 percent review by ADM Marshall.

When claims representative Skylar Davison was on maternity leave from **February 3, 2005** through the end of April 2005, her caseload was divided among grievant, grievant's mentor (Hull), and Janet Sharp, claims representative and alternate union representative in the McAlester office. This brought grievant's caseload to approximately 85 percent of the caseload carried by other claims representatives.

Mentor Hull issued write backs to grievant on practically all cases, often using red letters and exclamation points. The write backs were technical and displayed Hull's preference for a certain style and format in documenting a case. In grievant's view, Hull was not as readily available for face-to-face mentoring as grievant preferred and grievant was concerned about all the write backs. In **early March 2005** grievant asked ADM Marshall to check with Hull about grievant's progress. Marshall reported to grievant that Hull said she [grievant] was "on track."

On **March 15, 2005**, grievant received an informal assessment of her performance from ADM Marshall. This assessment was part of the observation and evaluation of grievant's work during the probationary year. During this assessment the ADM did not inform grievant that she was in jeopardy of being terminated for unsatisfactory performance but she did refer grievant to the adjudicatory checklist as a means to work independently. Marshall noted to grievant that the time for her within-grade increase (WIGI) was approaching.

On **April 11, 2005**, Sue L. Fereday, District Manager (DM), met with grievant to discuss the expectation that a probationary employee show progress in processing claims and to inform grievant that her work did not support granting a WIGI. In response to DM Fereday's inquiry, grievant stated that (1) training on documenting would be helpful since most of the write backs from Hull focused on documenting and (2) she needed more time with her mentor. There was no discussion that grievant's employment was in jeopardy.

**Early morning on April 12** grievant went to DM Fereday and stated that a plan or structure showing Fereday's expectations would be helpful. Fereday informed grievant that ADM Marshall and Rhonda Hull would develop a plan or guidelines. Later that day ADM Marshall met with grievant to informally discuss the guidelines for improving her accuracy rate on basic claims - - retirement, spousal, lump sum payments, disability. Present during this discussion was grievant's mentor (Hull). [Un. Exh. 3]

The guidelines stated that grievant's level of accuracy in processing these basic claims should be 97 to 99 percent. Processing for other claims also needed to improve although no percentage rate was issued to grievant. At this time (April 12) grievant's accuracy was about 40 percent on all cases. The duration for the guidelines was three weeks - - until May 3.

After this session with Marshall and Hull, grievant returned to Fereday who repeated to grievant that her work did not support a WIGI and the guidelines had no bearing on grievant's probationary period. After this exchange with Fereday, grievant returned to ADM Marshall who indicated that the guidelines were designed to elevate grievant's work to the next higher grade level and reiterated Fereday's statement that the guidelines did not affect grievant's probationary period.

After these discussions with DM Fereday and ADM Marshall, grievant met with Carol Lewis, claims representative and union representative in the McAlester office. Lewis advised grievant to contact the Union and to make a copy of her SF-7B file whereupon grievant went to Fereday and requested her file. She glanced through it since Fereday would not allow grievant to remove the file from the office.

Upon leaving Fereday's office grievant returned to Lewis and told her what had occurred. Lewis advised grievant that she has right to make a copy of her SF-7B file. Grievant returned to Fereday's office and informed the DM that she [grievant] had been advised by the Union that she could make a copy of her SF-7B file and she needed union representation.

Grievant returned to her desk after copying her file whereupon Fereday arrived to inform grievant that she [Fereday] had removed her personal notes scribed about the grievant prior to grievant's employment with the Agency. Fereday shredded these personal notes because they did not belong in grievant's SF-7B file.

**Shortly before noon on April 14** grievant notified DM Fereday and ADM Marshall by e-mail that "I am requesting union representation at this time." After receipt of that e-mail, DM Fereday met with grievant and Janet Sharp, the alternate union representative. Fereday told grievant she was disappointed that grievant was threatened by the guidelines and did not perceive them as making her [grievant] the best claims representative that she could be.

After this session, grievant's union representative (Ralph de Juliis) informed DM Fereday and ADM Marshall by e-mail at 2:39 p.m. that he was requesting travel and per diem as the grievant's representative. At 3:20 p.m. de Juliis informed Fereday by e-mail that he wanted to meet with the grievant on April 18 and was requesting a private room.

On **April 15 at approximately 8:00 a.m.** DM Fereday asked Carol Lewis if she could intervene such that the grievant's designated representative would not come to McAlester. Shortly later that morning Fereday asked Lewis to come to the DM's office to discuss the guidelines; Lewis took Janet Sharp to this meeting.

After reading the guidelines Sharp stated that if grievant had one error among ten basic claims she would fall short of the 97 to 99 percent accuracy rate. DM Fereday indicated she was confident that grievant would attain that rate on the targeted cases during the 3-week period. In response to Lewis' question what would happen to grievant if she did not improve during the 3-week period, DM Fereday indicated that she could stretch the period to two or three weeks before grievant's anniversary date to ensure she met the goal. Fereday indicated that if the Union became involved then she would have to review all of grievant's past work and have a "work drop" from the regional office.

Fereday asked Lewis to check with grievant whether she wanted to continue with union representation because they (Lewis, Sharp, Fereday) could handle this matter. At **9:37 a.m. on April 15**, Lewis informed Fereday by e-mail that grievant was continuing with union representation. Fereday had no further discussions with Lewis, Sharp or grievant after the 15<sup>th</sup>.

On **April 21** DM Fereday sent an e-mail to Helene Jones, Labor and Employee Relations Specialist, Regional Office, with a copy of the guidelines. Fereday stated that "[m]y concern is that we may be setting ourselves up for a ULP if we don't honor the 3 week plan. If we are certain we don't have to honor the plan, I'd rather not, but sure don't want to jeopardize our case for termination." [Un. Exh. 14]

On **May 3** (the last day of the 3-week period) grievant asked ADM Marshall how she [grievant] was progressing. Janet Sharp was present. Marshall stated that she had not had time to review grievant's work so she could not respond to her question. During this 3-week period, write backs on grievant's cases were recorded on the DWO3 screen; these were reviewed by Marshall at some point after grievant inquired about her progress on May 3 but before grievant's receipt of the termination letter on May 5.

In this regard, **late in the afternoon on May 5** ADM Marshall called grievant into Marshall's office for what grievant assumed would be a discussion of her progress. Marshall handed grievant a letter of termination for unsatisfactory performance. [Jt. Exh. 4] The effective date for the termination was May 19. [Jt. Exh. 6]

On **May 19, 2005**, the Union filed a union-management grievance asserting that on April 12 and April 14, 2005, the Agency violated Article 21, Sections 6A. and 6F. and “since the above dates, SSA has committed additional on-going violations of the National Agreement (including but not limited to)” Articles 1, 3, 16, ...“etc.” The Union waived its right under Article 24 “to meet and/or discuss this grievance.” [Jt. Exh. 2]

On **June 6, 2005**, the Union invoked arbitration. AFGE stated to the Agency that Article 24 requires a written decision to the union-management grievance within ten (10) work days of the May 19 waiver of its right to make an oral presentation. Ten days past May 19 was June 3. “Accordingly, this matter is ripe for invocation of arbitration[.]” [Jt. Exh. 3]

On **September 8, 2005**, SSA issued its written decision: (1) this is an employee grievance because it concerns an individual employee; (2) this employee grievance is untimely because it was not filed within fifteen workdays of the action or date the employee became aware of the action; (3) this employee grievance is not grievable as a union-management grievance because the separation of a probationary employee is not an arbitrable matter; (4) notwithstanding the non-arbitrable nature of the employee grievance the probationary grievant was not entitled to contractual rights enumerated in Article 21 at Sections 6, 7 and 8; and (5) the Agency complied with Articles 1, 3, 16 and 21 of the National Agreement.

#### **Motions and Grievance: Process and Substance**

Prior to the first day of hearing (October 26, 2005) the Union had indicated to the Agency that it would submit a motion to sanction the Agency and strike its defenses. A copy of that motion was served on the Agency on October 26. After argument and debate between the parties about the Union’s motion, the Agency submitted a motion to dismiss which was followed by further argument and debate.

On May 3, 2006, the hearing reconvened after a 6-month recess. The Agency presented a supplemental motion to dismiss in response to the Union’s opening statement of October 26 wherein AFGE alleged a violation of merit system principles and asserted that the Agency committed prohibited personnel practices and an unfair labor practice. The parties debated this supplemental motion. The arguments overlapped with the arguments and debate that occurred on October 26.

Given the nature of the issue in the grievance, the motions also address some aspects of the merits of the grievance. Each motion and the response thereto are summarized below.

### **Summary of the Union's Position**

On May 19, 2005, the Union timely filed a union-management grievance (Article 25, Section 10) citing numerous ongoing violations of the National Agreement. These violations resulted in grievant's termination which was reprisal for grievant's protected activity in seeking union representation.

#### Motion to Sanction Agency and Strike Agency Defenses

The Agency's failure to provide a written answer to the grievance compromised the Union's ability to address the merits of the grievance and precluded the Union from making an informed decision whether to proceed to arbitration.

For example, on June 9, 2005, the Union engaged the Agency in an attempt to frame the issues but the Agency did not respond until July 7 that it (1) would not agree to an issue and (2) had not designated its representative.

