

A R B I T R A T I O N

O P I N I O N A N D A W A R D

Of Ed W. Bankston, Arbitrator

In a Matter of Dispute Between:

SOCIAL SECURITY ADMINISTRATION

And

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, Local 2505**

Held at:
Muskogee, OK
October 25, 2006

Case No.DF-2006-R-0001
Judy Norton --
2-Day Suspension

APPEARANCES:

For the Agency:

Mr. Greg White, Assistant Regional Counsel
Mr. Joe Deschaine, District Manager
Mr. Mr. Billy Williams, H/R Deputy Director
Mr. Earl Melebeck, Deputy Regional Commissioner

For the Union:

Mr. Ralph C. de Juliis, Executive Vice President
Mr. Bill Miller, Claims Representative (retired)
Ms. Maria Luisa Gomez, Technical Representative
Ms. Judy Norton, Grievant

January 11, 2007

I. GENERAL BACKGROUND

The parties to this dispute, SOCIAL SECURITY ADMINISTRATION ("Agency" or "SSA") and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Local 2505 ("Union") are signatories to a collective bargaining agreement effective April 6, 2000 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 payments. The Union represents professional and nonprofessional employees in a bargaining unit certified in 1979 as Case No. 22-09146(UC), and as approved by the Federal Labor Relations Authority. The Dallas Region is comprised of 134 divisional offices. The grievant has worked for the SSA since 1976, some thirty (30) years, most recently in the Muskogee, OK Field Office as a Claims Representative. There are twenty-one employees in the Muskogee Field Office, including the grievant. By letter dated May 28, 2004, the grievant was suspended from duty and pay for two (2) days, June 8th and 9th, 2004, for improperly accessing SSA records. (Jt.Ex.7)

The inability of the parties to resolve the dispute throughout the various steps of the grievance procedure

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 October 25, 2006 at Muskogee, OK. The hearing was tape-recorded by the arbitrator for his personal use in rendering this decision and was never intended to yield a formal transcript nor was it intended as an official record of the hearing.

Mr. Greg White, its attorney, represented the SSA at the hearing. Mr. Ralph C. de Juliis, its Executive Vice President, represented the Union. Each party was properly and ably represented at the hearing, and the parties agreed that the matter was 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 electing to provide the arbitrator the benefit of Post-Hearing Briefs. The Briefs were timely received on December 18, 2006, and the hearing was closed.

By letter dated November 12, 2003, the grievant was informed that, "I propose that you be suspended for two (2) calendar days...for...your unauthorized access to the

record of a co-worker's relative and disclosure of information from the record to the authorized individual." (Jt.Ex.6) By letter dated May 26, 2004, the grievant was notified of her 2-day suspension "effective Tuesday, June 8, 2004 through Wednesday, June 9, 2004." (Jt.Ex.7) The Union grieved the proposed suspension on June 2, 2004, asserting violation of the National Agreement, Articles 1,2 3, 18 and 23. (Jt.Ex.8) The Agency denied the grievance by letter dated September 7, 2004. (Jt.Ex.9) Thereafter, the matter was referred to arbitration. (Jt.Ex.10)

II. ISSUES

"Once a dispute is submitted for arbitration, the matter of framing the issues is 'to be resolved by the arbitrator,' who is 'limited by the language of the contract.'" *Avon Products, Inc. v. Int'l Union, UAW, AFL-CIO, Local 710*, 386 F.2d 651 (8th Cir.1967). That notion is also found in the National Agreement at Article 25, Section 1. It provides that, "If the parties fail to agree on a joint submission of the issue for arbitration, each shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard." (Jt.Ex.1, p.165)

The Agency proposes the issue to be:

Did the Agency have just cause for issuing a two-day suspension to Judy Norton in June 2004 pursuant to the Agency's Sanctions for Unauthorized Systems Access Violations? If not, what is the appropriate remedy? (Agency Brief, p.1)

The Union proposes issues as follow:

Did the Social Security Administration violate 5 U.S.C. 7116, and commit an Unfair Labor Practice by the actions of its officers and agents which led up to and resulted in its May 26, 2004 decision to suspend Judy Norton for two days from her position as a GS-11 Claims Representative in the Muskogee, OK SSA Field Office after she engaged in protected Union activities?

