

ARBITRATION

OPINION AND AWARD

Of Ed W. Bankston

in a Matter of Dispute Between:

SOCIAL SECURITY ADMINISTRATION

and

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFGE, LOCAL 3291**

Held at:
Little Rock, Arkansas
March 3 – 4, 2010

Case Number: DF-2009-R-0004(B)
Magnolia Littles
90-Day Suspension

APPEARANCES:

For the Agency:

- Ms. Dianne Mullins Pryor, Assistant Regional Counsel
- Mr. Ralph Padiella, Senior Advisor, OLMER
- Ms. Rebecca Crosland, Manager, SSA Conway, AR Office
- Ms. Carolyn Jackson, Center for H/R, Dallas Regional Office
- Mr. Mike Lienhart, District Manager, Little Rock, AR Office

For the AFGE:

- Ms. Patricia J. McGowan, Attorney for AFGE, Council 220
- Ms. Cheryl Spurr, Technical Expert
- Ms. Lisa Morris, Technical Expert
- Ms. Magnolia Littles, Grievant

May 28, 2010

I. GENERAL BACKGROUND

The parties to this dispute, SOCIAL SECURITY ADMINISTRATION (“Agency”) and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Local 3291 (“Union”) are signatories to a collective bargaining agreement effective August 15, 2005, for an initial term of four years and annually renewable thereafter. The Social Security Administration is charged with administration of the Social Security Act of 1935, a government program of old age, unemployment, health, disability and survivors’ insurance funded by employer and employee contributions. The Union represents professional and nonprofessional employees in a bargaining unit certified by the Federal Labor Relations Authority (“FLRA”) on August 30, 1979 as Case No. 2-09146(UC).

The grievant was first employed by the Agency as a college work-study student beginning in 1987. On April 17, 1994, she began work as a full-time “Service Representative.” In October 2003, she was promoted to the position of “Claims Representative,” and held that position for three years. In September 2007, the grievant voluntarily downgraded to Service Representative seeking to reduce stress levels due to severe, unexpected family trauma. The personal stress had impacted her work such that she was denied a regular step increase and her work effort was placed under supervisory review. It was during 2007 that she approved certain CPS payments requested of her by fellow employee Zelenka Herts. Those CPS payments proved to be fraudulent and Herts was later convicted of theft. For her role in approving those CPS payments, the grievant received a 90-day suspension. It is this 90-day disciplinary action which is the subject of this dispute.

The inability of the parties to resolve the dispute throughout the various steps of the grievance procedure and preliminary to arbitration has resulted in the grievance being submitted to the undersigned arbitrator for resolution. The dispute was heard by Ed W. Bankston who was selected by the parties pursuant to Article 25 of the National Agreement. The hearing was held on March 3rd and March 4th, 2010, at SSA Offices in Little Rock, Arkansas. The hearing was recorded and transcribed by Ms. Kay Butler, CCR, CVR-CM, duly certified as a Court Reporter for the State of Arkansas. A transcript of the hearing was timely received by the arbitrator and by the parties.

The Agency was represented at the hearing by Ms. Dianne Mullins Pryor, Assistant General Counsel. The Union was represented by its attorney, Ms. Patricia J. McGowan. Each party was properly and ably represented at the hearing. The parties agreed that the matter is properly before the arbitrator. Although the hearing was informal, each party was provided an opportunity to support its position with respect to the dispute by the testimony of sworn witnesses, exhibits and oral argument. The parties waived oral summation and elected presentation of Post-Hearing Briefs. The Briefs were timely received and the record was closed.

II. ISSUES

The parties were unable to agree upon issues to be submitted. The Agency proposes the issue to be:

Whether the Agency violated the 2000 American Federation of Government Employee/Social Security Administration (AFGE/SSA) National Agreement when it suspended Magnolia Littles (Grievant) for 90 days in this case? (Agency's Closing Brief, p.1)

The Union proposes the following issues:

Whether under the 2005 Negotiated Agreement Ralph DeJuliis is entitled to testify at hearing and to reimbursement of travel and per diem expenses?

Was the Grievant's 90 Day suspension for just cause? Did the Agency violate Articles 2,3,18, and 23, 25, of the AFGE/National Agreement? If so, what shall the appropriate remedy be? (Union Post-Hearing Brief, p.10)

Pursuant to Article 25, Section 1, the arbitrator frames the issues as follows:

1. Whether the Agency violated the National Agreement by its 90-day suspension of the grievant? If so, what shall the remedy be?
2. Whether Ralph DeJuliis is entitled to travel and per diem expenses as witness at the hearing?