The Agency issued a written answer to the grievance on September 8 which was several months after the May 19 waiver and after the Union invoked arbitration (June 6). Under Article 24, Section 10, a written decision was due "within ten (10) working days of the meeting or of the date of waiver." The Agency answer to the grievance claimed that the matter was not a union-management grievance but an "untimely" employee grievance (Article 25, Section 9) since relief was requested for only one employee. [Jt. Exh. 2]

Since the Agency's September 8 response to the grievance is not timely, it should be barred from raising claims of grievability or arbitrability because Article 24, Section 6, states that grievability or arbitrability is to be raised prior to the time limit for the written answer in the final step of the grievance procedure.

On September 13 the Union inquired whether the Agency would raise grievability or arbitrability questions; the Agency responded that it would get back with the Union. During a teleconference on October 17, 2005, the Agency informed the Union that it would raise grievability or arbitrability. This was 35 days after the Union's initial inquiry whether arbitrability issues would be presented. The Agency should be barred from presenting testimony and/or evidence on this matter.

Aside from belatedly raising arbitrability during the teleconference, the Agency refused to identify its witnesses which precluded the Union from anticipating Agency testimony and preparing for cross-examination. The National Agreement does not require the disclosure of the witness list but the United States Government is held to this disclosure as a due process requirement.<sup>1</sup>

In rebuttal to the Agency's oral response on October 26 that the Union prematurely invoked arbitration because Section 10 in Article 24 requires the Union to wait until it receives a written decision, AFGE notes that SSA's written answer did not assert this matter so this is an untimely defense. Moreover, the Agency's interpretation of

<sup>1</sup>*Weatherford v. Bursey*, 429 U.S. 545 (1977) citing *Wardius v. Oregon*, 412 U.S. 470 (1973).

Article 24 frustrates the grievance process because SSA could refrain from issuing a written decision and thereby preclude the Union from invoking arbitration.

The Union's right to invoke arbitration "is not contingent upon receiving the Agency's response" to the grievance because Section 12 in Article 24 states that the Agency's failure "to meet any of the time requirements of this procedure will permit the grievance to advance to the next step." [Tr. 17-19]

The Agency should not benefit from its failure to issue a written decision to the grievance or from its failure to (1) act within time frames in the National Agreement, (2) discuss the issues and identify witnesses, and (3) appoint a representative. Had the Union failed to appoint its representative in a timely manner, AFGE would lose.<sup>2</sup> SSA's failure to exercise due diligence in these matters, as reflected by the papertrail of e-mails, shows that sanctions are warranted in the interest of justice.<sup>3</sup>

In the interests of due process, fairness, equity, and to preclude one party from deliberately ignoring the written procedural requirements of the grievance and arbitration process, the appropriate sanction is to strike all Agency defenses except its argument and cross-examination of Union witnesses.

Union's Response to Agency's Motion to Dismiss and Supplemental Motion to Dismiss

At the hearing the Union replied that the motion to dismiss is designed to bifurcate the issues and avoid a hearing on the merits. Article 24 does not authorize the arbitrator to restrict the hearing to arbitrability claims unless the parties agree. The Union did not agree. [Tr. 26]

SSA's argument that the Union can not file a union-management grievance for a matter that involves only one employee is untimely since the Agency did not raise it within 10 work days after the Union waived its right to make an oral presentation. The Union can file a union-management grievance because Article 24 defines grievance as "any complaint...by the Union concerning any matter relating to the employment of any employee[.]" Even the Agency's expert witness acknowledged that the Union could file a grievance over a matter that involved one employee. [Tr. 437]

The Agency's arbitrability argument that a "probationary employee has no grievable enforceable rights under the National Agreement" was also refuted by the expert witness' acknowledgment that a probationary employee could file a grievance to seek enforcement of rights under the National Agreement, e.g., leave and a request for

---

<sup>2</sup>*Slatem v. Department of Defense*, 6 MSPB 623, 624 (1981) where the hearing officer denied appellant's request to postpone a hearing because the appellant showed a lack of due diligence in securing representation.

<sup>3</sup>*Hey v. U.S. Postal Service*, 57 MSPR 443 and *Williams v. Office of Personnel Management*, 71 MSPR 597, 603 (1996) *aff'd*, 119 F.3d 16 (Fed. Cir. 1997).

union representation. This untimely arbitrability argument was not raised during the 10-day window for responding to the grievance.

The paramount issue in this grievance is not arbitrability but remedy. Specifically can the Union obtain a remedy beyond an FLRA-type notice and posting such as a *status quo ante* remedy and reinstatement of a probationary employee who engaged in protected activity.<sup>4</sup> Contrary to the Agency's assertion that an arbitrator is without authority to rule on an unfair labor practice allegation, the FLRA has determined otherwise.<sup>5</sup> AFGE asserts that the arbitrator, after applying the appropriate analytical framework, will find that the Agency violated 5 U.S.C. 7116(a)(1), (2), and (3).<sup>6</sup>

#### Reprisal for Protected Activity

The grievant is an "employee", as that term is defined at 5 U.S.C. 7103(a), whose employment with the Agency "ceased because of [an] unfair labor practice."<sup>7</sup>

On April 14, 2005, grievant requested union representation with an e-mail to DM Fereday and ADM Marshall. This right to representation is based in the National Agreement under Governing Laws and Regulations (Article 1), Union Rights and Responsibilities (Article 2), and Article 33 at Section 3D.: "Probationary employees have the right to Union representation."

DM Fereday and ADM Marshall testified that they knew grievant had requested representation. [Tr. 507, 560] The grievant's request, grounded in the National Agreement, and the officials acknowledgement of it, constitute a preponderance of evidence that grievant engaged in protected activity on April 14 when she notified management officials in McAlester that she was exercising her right to representation.

---

<sup>4</sup>U.S. Department of Agriculture, Food and Nutrition Service, Alexandria, Virginia and National Treasury Employees Union, 61 FLRA 16 (2005); Indian Health Service, Crow Hospital, Crow Agency, Montana and Marcella A. Knaub and Millie F. Stewart, 57 FLRA 109 (2001); Department of Labor, Employment and Training Administration, San Francisco, California and Lou Ann Bassan, 43 FLRA 1036 (1992).

<sup>5</sup>Social Security Administration, Baltimore, Maryland and Council 220, American Federation of Government Employees, 55 FLRA 498 (1999).

<sup>6</sup>Letterkenny Army Depot and International Brotherhood of Police Officers, Local 358, 35 FLRA 113 (1990)(hereinafter referred to as *Letterkenny*).

<sup>7</sup>5 U.S.C. 7103(a) states in relevant part:

(2) "employee" means an individual –

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under Section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority[.]

The preponderance of evidence also shows that grievant's engaging in a protected activity - - grounded in the National Agreement and itemized at 5 U.S.C. 7116<sup>8</sup> - - was a motivating factor in the Agency's treatment of grievant related to her tenure, promotion or other conditions of employment. Grievant testified that after she requested union representation - - and elected to continue with it after DM Fereday (through union representative Carol Lewis) requested that the Union not come to McAlester - - her working conditions worsened.

Lewis testified that all discussions she had with DM Fereday focused on grievant's WIGI and Fereday's confidence that grievant would earn it. Lewis testified that Fereday was not aware that grievant was on 100 percent case review but Fereday stated that should the Union become involved then some form of "work drop" and total review of all grievant's cases would take place. [Un. Exhs. 7, 8]

Janet Sharp's testimony corroborated Lewis' recounting that all discussions focused on grievant's WIGI and continued employment. Grievant's testimony corroborates the versions from Lewis and Sharp. Grievant testified that during her meeting with DM Fereday on April 11 she was assured her job was not in jeopardy. Thus, the testimonies from grievant, Lewis, and Sharp about their discussions with DM Fereday show that the DM's comments about the Union's involvement were a threat that grievant would not retain her job if she followed through with union representation.

In short, SSA viewed grievant's error rate as bearable so long as the Union was not present or involved. Once grievant persisted with her request for union representation, the DM and ADM concluded that grievant could not learn or do the job. The cumulative effect of the credible testimony from union witnesses shows that the Agency's proffered reason for grievant's termination (performance) is a pretext for grievant's engaging in protected activity and, in the absence of that protected activity, the Agency would not have terminated the grievant.

---

<sup>8</sup>§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency -

- (1) to interfere with, restrain, or coerce any employee in the exercise of any right under this chapter;
- (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
- (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]

The "smoking gun" showing that the Agency's articulated reason is pretext and the true reason was grievant's protected activity is DM Fereday's e-mail dated April 21, 2005, to Helene Jones, Labor and Employee Relations Specialist, Regional Office:

I thought I should send to you the plan [grievant's] supervisor had given her on 4/12 as an opportunity to improve over a 3 week period of time. My concern is that we may be setting ourselves up for a ULP if we don't honor the 3 week plan. If we are certain we don't have to honor the plan, I'd rather not, but sure don't want to jeopardize our case for termination.

[Un. Exh. 14]

April 21 is (1) only 7 calendar days after grievant notified the DM and the ADM that she wanted union representation and the grievant's designated union representative informed the DM that he wanted to be present for all performance-related discussions and (2) only 6 calendar days after Fereday was informed by Carol Lewis that grievant wanted to continue with union representation. The April 21 e-mail was motivated by DM Fereday's failure to secure grievant's withdrawal of her request for union representation.