Did the Social Security Administration violate 5 U.S.C. 2301 (Merit System Principles) and 5 U.S.C. 2302 and commit a Prohibited Personnel Practice by the actions of its officers and agents which led up to and resulted in its May 26, 2004 decision to suspension Judy Norton for two days from her position as a GS-11 Claims Representative in Muskogee, OK SSA Field Office after she engaged in protected Union activities?

Did the Social Security Administration violate the provisions of the AFGE-SSA National Agreement, dated April 6, 2000, including but not limited to the provisions of Articles 1 (Governing, Laws and Regulations), 2 (Union Rights and Responsibilities), 3 (Employee Rights), 18 (Equal Employment Opportunity) and 23 (Disciplinary and Adverse Actions) by the actions of its officers and agents which led up to and resulted in its May 26, 2004 decision to suspension Judy Norton for two days from her position as a GS-11 Claims Representative in the Muskogee, OK SSA Field Office?

If so, what shall those remedies be? (Union Statement of Issues)

In view of the parties' proposals, of the facts of the matter, and of the nature of the dispute, the arbitrator frames the issue thusly:

Whether the Agency's two-day suspension of the grievant was for just cause, and if not what is the appropriate remedy?

III. RELEVANT PROVISIONS OF THE AGREEMENT

In view of the nature of this dispute as briefly described above, the issue to be resolved by your arbitrator, and the positions of the parties with respect to the issue, it appears that the following provisions of the Agreement are relevant to the resolution of this dispute.

MANAGEMENT RIGHTS

Section 1-Statutory Rights

- A. Subject to subsection (B) of this section, nothing in this Agreement shall affect the authority of any management official of any agency--
1. to determine the mission, budget, organization, number of employees and internal security practices of the agency; and
 2. in accordance with applicable laws--
 - a. to hire, assign, direct, layoff and retain employees in the agency or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

* * *

ARTICLE 3 EMPLOYEE RIGHTS

* * *

Section 2. Personal Rights

- A. All employees shall be treated fairly and equitably in all aspects of personnel management and without regard to political affiliation, race, color religion, national origin, sex, sexual orientation, marital status, age or disabling condition, and with proper regard and protection of their privacy and constitutional rights.

* * *

ARTICLE 23 DISCIPLINARY AND ADVERSE ACTIONS

Section 1-Statement of Purpose and Policy

The parties agree that the objective of discipline is to correct and improve employee behavior so as to promote the efficiency of the service. The parties agree to the concept of progressive discipline which is designed primarily to correct and improve employee behavior. A common pattern of progressive discipline is reprimand, short term suspension, long term suspension and removal. Any of these steps may be bypassed where management determines by the severe nature of the behavior that a lesser form of discipline would not be appropriate.

The parties further agree that normally, discipline should be preceded by counseling and assistance including oral warnings which are informal in nature and not recorded. Counseling and warnings will be conducted privately and in such a manner so as to avoid embarrassment to the employee. Bargaining unit employees will be subject to disciplinary or adverse action only for just cause.

Section 2-Timeliness of Discipline

If the Agency feels that disciplinary or adverse action is necessary, such action will be initiated timely after the offense was committed or made known to the Agency.

ARTICLE 24 GRIEVANCE PROCEDURE

Section 1—Purpose

The purpose of this article is to provide a mutually acceptable method for the prompt and equitable settlement of grievances filed by bargaining unit employee(s), the Union or the Administration.

Section 2—Coverage and Scope

A grievance means any complaint:

- A. by an employee(s) concerning any matter relating to the employment of the employee;

* * *

Section 5—Resolution of Grievances. . .

The Union and the Administration agree that grievances should be settled in an orderly, prompt and equitable manner so that the efficiency of the Administration may be maintained and morale of employees shall not be impaired. Every effort shall be made by the Administration and the Union to settle grievances at the first level of supervision. Employees and their representatives will be unimpeded and free from restraint, interference, coercion, discrimination or reprisal, consistent with 5 U.S.C. 71 and this agreement, in seeking adjustment of grievances.