III. PERTINENT FACTS

The grievant is a long-term employee of the Agency having worked fourteen (14) years full-time since April 17, 1994. Prior to that, she worked for seven years as a college work-study student beginning in 1987. Her work history is clean and without disciplinary blemish. She has received numerous awards during her service to the Agency. But, on April 28, 2009, she was issued a 90-day disciplinary suspension "for approving CPS payments on two Social Security records which resulted in fraudulent payments totaling \$21,344.00." (Agency Brief, p.2) The grievant had approved three (3) payments in the summer of 2007, upon request of Claims Representative Zelenka Herts, at that time a trusted employee. Later, it turns that those payments were deemed fraudulent and Herts was indicted for theft amounting to over \$100,000.00. Herts had initiated the claims which were regularly reviewed and "approved" by the grievant.

The approvals at issue were performed by the grievant during the summer of 2007. The Agency conducted an investigatory interview on July 28, 2008, whereupon the grievant was told that she would be suspended for 14 days. (Union Opening Statement, p.2; Union Brief, p.3) The grievant was not advised that the interview was disciplinary in

nature, and nothing further transpired until the Dallas Regional Office became involved and the 14-day suspension was transformed into a 90-day suspension. (Agency Brief, p.2)

The Union filed this grievance on May 15, 2009, complaining that the 90-day suspension was not for just cause. (Jt.Ex.5) The grievance was denied and the Union thereafter invoked arbitration on June 4, 2009. (Jt.Ex.6)

IV. POSITIONS OF THE PARTIES

The Agency – It is the position of the Agency that negligent actions of the grievant resulted in grievous injury to trust fund monies in the amount of \$21,344.00. As such, the 90-day suspension is for just cause. (Agency Brief, p.7) The grievant admits to having approved the payments such that her actions are inexcusable. The Agency insists that had the grievant properly reviewed the Beasley and Henderson accounts, “she would have recognized all the red flags indicating that the CPS payments were improper.” (Agency Brief, p.9) The Agency maintains that “it is clear that while Ms. Herts initiated the fraudulent payments, it was due solely to Grievant’s negligence in not performing her job that Ms. Herts was able to get away with the fraud.” (Agency Brief, p.11) The Agency maintains that the seriousness of the offense justifies the 90-day suspension. (Agency Brief, p.12)

The Agency denies that the grievant (African American) was subject to “disparate treatment” based on race. (Agency Brief, p.14) The comparison employee who is white and similarly implicated was not disciplined because, “there was nothing to alert Ms. Miller that the CPS payments were incorrect or any reason for her to question the payment.” (Agency Brief, p.15)

The Agency insists that it did not violate the National Agreement by failing to apprise the grievant of her right to union representation as the investigating supervisor "was not required" to so inform the grievant. (Agency Brief, p.3) It was sufficient that the grievant was "informed . . . that the purpose of the meeting was to discuss her approval of some of the fraudulent CPS payments that Ms. Herts made." (Agency Brief, p.3) "The Agency submits that the AFGE/SSA National Agreement did not require Ms. Crosland to advise Grievant of her right to representation." (Agency Brief, p.4)

With respect to the lapse of time between the grievant's offense and her 90-day suspension, the Agency insists that "While the OIG investigation was pending, the Agency could not approach Grievant with the suspicious activity, question Grievant about her involvement, or take any other action so as to not compromise the OIG investigation." (Agency Brief, p.5) Once the OIG had completed its investigation, then field office management was instructed to proceed with investigatory interview of the grievant. The Agency insists that, "The constraint of the OIG investigation was the reason that Ms. Crosland could not conduct the investigatory meeting with Grievant until July 2008." (Agency Brief, p.6) The Agency asks that the grievance be denied.

The Union – It is the position of the Union that the 90-day suspension of the grievant is in violation of the parties' National Agreement and without just cause. The Union contends that the Agency has failed to meet its burden of proof that the grievant was guilty of negligence. (Union Brief, p.40) The Union faults the Agency for failing to properly notify the grievant of her right to union representation prior to the investigatory interview and pending disciplinary action. (Union Brief, p.25) Accordingly, the Union insists that the grievant's Weingarten rights have been violated. Moreover, the Union