Rather than having a 3-week period to improve performance, and extending it as DM Fereday told Lewis and Sharp could happen if grievant did not continue with her request for union representation, DM Fereday concluded by April 21 that grievant would be terminated. The e-mail shows that the DM's and ADM's stories about the grievant's unsatisfactory performance are fabrication and pretext.

Further proof of pretext surfaces with ADM Marshall's statement to grievant on May 3 that she had not reviewed grievant's cases. There was no review because DM Fereday had already determined, prior to the conclusion of the 3-week review period, that grievant would be terminated based on her protected activity and not performance.

ADM Marshall's testimony reflects pretext through its lack of probity. She testified that she switched grievant to a different mentor because the ADM had concerns in January 2005 about grievant's progress and believed that a different mentor with a different approach may improve the situation. This is not believable given her testimony that she had additional duties assigned to her in January 2005 (Medicare Part D) and, due to those duties, did not have time to mentor grievant. Although the termination letter states that unsatisfactory performance is the reason for grievant's termination, ADM Marshall testified that the sole basis for grievant's removal was the number of errors. [Tr. 281-'92, 520-'21]

When union representative de Juliis notified DM Fereday and ADM Marshall by e-mail on April 14 that he was representing the grievant, he requested certain information on grievant's cases. DM Fereday testified that she collected the data but, notwithstanding

the Union's request for information, Fereday did not provide any information or data to the Union. [Tr. 534-'35, 566, 581, 656]

The only document shared with the Union surfaced at the hearing. [Ag. Exh. 6] This surprise document was a summary of grievant's performance and alleged errors with no underlying support documents and no testimony from grievant's mentor (Rhonda Hull). This document is not credible.

The Agency's failure to produce evidence for the record of any write back from mentor Hull to grievant and the failure of the Agency to call Hull to testify contribute to the lack of probative evidence from the Agency. Further support for this conclusion is the fact that DM Fereday has no personal knowledge of grievant's work because she relied on ADM Marshall for information and a summary of data.

Applying the analytical framework in *Letterkenny* shows that the absence of performance-related documentation submitted in this proceeding, the failure to produce the mentor (Hull) to testify, the incredulous testimony by Marshall and Fereday that betray the facts of their illegal action all show that reprisal for exercising a statutory right to engage in protected activity and not performance was the motivating reason for grievant's termination.

By terminating grievant for exercising a statutory right while professing to act under the guise of performance, the Agency also violated numerous **articles in the National Agreement** as itemized below:

Article 1, Section 1 and Article 2

SSA violated Article 1, Section 1, which incorporates by reference 5 U.S.C. 71 and 5 U.S.C. 2302. Based on the reasons at p. 15 herein that support a finding that the Agency violated Article 3, Section 10, AFGE asserts that the Agency violated Article 1, Section 1.

SSA violated Article 2; it incorporates by reference 5 U.S.C. 71. On April 14 the designated union representative requested through Fereday statistical data about accuracy and timeliness for grievant and other claims representatives as well as SSA's analysis showing statistical validity. This "particularized need" was repeated and supported in other memoranda. [Un. Exhs. 5, 6, 7] SSA's failure to respond constitutes a violation of Article 1, Section 1 and Article 2 as well as 5 U.S.C. 7114(b)(4)(B).<sup>9</sup>

Article 3, Sections 2A., 2B., 2C., 4B., 4D., 5B., 6B., 6E.1, 6I., and 10

"In the interest of maintaining a congenial work environment," the parties agreed that "supervisors and employees will deal with each other in a professional manner and

---

<sup>9</sup>Failure to comply with an information request is a violation of 5 U.S.C. 7116(a)(1) and (5). *Department of Health and Human Services, Social Security Administration, New York Region, New York, New York*, 52 FLRA 1133 (1997).

with courtesy, dignity, and respect. To that end, all [SSA] employees should refrain from coercive, intimidating, loud or abusive behavior.”

A Section 2A. violation is demonstrated by the ample testimony from employees about Rhonda Hull, grievant’s mentor, meddling in their cases yet officials did nothing to alleviate stress to promote a “congenial work environment.” Union witnesses testified to the intimidating and coercive behavior by officials. For example, grievant was instructed by Hull not to ask questions of other employees whereas the other probationary employee (Ben Toman) had no such restriction. This unfair treatment of grievant continued with SSA’s issuance of an unattainable accuracy rate of 97 to 99 percent for her performance standard.

Section 2B. was breached when the Agency did not ensure a professional manner with courtesy, respect and dignity among supervisor and employees. Section 2C. was breached when the Agency failed to refrain from coercive, intimidating and abusive behavior as evidenced by management’s decision to appear or be present for any discussion between two or more employees.

When DM Fereday informed grievant on April 11 that she was “disappointed” grievant had requested Union assistance, SSA breached Section 4B.

DM Fereday testified that her pre-employment notes were erroneously placed in grievant’s SF-7B file. The notes belong in the SF-7B file because they are on SSA forms from the Personnel Manual for Supervisors and are not personal notes. [Un. Exhs. 10, 11] SSA violated Section 4D. by refusing to provide the original forms to grievant.

Assuming these were Fereday’s personal notes, when she gave grievant her SF-7B file Fereday shared personal notes with someone who was not the creator of those notes. ADM Marshall testified that the summary of grievant’s work was prepared from her personal notes that she shared with DM Fereday. Since these supervisory notes were not placed in grievant’s SF-7B extension file, the Agency violated Section 4D.<sup>10</sup>

The Agency breached Section 5B. when it (1) purged and shredded outdated material from grievant’s SF-7B file rather than return the materials to grievant and (2) failed and refused to allow grievant to enter rebuttal information into that file.

There were no write backs in grievant’s SF-7B file. This violates Section 5E. ADM Marshall testified that she reviewed write backs and prepared a data summary of grievant’s work. [Tr. 500-’01, 616] The Agency’s data summary presented at the hearing

---

<sup>10</sup>Section 4D. states in part that “[p]ersonal notes pertaining to an employee not qualifying as a system of records under the Privacy Act may be kept and maintained by and for the personal use of the management official who wrote them. Such notes will not be disclosed to anyone[.]...Personal notes... will not be used to circumvent timely disclosure to an employee, nor may they be used to retain information that should properly be contained in a system of records such as the SF-7B file[.]”

was never shared with grievant or the Union; it is based on information that was not placed in an authorized file. [Ag. Exh. 6]

There is no evidence that the write backs or files reviewed to compile the data summary are exempt from disclosure or inclusion in an authorized file. Arbitrators have set aside suspensions where there was a failure to place all data or records relied upon for that action in personnel files.<sup>11</sup>

Where the manager is aware that discipline may result or the employee reasonably believes that the event may result in disciplinary action against her, union representation may be invoked. Section 6B. states that “[h]owever, this does not apply to run-of-the-mill conversations.” DM Fereday acknowledged that the discussions she had with grievant about performance were not ordinary discussions. [Tr. 619-‘20] This is an admission against interest so management was required to “inform the employee of their right to have a union representative present if she chooses.” DM Fereday violated Section 6B.

The April 12 meeting by DM Fereday with grievant was a formal discussion under 5 U.S.C. 7114(a)(2)(A) because there was one generic job task for grievant’s position, she was given a specific numeric standard, and questions were asked and answered. Failure to provide the Union with advance notice of this formal discussion and an opportunity to attend violates Section 6E1. and 5 U.S.C. 7114(a)(2)(A).

The 3-week improvement plan or guidelines constituted a last chance agreement (LCA). It was deficient since the LCA was not preceded by a formal adverse action proposal and the Union was not noticed or offered an opportunity to be present at the meeting where it was discussed thereby violating Section 6I.

Section 10 states that personnel management must be conducted in accordance “with the provisions of 5 U.S.C. 2301, Merit System Principles, and 5 U.S.C. 2302(b), Prohibited Personnel Practices.” Since grievant was terminated for engaging in protected activity, the Agency violated the merit system principles and committed a prohibited personnel practice.

Article 16, Sections 1, 9B, 9C1., 9D., and 9E.

SSA is “responsible for ensuring that all employees receive the training necessary for the performance of their assigned duties.” Grievant requested training on E-works but mentor Hull did not know how it worked. [Tr. 295] There was discussion of additional training when grievant was informed on April 12 that she needed to improve

---

<sup>11</sup>*American Federation of Government Employees, Local 1760 and Social Security Administration*, 22 FLRA 195 (1986) and *Social Security Administration and Local 1923, American Federation of Government Employees*, 22 FLRA 602 (1986).

her performance to earn a WIGI but she was issued guidelines which contained no training. All of this violates Section 1.

Under technical mentoring the parties agreed that “[m]entors should be highly motivated, knowledgeable employees with good interpersonal skills.” Rhonda Hull was not accepted by McAlester staff. Her interpersonal skills were lacking and management was aware of it for at least one claims representative informed them of Hull’s meddling in her cases. Notwithstanding this notice, management asserted at the hearing it never received any comments or complaints about Hull. SSA violated Section 9B.

By devising a mentoring process that did not involve three-way communication (employee-mentor-management) since it prohibited grievant from asking any questions of any employee including her mentor, the Agency violated Sections 9C1. and 9E.

Section 9D. requires management to consider adjusting a mentor’s workload “as deemed necessary” so that sufficient time may be dedicated to mentoring a trainee. ADM Marshall lacked sufficient time to mentor grievant when the Medicare Part D duties were assigned to her. Hull carried a full workload and rarely discussed with grievant her concerns other than to leave write backs in capitalized letters using red ink. Grievant informed ADM Marshall that Hull did not have time to mentor her. Since the Agency did not adjust Hull’s workload to allow sufficient time to mentor the grievant, it violated Section 9D.

Article 21, Sections 1, 2, 6A., 6E., and 6F.

SSA violated Article 21 when it assigned numerical goals and/or performance levels to grievant (Section 1); devised an unfair, inequitable and unreasonable design and application of an absolute performance system only for the grievant that did not allow for error (Section 2); did not provide at least 90 days to resolve the performance-related problems (Section 6), and determined that a total review of all grievant’s work was “appropriate assistance” (Section 6E.).

The Agency violated Section 6A. when it failed and refused to inform grievant of her right to request the assistance and presence of a union representative at a meeting held on April 12, 2005, to discuss her performance. At that meeting ADM Marshall informed grievant that her performance was deficient and she needed to achieve an accuracy rate of 97 to 99 percent in retirement and disability claims.

After the Agency received notice from grievant and the Union on April 14 that the Executive Vice President of Local 2505 was designated as grievant’s representative the Agency continued to conduct performance-related meetings with her in violation of Section 6F.

Article 22 (Within-Grade Increase)

AFGE presented this as an issue in its opening statement.

Article 24, Section 10

AFGE argued, in its motion, that the Agency violated Section 10 when it did not issue a written answer to the grievance within ten (10) work days after the date that the Union waived its contractual right to make an oral presentation.

Article 30, Section 2

SSA failed to recognize the grievant's designated representatives until after her termination. Fereday interfered in the designation by approaching local representative Carol Lewis and asking her to intervene to stop grievant's representative from coming to the McAlester office. This is not the first time SSA has failed or refused to recognize a designated representative.<sup>12</sup>

Article 33, Sections 3A., 3C., and 3E.

SSA agreed to "provide probationary employees with the opportunity to develop and to demonstrate their proficiency." An accuracy rate of 97 to 99 percent is an unattainable performance standard and, as such, denied grievant the "opportunity to develop and to demonstrate" proficiency. Moreover, DM Fereday's e-mail dated April 21 where she states her intention not to honor the 3-week improvement period is proof that the Agency did not provide a good faith opportunity to develop proficiency in violation of Section 3A.

A probationary employee is "entitled to ongoing counseling about their... performance and standing through completion" of the probationary period. DM Fereday told grievant, Sharp and Lewis that she [Fereday] was confident grievant would attain her WIGI by meeting the accuracy goals and Fereday could extend that time up to grievant's anniversary date. Since the DM and ADM did not communicate with grievant after she requested union representation on April 14, she was denied "ongoing counseling" about performance in violation of Section 3C.

Notwithstanding the lack of counseling and SSA's alleged concerns about long-term performance problems with grievant, ADM Marshall told grievant, in response to grievant's inquiry how she was progressing, that mentor Hull said she was "on track." [Tr. 290] Confirmation of being on track is the fact that in January 2005 grievant worked overtime which is only available for employees whose performance is "fully successful" (Article 10, Section 3A.). All of this contradicts ADM Marshall's testimony that "early on" she did not perceive her mentoring as "getting through" to grievant.

DM Fereday did not need to know how grievant was performing and ADM Marshall, who acknowledged she did not know how many cases grievant was processing, did not need to know either because performance was not relevant since grievant had challenged their authority by requesting representation. [Tr. 501] The DM and ADM had

---

<sup>12</sup>In *Social Security Administration and American Federation of Government Employees, Council 220*, Case No. BW-2003-R-0024 (Feigenbaum, 2003) the arbitrator found a violation of the National Agreement as well as 5 U.S.C. 7116 when the agency failed to recognize the designated representative.

experienced the designated representative's involvement in their office in 2003 and sought to avoid it.

Section 3E. states that "management's intent" when terminating a probationary employee is to "ordinarily [provide] two weeks notice of termination, when practicable or such notice as the remaining probationary period permits."

According to DM Fereday, grievant had appeal rights only to the MSPB and the EEOC and a probationary employee can not appeal her termination by having the Union file a union-management grievance. [Tr. 578]

This position conflicts with the admission by the Agency's expert witness that the Union had a right under the National Agreement to file a grievance that involved only one employee. [Tr. 437]

McAlester officials failed or refused to include in grievant's termination letter her appeal right to the Federal Labor Relations Authority to challenge her termination as reprisal for having engaged in protected activity. This renders the letter procedurally deficient and the deficiency rises to the level of harmful error.

The FLRA has concluded that (1) arbitrators are required to apply the harmful error rule if the grievable matter also could have been appealed to the Merit Systems Protection Board and (2) no law, rule or regulation precludes an arbitrator from applying the harmful error rule in cases where it is not required.<sup>13</sup>

In sum, the Union requests that the arbitrator find as follows:

- (1) that the union-management grievance is grievable and arbitrable;
- (2) that grievant was removed or terminated from her position because she exercised her rights under the National Agreement and "but for" that exercise of protected rights she would not have been removed;
- (3) that SSA violated Article 33 by its failure to provide the grievant with "an opportunity to develop and to demonstrate proficiency" and by failing or refusing to provide grievant with "ongoing counseling" on performance;
- (4) that SSA issued a defective letter of termination to grievant because it did not inform her of a right of appeal to the FLRA or advise grievant of her right to union representation;

---

<sup>13</sup> *American Federation of Government Employees, Local 331 and U.S. Department of Veterans Affairs, VA Maryland Health Care System*, 61 FLRA 550 (2006).

- (5) that SSA violated Article 3 by failing to “maintain a congenial work environment” and by its officials failure to “refrain from coercive, intimidating...or abusive behavior”;
- (6) that SSA violated Article 3 because it failed to treat grievant “fairly and equitably in all aspects of personnel management” as well as failed to treat her “with courtesy, dignity and respect”;
- (7) that SSA violated Article 3 by shredding materials in grievant’s SF-7B file rather than returning the documents to grievant;
- (8) that SSA violated Article 3 by relying on write backs and other data that was not contained in grievant’s SF-7B file and such documents were not contained in any other authorized file;
- (9) that SSA violated Article 3 and Article 30 by failing to recognize the grievant’s designated representative and by failing to permit the designated representative to be present at performance discussions between officials and grievant;
- (10) that SSA violated Article 16 by failing to provide grievant with a mentor who had sufficient time to engage in mentoring with grievant;
- (11) that SSA violated Article 16 by failing to provide grievant with training;
- (12) that SSA violated Article 1 and Article 2 and committed an unfair labor practice by not responding to the Union’s request for information or by not providing the requested documentation;
- and
- (13) that SSA violated Article 24 by failing to issue a timely response to the union-management grievance.

Since the parties failed to stipulate to the issues for arbitration, the arbitrator has broad authority to fashion an appropriate remedy.<sup>14</sup>

The Union seeks the following **remedial order**: (1) SSA will cease and desist from terminating or otherwise discriminating against bargaining unit employees including probationary employees because they have exercised rights under the National Agreement or sought assistance from Local 2505; (2) SSA will cease and desist from any like or related manner interfering with, restraining or coercing employees in the exercise of their

---

<sup>14</sup>*Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Marianna, Florida and American Federation of Government Employees, Local 4036, 56 FLRA 467 (2000).*

rights under the National Agreement; (3) SSA will reinstate grievant to her former position or a substantially equivalent position without prejudice to her seniority and other rights; (4) SSA will make grievant whole in accordance with the Back Pay Act; (5) SSA will expunge from its records any reference to grievant's termination; (6) SSA will cease and desist from failing to recognize any designated representative duly authorized by Local 2505 at any formal meeting held pursuant to Article 3 and or Article 33; (7) SSA cease and desist from failing to respond to Union requests for information and from failing to provide that information; (8) SSA refer this matter for investigation to the U.S. Office of Special Counsel for violations of 5 U.S.C. 2302 by DM Fereday and ADM Marshall; (9) SSA propose to discipline DM Fereday and ADM Marshall<sup>15</sup>; (10) SSA cease and desist from violating Articles 1, 2, 3, 16, 24, 30 and 33; (11) SSA post at facilities where employees are represented by Local 2505 a notice of these violations enumerated in items (1) through (10); and (12) the arbitrator retain jurisdiction for 120 days for the sole purpose of resolving any disputes that arise out of the implementation of this award. [Un. Br. at 29-31]

#### **Summary of the Agency's Position**

Grievant failed to demonstrate her fitness as an employee during the probationary period due to unsatisfactory performance. A letter of termination issued on May 5, 2005, with an effective termination date of May 19, 2005.

#### Response to Union's Motion to Sanction and Strike Agency Defenses

Although the Union notified the Agency by e-mail that a motion to sanction and strike defenses would be forthcoming, SSA did not receive a copy of the motion until the Union distributed it at the October 26 hearing.

The Union acknowledges there is no requirement in the National Agreement for the Agency to provide advance notice to the Union of the Agency's witnesses and "[t]here is nothing in the contract that says that the failure of the Agency to act within a prescribed time frame means the Union gets to submit a one-sided case without rebuttal." When the Agency does not submit a written decision within 10 work days, Article 24 provides that the grievance moves forward. The Agency is not precluded from presenting its case. [Tr. 12-20]

The Agency addressed grievability on procedure and subject matter in its September 8 written answer to this employee grievance. The Agency did not waive its right to argue grievability when it responded to the Union's inquiry on September 13, 2005, by stating SSA would get back with the Union on that matter. The reasonable conclusion is that the September 8 decision identified grievability as a defense and it remains an active defense.

Although the Union claims that the Agency violated Article 24 (Grievance Procedure), the Union also has "unclean hands." For example, at the October 26 hearing

<sup>15</sup>*U.S. Department of Justice v. Federal Labor Relations Authority*, 981 F.2d 1339 (D.C. Cir. 1993).

the Agency noted that the Union prematurely invoked arbitration because Article 24, Section 10, states that “the grieving party may invoke arbitration within 30 working days after receipt of the final decision.” The final decision was September 8 but the Union invoked arbitration on June 6 or prior to the conclusion of the 30-day window.

Should the Agency not issue a written decision within 10 work days, arbitration is not stalled or prevented because Section 10 states that “either party may move its grievance to arbitration 45 calendar days after the grievance was filed.” To support its premature invocation of arbitration, AFGE relies on wording applicable to an employee grievance. [Tr. 16, 18]

#### Motion to Dismiss and Supplemental Motion to Dismiss

The Agency’s motions assert that the grievance should not be heard based on procedure, timeliness, and arbitrability. With respect to **procedure and timeliness**, since the grievance involves one employee, its an employee grievance (Article 24, Section 9) and not a union-management grievance (Article 24, Section 10) as filed by AFGE.

This employee grievance is untimely because it was not filed until May 19 which is not within 15 work days of the action or date the employee became aware of the particular action, e.g., the April 12 informal discussion and the April 14 request for representation.

With respect to the union-management grievance, it must be filed no later than 25 days after an alleged wrongful act. In its post-hearing brief the Agency argued that any alleged wrongful act prior to April 14 is not timely grieved because 25 days prior to May 19 (the date of the grievance) is April 14. Thus the April 12 guidelines are outside the 25-day window for filing a grievance. [Ag. Br. at 5]

This union-management grievance does not concern a “continuing practice” because AFGE identified two acts: (1) the April 12 informal discussion with grievant where the Union claims she was not informed of her right to request a union representative and (2) the “Agency’s continued performance meetings with [grievant] without a Union representative after she requested Union representation on April 14, 2005.” [Ag. Br. at 5]

As for **subject-matter arbitrability**, the termination of a probationary employee is nongrievable as an employee grievance and as a union-management grievance. By filing a union-management grievance, the Union seeks to obtain arbitral review of this termination, if allowed to do so, would thereby confer upon grievant appeal rights that she does not have as a probationary employee.

The termination of grievant during her probationary period is not grievable because the examination, certification and appointment of an employee is outside the scope of the grievance procedure as defined in Article 24 and OPM regulations on grievance rights for probationary employees exclude “an employee in the competitive

service who is serving a probationary...period under an initial appointment.” (5 C.F.R. Part 315, Subpart H)

To avoid a direct challenge to the termination, the Union disguises the grievance by alleging violations of the National Agreement on performance, training, and union representation. The grievance seeks to display reasons why the grievant should not have been terminated - - improper training, improper evaluation of performance, denial of union representation - - all of which concern the termination itself and can not be redressed as a matter of law.

Should the Union maintain that the grievant's termination is not the subject of this grievance but only the violations of the National Agreement as applied to a probationary employee, then there is no remedy available for the alleged violations. For example, Articles 3 and 21 deal with a grievant's right to union representation and guidelines for performance. If the Agency is directed to conduct, again, the discussions with grievant in the presence of a union representative, that requires vacating the Agency's properly issued termination and the arbitrator is without authority to vacate the discharge. The same rationale and conclusion applies to Article 16 (training and mentoring).

The Union's requested relief can not be granted without violating applicable statutes, regulations and precedential case law.<sup>16</sup> Separating the alleged violations of the National Agreement from the requested relief to “turn back the clock” means reinstating a probationary employee. This shows that the Union is seeking arbitral review of a probationary employee's termination which conflicts with Congressional intent, OPM regulations and *INS*. In applying *INS* the FLRA has consistently set aside awards where the arbitrator found termination of a probationary employee subject to arbitral review because that is contrary to statutory and regulatory schemes.<sup>17</sup>

Not only does the law and applicable regulations preclude arbitral review of a probationary employee's termination, but so does collective bargaining. For example, an agency's failure to comply with a collective bargaining agreement's provisions on performance standards and critical elements as applied to a probationary employee does not render the grievance arbitrable.<sup>18</sup> The FLRA affirmed an award where the arbitrator concluded that the parties could not provide procedural protections for probationary employees through collective bargaining.<sup>19</sup>

---

<sup>16</sup>*U.S. Department of Justice, Immigration and Naturalization Service v. Federal Labor Relations Authority*, 709 F.2d 724 (D.C. Cir. 1983)(hereinafter referred to as *INS*).

<sup>17</sup>*Department of Health and Human Services, Social Security Administration v. American Federation of Government Employees, Local 3342*, 14 FLRA 164 (1984) and *Department of Health and Human Services, Social Security Administration v. American Federation of Government Employees, Local 1923*, 15 FLRA 714 (1984).

<sup>18</sup>*General Services Administration, Region 2, New York City, New York v. American Federation of Government Employees, Council 236*, 58 FLRA 588 (2003).

<sup>19</sup>*American Federation of Government Employees, Local 2006 v. Social Security Administration*, 58 FLRA 297 (2003).

Article 33 at Section 3 authorizes the Agency to observe a probationary employee's conduct and performance and to separate the employee for cause. AFGE acknowledged that grievant is a probationary employee and no provision in the National Agreement authorizes a probationary employee to grieve termination. Filing a union-management grievance does not confer authority for the arbitrator to act in contravention of OPM regulations, case law and the National Agreement. Thus the arbitrator should dismiss this grievance in its entirety.

In response to the Union's opening statement wherein AFGE argued prohibited personnel practices (5 U.S.C. 2301 and 2302) and an unfair labor practice (5 U.S.C. 7116(a)), the Agency submitted a **supplemental motion to dismiss** wherein it asserts that an arbitrator is without authority to decide whether the Agency violated 5 U.S.C. 2301 and 2302 and 5 U.S.C. 7116(a). [Tr. 36-37, 80]

Title 5 of the U.S. Code clearly defines where the authority resides to investigate and adjudicate these practices; that authority resides with the Office of Special Counsel at the MSPB and the FLRA's Office of the General Counsel. These allegations should be dismissed.

As for the alleged violations of the National Agreement, the Agency argues that it complied with all applicable provisions as discussed below.

#### Article 3

There is no violation of Article 3 and grievant's right to unionism, fair and equitable treatment and a congenial work environment free of coercive, intimidating or abusive behavior.

DM Fereday did not tell grievant she was disappointed grievant was seeking union representation but disappointed she perceived the guidelines as threatening. There is no identification of another employee similarly-situated who was treated better than grievant. The other probationary employee (Ben Toman) progressed sufficiently that he was removed from 100 percent review prior to the end of his first year whereas grievant never progressed due to repetitive and excessive errors. DM Fereday testified that Carol Lewis and Janet Sharp both progressed during their probationary periods and accurately processed cases. The environment is not intimidating, coercive or abusive.

There were no particulars to the Union's assertion that when employees gather for discussion or conversation that officials disrupt them. DM Fereday testified that when the discussion is extended and not work-related then she inquires.

Fereday remarked appropriately to grievant that use of Family Friendly Sick Leave for a family related accident was available; Fereday informed Carol Lewis to record grievant's time under that leave. There were no insensitive comments or denial of leave.

The SF-7B file was properly maintained; grievant never asked to rebut anything and when she asked to copy her file DM Fereday gave it to her. Upon returning the file Fereday noticed that her pre-employment notes were in it so she removed them and shredded her notes. Since the notes were Fereday's the employee has no right to them. There is no Article 3, Section 5 violation.

The evidence shows that the McAlester office is not anti-union. In July 2003 four union representatives came to McAlester to meet with employees and management after two grievances surfaced. Thereafter the problems "got a lot better" and workload was reduced for an employee. [Tr. 61, 164-'65] Further support that the office is not anti-union is the fact that DM Fereday met twice with local union representatives to discuss the April 12 guidelines issued to grievant.

#### Article 16

The Agency provided appropriate and sufficient training for grievant. There is no violation of Article 16 at Sections 1, 2, and 3 because grievant received the same training that other probationary employees received. That is, she had core or basic training in McAlester, she completed the 9-week training in Dallas that included a repeat of the core training, and when she returned to McAlester from Dallas grievant was assigned a mentor as all new trainees are for on-the-job training. Grievant acknowledged receiving training on E-works and further explanation about "A101" cases from ADM Marshall.

SSA complied with Article 16, Section 9 by assigning a mentor to assist grievant with learning the job to progress in her position. Mentors assigned to grievant had extensive experience (Marshall 26 years and mentoring off and on since 1986; Hull 20 years including 15 as a mentor). ADM Marshall testified that Hull was a good listener, cooperative, and pleasant. Grievant's only comment to Marshall about Hull was that she was very technical and provided write backs on very case; grievant admitted the write backs were instructive. [Tr. 337-341] When Hull was too busy to assist grievant, ADM Marshall met with grievant.

Although ADM Marshall testified that an employee should discuss questions with her mentor, management did not prohibit grievant from asking questions of other employees. Grievant admitted that ADM Marshall suggested she discuss cases with her mentor primarily to avoid confusion in processing. [Tr. 310] Testimony from union witnesses Sharp, Lewis and Davison show that they did not review all the write backs provided to grievant, they have not served as mentors, and their knowledge of grievant's relationship with Hull came from grievant.

#### Articles 21 and 33

Although a probationary employee is not entitled to an assistance plan (AP) or performance enhancement plan (PEP), the Agency assisted grievant through several informal discussions. Article 21, Section 3B. does not require the Agency to have a union representative present during these informal discussions.

Only when a performance discussion is undertaken in the context of an AP or a PEP is the Agency required by Article 21 at Sections 6A. and 6F. to inform the employee of a right to union representation. The April 12 guidelines were not an AP or PEP and grievant acknowledged there were no performance-related discussions with her after that date although there was instruction for specific cases. [Tr. 483]

SSA was not required to give grievant a 90-day period to improve (Article 21, Section 6C.) and the Union misinterprets "100% review" with "appropriate assistance" (Article 21, Section 6E.). The guidelines were not an "assessment system" under Article 21, Section 1, for they were designed to help grievant process cases accurately and independently.

DM Fereday and ADM Marshall testified that they did not systematically apply similar guidelines to other probationary employees but when they became aware of grievant's problems with accuracy, they used the guidelines to convey the message that her accuracy needed to improve. [Ag. Br. at 15]

Grievant does not have contractual rights under Article 21 at Sections 6, 7, 8. In this regard, Article 33 at Section 1 states that all bargaining-unit employees are covered by the National Agreement "to the extent consistent with CSRA and other applicable laws and regulations." In that context, Section 3B. in Article 33 authorizes the Agency to observe and evaluate a probationary employee's performance without restrictions such as the 90-day improvement period.

Sections 6, 7, 8 in Article 21 must be consistent with OPM regulations for probationary employees and those regulations exclude from coverage "an employee in the competitive service who is serving a probationary or trial period under an initial appointment." (5 C.F.R. 432.102(f)) The only requirement on the Agency was to notify the grievant in writing why she was separated and the effective date of it. (5 C.F.R. 315.804(a)).

The guidelines did not require error-free accuracy by grievant. Rather grievant was to demonstrate 97 to 99 percent proficiency in simple, basic claims. She handled other cases but they were not included in the guidelines. DM Fereday and ADM Marshall both testified that had grievant failed to attain the 97 to 99 percent accuracy rate but had shown marked improvement during the three weeks she would have been placed on partial review. DM Fereday testified that if grievant could not accurately process basic claims then she could not be expected to process more complex cases.

Grievant was terminated because her level of proficiency in accurately reviewing the most basic claims was 37 percent (a decrease from about 40 percent in March 2005) and she continued to rely too much on her mentor rather than acting independently. Only after ADM Marshall completed a plenary review of all cases worked on by grievant at the end of the 3-week period did she and Fereday decide that termination was the only option. [Ag. Br. at 16]

### Conclusions

There are a number of issues to decide such as whether the grievance is barred from arbitration based on grievability/arbitrability and, if not barred, whether grievant was terminated for having engaged in protected activity as well as whether alleged violations of various articles can be remedied in the circumstances of this grievance.

#### Grievance Barred From Arbitration: Grievability\Arbitrability

The overlapping motions filed by the parties focus on compliance with the grievance procedure, type of grievance, and arbitrable defenses. For the reasons that follow, the Union's **motion to sanction and strike Agency defenses** is denied and SSA's **supplemental motion to dismiss** is denied. The Agency's **motion to dismiss** based on procedural arbitrability is denied; that part of the **motion** addressing substantive arbitrability can be argued at any time but, to the extent SSA relies upon *INS* as the sole basis to adjudge this grievance without consideration of the statutory right to engage in protected activity, then the motion is denied.

In AFGE's **motion to sanction and strike Agency defenses**, the Union asserts that it was precluded from making an informed judgment whether to proceed to arbitration with this grievance because the Agency did not issue its written answer within 10 work days after the date of the Union's waiver of its right to make an oral presentation.

AFGE's actions do not comport with its argument. The date of the waiver was May 19 (the same date that the grievance was filed) and the Union invoked arbitration on June 5 which was the first business day after the expiration of the 10-day window. The concurrent date for the filing of the grievance and waiver followed by the immediacy of the Union's invocation of arbitration shows that AFGE did not hesitate in making a decision to proceed to arbitration notwithstanding the Agency's failure to submit a timely written answer.

Other reasons offered by AFGE to sustain its **motion to sanction and strike defenses** are (1) the Agency's delay in responding to the Union's effort to frame the issues, (2) SSA's delay in designating a representative, and (3) the Agency's failure or refusal to identify its witnesses.

Article 25, Section 1 states that the parties "shall try to define the issue(s)" for arbitration within 10 work days "from the date of the request for arbitration." The effort to frame the issues was not completed during the 10-day window. Section 1 stipulates that the consequence for failure to reach agreement on the issues (without regard to the reason for that non-agreement) is not to sanction or preclude a party from presenting its case but to have the arbitrator frame the issues.

The Union was not hindered in its effort to proceed or prepare for arbitration by the purported lack of a designated Agency representative. AFGE was notified by e-mail dated July 7, 2005, that a senior labor relations specialist was the point of contact until

further notice and the specialist instructed the Union to proceed with contacting the arbitrator for hearing dates.

To support its argument that the Agency's failure to identify witnesses denied the Union an opportunity to anticipate or prepare for witness testimony so SSA should be precluded from presenting its case, the Union relies on (1) the rationale in the dissenting opinion of a criminal case and (2) an unpublished federal opinion which, under that court's rules, is not to be cited as precedent. The cited cases are not relevant and the National Agreement does not require witness disclosure.

AFGE motions that the Agency's defenses in its written answer to the grievance, and any proffered at the hearing through testimony or documents, should be barred and the Agency allowed to examine only the Union's witnesses because SSA's written answer to the grievance was issued several months after it was due. This matter is considered in the context of the substantive arbitrability argument in the Agency's **motion to dismiss**.

SSA contends this union-management grievance is a disguised employee grievance designed to skirt *INS* where termination for cause of a probationary employee is excluded from the grievance procedure as a matter of law. The Agency notes that filing a union-management grievance seeking arbitral review of a probationary employee's termination for unsatisfactory performance does not confer any rights on the grievant that are not otherwise available by filing an employee grievance, therefore, this grievance is not arbitrable.

Challenging subject-matter jurisdiction in arbitration is equivalent to challenging subject-matter jurisdiction in court where a party may contest a court's jurisdiction at any time because, absent jurisdiction, the court's decision is of no force and effect. The same conclusion applies in this arbitration. Specifically, Article 24 must be read with Article 1 where matters covered by the National Agreement are governed by "existing or future laws." To bar SSA from asserting that a subject is no longer covered by the National Agreement due to a development in law that now governs the subject but was not raised within a specific time frame under Article 24 would result in an award without force or effect. Substantive arbitrability is a defense not limited by Article 24 time limits.

This union-management grievance, however, involves an employee's statutory right to engage in protected activity without penalty or reprisal even while in a probationary status. AFGE presented FLRA decisions at the hearing on reinstatement of a probationary employee for protected activity.<sup>20</sup> The Agency remains steadfast with *INS* and OPM regulations as dispositive of this grievance. A probationary employee may be terminated for a good reason or no reason so long as the reason is not illegal but termination in violation of the Statute is an unfair labor practice and is a matter covered by the National Agreement and subject to the grievance procedure.

---

<sup>20</sup>See n. 4 at p. 10 *infra*.

Moreover, the grievant or Union is not constrained by the National Agreement to file the grievance as a Section 9 employee grievance as opposed to this Section 10 union-management grievance because “an employee or union may allege in a grievance that an agency violated any law, including the Statute.”<sup>21</sup> [Emphasis added.]

In this regard the statutory definition of “grievance” at 5 U.S.C. 7103(a)(9)(C)(ii) is mirrored or replicated in Article 24: “any complaint...by the Union concerning any matter relating to the employment of any employee; or [any complaint] by...the Union...concerning...the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or... any claimed violation, misinterpretation or misapplication of any law, rule or regulation affecting conditions of employment.”

This union-management grievance concerns the violation of “any law, including the Statute” since the Union alleges that the Agency committed an unfair labor practice by terminating grievant for exercising a statutory right to engage in protected activity. An unfair labor practice (5 U.S.C. 7116(a)) arises when an agency interferes with, restrains or coerces any employee in the exercise of any statutory right under the Statute; “employee” (5 U.S.C. 7103(a)(2)(B)) is “an individual whose employment has ceased because of any unfair labor practice under 5 U.S.C. 7116.” Grievant is an “employee” whose employment ceased, the Union alleges, because SSA committed an unfair labor practice.

SSA obligated itself to adhere to 5 U.S.C. 7116 in the National Agreement at Article 1 (“officials shall be governed by existing...laws); Article 2 (“In all matters relating to...conditions of employment, the parties will have due regard for the obligations imposed by 5 U.S.C. 71”); and Article 3 (“Each employee shall have the right to join or assist the Union...without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right”).

Aside from its defenses related to *INS* and type of grievance, the Agency argues this is not a continuing grievance since only two incidents were cited by the Union in the grievance filed on May 19. This union-management grievance was timely filed. The procedural defenses raised by the Agency are after the fact, that is, after the 10-day window in Section 6 of Article 24. Also falling beyond the 10-day window is SSA’s argument that AFGE prematurely invoked arbitration. This was not argued by the Agency in its September 8 grievance answer; it arose for the first time at the October 26 hearing.

In summary the National Agreement covers the situation presented in this grievance. That is, a Section 10 union-management grievance pertaining to one employee in probationary status engaged in protected activity under the Statute. In the particulars of this grievance, the Agency’s procedural defenses do not bar this arbitration because SSA did not present such defenses to this union-management grievance within Article 24 time limits and *INS* does not foreclose adjudication of grievant’s statutory claim.

---

<sup>21</sup>U.S. Department of Health and Human Services, Region V and National Treasury Employees Union, Chapter 230, 45 FLRA 737, 743-44 (1992).

Termination of Probationary Employee  
For Protected Activity

There is no dispute that grievant requested union representation thereby exercising a statutory right at 5 U.S.C. 71 and embedded in the National Agreement at Articles 1, 2, 3, and at Article 33, Section 3D.: “[p]robationary employees have the right to Union representation.”

Union representation for grievant was well-known to the Agency for grievant notified Fereday by e-mail shortly before noon on April 14 that she wanted representation and a little later that day Fereday received an e-mail that de Juliis was the designated representative. Fereday also knew on April 12 that grievant had associated with the Union on the SF-7B matter because grievant told her.

After Fereday received notice of grievant’s designated representative on the 14<sup>th</sup> she met with grievant and Janet Sharp, alternate union representative, to express her disappointment that grievant perceived the guidelines, in Fereday’s view, as threatening. Following this meeting with grievant and Sharp, DM Fereday and ADM Marshall received an e-mail from de Juliis about travel and per diem for his representation of grievant.

At 8:00 a.m. on the following day (April 15), Fereday approached Carol Lewis, local union representative, to have her intervene such that de Juliis not be present in McAlester to represent grievant. Later in the morning on the 15<sup>th</sup> Fereday invited Lewis to discuss the guidelines in Fereday’s office; Lewis was accompanied by Janet Sharp. During this discussion Fereday stated that if the Union, i.e., de Juliis, came to the office to represent grievant then Fereday would pull a “work drop” from the regional office and review all of grievant’s work. Fereday asked Lewis to check with grievant whether she wanted to continue with union representation.

At 9:37 a.m. on the 15<sup>th</sup> Lewis sent an e-mail to Fereday confirming that grievant wanted to continue with union representation. There were no further discussions by Fereday with Lewis, Sharp or grievant after this e-mail.

Six days later (April 21) Fereday sent an e-mail to Labor and Employee Relations Specialist Jones stating that she [Fereday] did not want “to honor” the 3-week duration for the guidelines because she did not “want to jeopardize our case for termination.”

Not honoring the 3 weeks for the guidelines and terminating grievant was motivated by Fereday’s not wanting the designated representative in the office because she wanted to deal on grievant through less experienced local representatives (Lewis and Sharp). When Fereday failed to persuade grievant to discontinue with union representation, she turned to grievant’s termination. Union representation was a motivating factor in SSA’s treatment of grievant in connection with terms and conditions of employment under the National Agreement. A preponderance of evidence shows a *prima facie* case of termination based on protected activity.

In response to this *prima facie* case SSA notes that it has broad authority under *INS* and *OPM* regulations to assess grievant's performance during her probationary year. ADM Marshall testified that she began to have concerns about grievant in January 2005 and decided that a change in mentor would be beneficial; Hull was assigned as mentor that month. Marshall also testified that around March 15 she and Hull began to develop the guidelines to assist grievant. Grievant never progressed, even on the simplest claims, and was always under 100 percent review for her work. The Agency considers "the whole scope" of performance - - timeliness, quantity, manner of performance - - and acknowledged that grievant performed acceptably in some areas but she failed to improve her accuracy and avoid repetitious errors on basic claims.

Even if grievant had not engaged in protected activity, the Agency would have terminated the grievant because she did not demonstrate an ability to develop as a claims representative but remained stuck in a clerical mode. At the end of the 3 weeks under the guidelines, grievant's accuracy rate was 37 percent, a decrease from 40 percent prior to the guidelines. Grievant demonstrated no improvement and, despite informal assistance with two different mentors and the full complement of training, she was not capable of working independently and taking ownership of her work. After consulting with labor and employee relations on April 21 and exploring options, DM Fereday and ADM Marshall concluded after May 3 that termination was the only option.

The Agency's rebuttal to the *prima facie* case presents a motive based on a lawful reason (performance) rather than a motive based on an unlawful reason (protected activity). There are few limits or restrictions on the Agency's expansive authority to assess the performance of a probationary employee who has limited appeal rights to the MSPB and EEOC. SSA answered the *prima facie* case.

To prove that the Agency's proffered reason of performance is pretext and but for grievant's protected activity she would not have been terminated, the Union cites the April 21 e-mail from DM Fereday to Labor and Employee Relations Specialist Jones. Fereday testified that she maintained an open mind at all times. This e-mail reflects a mindset showing that the purported 3-week opportunity to show progress closed on April 21. That closure was based on grievant's protected activity. This conclusion is evidenced in the Agency's statements and actions.

On April 14 Fereday knew that de Juliis was the designated representative; she immediately engaged the grievant and local representative Sharp in her office to tell grievant of her [Fereday] disappointment that the guidelines were seen as a threat rather than making grievant the best claims representative she could be. The next day (April 15) Fereday approached Carol Lewis at 8:00 a.m. to seek her intervention in precluding the designated representative from coming to McAlester and for them to handle this matter locally, in-house.

At some point after this 8:00 a.m. approach to Lewis but prior to Lewis sending an e-mail to Fereday at 9:37 a.m., Fereday initiated a meeting in her office with Lewis and Sharp and, during that meeting, Sharp pointedly stated that any error on a basic claim by grievant would place her short of the accuracy rate in the guidelines. Sharp's comments about the guidelines are not speculative thoughts because she is an experienced and proficient claims representative. Despite Sharp's concerns, Fereday testified that she concluded Sharp agreed the guidelines were attainable and reasonable.

Lewis followed up on Sharp's concern by asking Fereday what would happen to grievant if she fell short of the guidelines. Rather than respond directly to Lewis' question, Fereday stated that she was confident grievant would progress and, to show her confidence in grievant, Fereday stated she could extend the 3 weeks (April 12 – May 3) for several more. Fereday testified this meeting was to get Lewis and Sharp aligned with the guidelines and to keep lines of communication open. This is not credible since, having offered the carrot to extend the 3-weeks for about a month, Fereday concluded with the stick by stating a work drop from the regional office would be forthcoming if the Union, i.e., de Juliis, came to the office and, with that mindset, Lewis should pursue the representation matter with grievant.

Lewis' and Sharp's testimony and contemporaneous memorandum of their discussion with Fereday is more persuasive than Fereday's version. Pivotal in that credibility determination is the e-mail that Lewis sent to Fereday after the meeting stating that grievant wanted to continue with union representation. Unless the topic of grievant's union representation was broached during the meeting, there would have been no basis for Lewis to have sent that e-mail to Fereday.

Without success in precluding union representation from Tulsa coming to McAlester, the purported opportunity framed in the guidelines plus the extension of it vanished because about a week after the meeting with grievant, Lewis, and Sharp, Fereday cut short the 3 weeks and reprised against grievant for continuing with union representation with termination. Performance under the guidelines was not considered because as of April 21 Fereday would not have had the data summary that ADM Marshall testified she prepared on May 4 or the morning of May 5. Placed in the context of these events and exchanges, the Agency's assertion that it would have terminated grievant with or without concern for her protected activity is not persuasive.

Included within this context is Marshall's testimony which showed an uneasy facility of recall as to when she prepared that review. This is noteworthy because Marshall's testimony rang true that the decision to terminate grievant was a difficult, emotionally wrenching experience for her yet she was unable or unwilling to state, without prodding, when she engaged in the assessment that showed the only option as termination. Difficult and emotional acts do not readily dissipate from memory during the relative time between the emotional act (May 5 termination letter) and testifying about it (May 3). Rather, SSA determined on April 11 that grievant's performance was not at a level to grant a WIGI and it determined on April 15 that grievant's employment would

cease due to her continuing with protected activity in the form union representation. With that knowledge Marshall signed the termination letter.

Other acts and testimony point to protected activity and pretext rather than performance. For example, Marshall testified she began having concerns about grievant's performance in January 2005. Beginning February 3, however, grievant is assigned some of Skylar Davison's alpha cases because Davison is on maternity leave through April. Marshall also testified that she began to think about guidelines in mid-March; grievant approached Fereday with the idea for guidelines on April 12 or the day after Fereday told grievant a WIGI may not be forthcoming.

This news on April 11 about the WIGI surprised grievant because, prior to that time, Marshall had not expressed concerns to grievant that she was not progressing -- a point confirmed by Marshall in her testimony. Marshall did not need a month (March 15 to April 12) to develop the guidelines and her testimony that she developed the guidelines because grievant told her during the March 15 informal performance review that she [grievant] relied too much on Hull is not credited. Grievant's un rebutted testimony is that Marshall told grievant on March 15 that she had been informed by Hull that grievant was "on track."

Another event that indicates grievant's termination was for protected activity and not performance occurred when designated representative de Juliis sent an e-mail to DM Fereday around April 14 requesting certain information or data related to grievant and other claims representatives. Fereday testified that she considered this e-mail a request for information and she "pulled all data" because she wanted to know about grievant's performance. Although she had the data, Fereday did not to respond to the request. This is prejudicial to the grievant's interests because it shows Fereday's determination not to deal with de Juliis and, to carry that to fruition, it entailed terminating grievant for protected activity rather than seeing de Juliis' presence in McAlester.

Fereday's testimony as to her knowledge about grievant's performance varied between (1) she relied on Marshall's summary of data to (2) she pulled all the data to ensure she had a complete picture. Whether it was a summary or a detailed inspection that occurred at some point between the Union's request for information and grievant's termination, it was not disclosed to grievant's representative. A contention that a grievance is not grievable does not relieve the Agency of its obligation to respond to the Union's informational request.<sup>22</sup> The no-response in this grievance is an expression that undercuts the Agency's articulated reason for termination.

SSA argues that union representation has nothing to do with this termination because in 2003 union officials from Tulsa met with employees in response to their concerns about Fereday's micro-management. Union witnesses testified that the office

---

<sup>22</sup>*Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, Local 3937, 39 FLRA 298 (1991).*

environment improved after de Juliis and company intervened. The Agency portrays this as a salutary experience reflective of Fereday's willingness to deal with the Union.

If that is an accurate portrayal of the intervention, then willingness or openness to deal with the designated representative would not have prompted Fereday to approach local representative Lewis and seek her intervention essentially to preclude de Juliis from representing the grievant. This occurred after Fereday knew de Juliis was the designated representative.

The Agency acted with knowledge of grievant's union representation and a motivation to avoid it and that motivation to terminate in reprisal for protected activity was determinative before Marshall did any assessment under the guidelines. When Fereday failed on April 15 to persuade grievant to work through Lewis and Sharp, steps were taken to terminate. The Agency would not have terminated grievant at the time it effectuated the discharge had she not exercised her statutory right to engage in protected activity.

Given the framework in *Letterkenny*, the Union established a *prima facie* case of reprisal and the Agency responded why it would have terminated grievant with or without her engaging in protected activity. The Union demonstrated that the reason for the termination is a pretext for the protected activity and, but for that protected activity, the Union has shown that the termination would not occurred at that time during grievant's probationary year.

#### Alleged Violations of National Agreement

AFGE is the exclusive representative for all bargaining-unit positions and the National Agreement covers all employees pursuant to that exclusive recognition. Article 33 deals with probationary employees among others; it states that all employees of the unit are covered by the National Agreement consistent with applicable laws and regulations.

AFGE asserts numerous violations of the National Agreement - - two surface for the first time in its post-hearing brief and another was mentioned in its opening argument but was not addressed thereafter. Union exhibit one is inadmissible due to relevancy.

#### Article 1, Section 1 and Article 2

SSA violated Article 1, Section 1, and Article 2, both of which incorporate the unfair labor practice provisions in 5 U.S.C. 71, when the Agency terminated grievant for engaging in protected activity and failed to reply to the Union's request for information. But for this violation based on protected activity the grievant would not have been terminated at the time it occurred during her probationary year.

#### Article 3, Sections 1., 2A., 2B., 2C., 4B., 4D., 5B., 5E., 6B., 6E.1, 6I., and 10

The Agency violated Section 1 when it reprised against the grievant by terminating her for exercising a protected right in requesting union representation.

There is insufficient evidence to establish violations of Sections 2A., 2B., and 2C. and there is no violation of Section 4B. (SF-7B file) given the Union's reliance on DM Fereday's alleged statement to grievant that she was disappointed grievant had requested union representation.

The Agency complied with Section 4D. because the exhibits relied upon by the Union are not Fereday's personal notes which did not belong to grievant. There is insufficient evidence to establish that the Agency refused to provide grievant with the original forms or intentionally disclosed notes in the file in such a manner that it prejudiced grievant. The absence of ADM Marshall's notes in the extension file is not a violation of 4D. since data was maintained on the DWO3 records screen.

There is no violation of 5B. because (1) the information removed from the file belonged to DM Fereday, (2) there is no evidence that grievant was precluded from entering rebuttal information, and (3) the arbitration cases cited by the Union concern non-probationary employees. Section 5E. was violated by SSA's failure to respond to AFGE's request for information.

There is insufficient evidence to prove a violation of 6B. since Fereday's discussions prior to the date of the request for union representation were either run-of-the-mill conversations or informal discussions. The Union's interpretative conclusion on Fereday's testimony is not credited. There is no violation of 6E1. because the discussion was informal assistance.

No violation of 6I. since this is a new issue, new argument, appearing for the first time in the Union's post-hearing brief.

Section 10 in Article 3 states that personnel management in the Agency "shall continue to be conducted in accordance with the provisions of 5 U.S.C. 2301, Merit System Principles, and 5 U.S.C. 2302, Prohibited Personnel Practices[.]" SSA argued in its supplemental motion to dismiss that the arbitrator is without authority to consider a prohibited personnel practice.

Section 8 in the grievance procedure provides that an employee affected by a prohibited personnel practice may raise it under the statutory procedure or the negotiated grievance procedure. The Union raised this alleged violation of a statutory provision (prohibited personnel practice) under the grievance procedure. This matter is properly before the arbitrator.

AFGE argues that the violation of 5 U.S.C. 7116(a) by the Agency constitutes a violation of merit system principles. There is insufficient evidence from the Union to establish a violation of 5 U.S.C. 2301 and 2302(b). Section 2301, standing alone, is not a violation. As for 2302(b), the Union does not identify a particular item under 2302(b) so finding a violation is speculation. There is no violation of Section 10.

Article 16, Sections 1, 9B., 9C1., 9D, and 9E.

No violation of Section 1 for grievant received the training she requested; insufficient evidence for a 9B. violation; no violations of 9C1. and 9E. since grievant was not precluded from posing questions to others but was instructed to focus on her mentor and ADM Marshall. No violation of 9E. since it requires only consideration to adjust workload.

Article 21, Sections 1, 2, 6A., 6E., and 6F.

The guidelines were not an AP or PEP and, thus, fell outside the parameters of Article 21 and any discussions with grievant after the issuance of the guidelines were in the context of assistance or instructions which are outside the scope of formal performance discussions. There is no violation.

Article 22

AFGE asserted a violation of Article 22 (Within-Grade Increases) in its opening statement. There was no evidence or argument presented after opening statement. This issue was abandoned.

Article 24, Section 10

Alleged violations by each party have been addressed at pp. 26-28 setting forth the consequences and/or remedies for claimed violations.

Article 30, Section 2

SSA violated Section 2 when DM Fereday actively involved local representative Lewis after Fereday had notice that the designated representative was not Lewis.

Article 33, Sections 3A., 3C., and 3E.

Grievant received all requisite training for a probationary employee and assistance from mentors and staff. Reliance on DM Fereday's April 21 e-mail goes to the matter of reprisal for protected activity. There is no 3A. violation.

There is insufficient evidence to reach a 3C. violation and there is no 3E. violation since the Agency provided the grievant with two weeks notice of termination.

Whether the termination letter is deficient and whether that deficiency should be deemed harmful error by the arbitrator is new argument in the Union's post-hearing brief and will not be considered. AFGE cites no regulation or law that requires the Agency to include notice of any and all possible basis(es) of appeal in a letter of termination.

**In conclusion the concise answer to the issues framed by the arbitrator at the outset follows:**

(1) the grievance is properly filed under Section 10 in Article 24 for the Agency committed acts or omitted acts that materially served to negate its contractual right to bar or preclude an adjudication of this union-management grievance in arbitration;

(2) the termination of a probationary employee is subject to grievance arbitration when that termination is based on an alleged unfair labor practice that is referenced or incorporated within article(s) in the National Agreement;

(3) the Agency did not comply with Articles 1, 2, 3 and 30 in the National Agreement; and

(4) the failure to comply with Articles 1, 2, 3 and 30 is to reinstate grievant to the same or comparable position within the commuting area of the district office and for the Agency to cease and desist from (i) dealing with non-designated union representatives and (ii) failing or refusing to respond to a request for information under the Statute.

The award that follows incorporates the findings and conclusions set forth in the text of the opinion.

#### **Award**

1. The Union's motion to sanction and strike Agency defenses is denied.
2. The Agency's supplemental motion to dismiss is denied.
3. The Agency's motion to dismiss based on procedural arbitrability is denied and that part of the motion based on substantive arbitrability can be raised at any time; however, to the extent the motion's substantive arbitrability defense is premised on *INS* as the sole basis to adjudge this grievance, then the motion is denied.
4. The grievance is sustained in part. The Agency violated Article 1 at § 1, Article 2 at ¶ A, Article 3 at §§ 1 and 5E., and Article 30 at § 2 when it when it (i) terminated grievant as reprisal for her exercise of a statutory right to engage in protected activity by requesting union representation and (ii) failed or refused to respond to the Union's informational request. But for this protected activity the grievant would not have been terminated at that time during her probationary year. Consistent with law and regulation, the termination will be expunged from all Agency records and grievant retroactively reinstated to the same position or a comparable position within the commuting area of the SSA's McAlester office and made whole with leave, seniority, and backpay (minus earned compensation) and the Agency will cease and desist in its failure or refusal to respond to a request for information.

5. All other alleged violations and requested reliefs are denied.

*Patrick Halter*

---

Patrick Halter  
Arbitrator

October 20<sup>th</sup>, 20 06