* * *

Section 9—Procedures for Employee Grievances

A grievance must be submitted in writing, preferably, on the standard grievance form provided by the Administration, and presented to the Step 1 management official (designated in the Grievance steps Chart below).

ARTICLE 25 ARBITRATION

Section 1—Invoking Arbitration

A grievance processed under this agreement, if unresolved may be referred to arbitration as provided

for in this article...If the parties fail to agree on a joint submission of the issue for arbitration, each shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard.

Section 5-Procedures

- A. The procedures used to conduct the arbitration shall be determined by the arbitrator...
- B. The arbitrator's fees and expenses will be shared equally by the parties.

* * *

- F. The arbitrator's decision shall be final and binding.

IV. PERTINENT FACTS

As reflected in the three statements to follow, the salient facts of the matter are not disputed. On June 8, 2004 and June 9, 2004, a two-day disciplinary suspension was assessed the grievant "for her unauthorized access into the record of a co-worker's relative." (Jt.Ex.9)

The Agency had employed the grievant for some twenty-seven (27) years, all without disciplinary incident. For the previous ten years she had worked in the Muskogee, OK Field Office as a Claims Representative. On October 3, 2003, she provided the following statement of an incident occurring that day:

On 10/3/03, Bill Miller called my extension and said Susie needs to talk with you. Susie got on the phone and asked me if I would check to see if her newborn son, Jacob William Chapple, had been issued a social security number. I queried the system, since I do not

know Susie and gave her the number. I did not know this was a security violation since I did not know the individual on a personal basis. I thought this would be like any individual coming in and requesting this information. (Jt.Ex.3)

Joe Deschaine, District Manager, was the grievant's immediate supervisor. On October 7, 2003, he reported as follows:

I was walking by CR Judy Norton's desk on October 3, 2003 and she informed me that CR Bill Miller (Re-Employed Annuitant) had just called her and put his daughter (Susie) on the phone. Bill did not ask any questions or make any requests he just turned the phone over to his daughter. Susie needed the SSN of her newborn son. Judy queried the system and provided the SSN to Susie. When I asked Judy why she had queried the system she said she did not know Susie and did not realize that it would be considered a security violation. (Jt.Ex.4)

Bill Miller had been a Claims Representative for several years in the Muskogee, OK Field Office where he worked alongside the grievant. Although recently retired, he was again working "for a short time in the last half of 2003 as a re-employed annuitant." (Agency Brief, p.14) On November 11, 2003, he reported the incident, in pertinent part, as follows:

I have been asked to submit, in writing, what transpired between a co-worker and a member of my family.

On or about October 3, 2003...I called...Judy Norton's extension...

When Judy answered the telephone, I told her who I was and told her that my daughter wanted to speak to her

...My daughter...proceeded to ask if a Social Security number had been assigned to her son (born August 24, 2003). I heard my daughter give Judy information about her son (my grandson)...I saw my daughter write down the Social Security number and then repeat it back to Judy. She thanked Judy and that ended the conversation.

I did not speak to Judy after my daughter talked to her. I did not hear Judy give my daughter any of the information.

I have also been told that I may be assessed a sanction for my part in the above-mentioned incident. In re-reading the 'Reminder: Sanctions for Unauthorized Systems Violations,' I do not understand how I can be assessed a sanction since I did not access a record nor did I disclose information from a record.

...The responsibility rests on the shoulder of the person to access/disclose information.

...I regret the action that may be taken against a co-worker.

I also regret any negative reflection this places on you as manager of the Muskogee Social Security office. You have done everything to keep your employees informed of their responsibilities. (Jt.Ex.5)

Following his conversation with the grievant, Deschaine called the Dallas Regional Office for guidance. He was told to secure statements from Norton and Miller and to provide a statement himself. These three statements, appearing above, were thereupon evaluated by the Dallas staff office and a letter was provided to Deschaine for his signature proposing to suspend grievant for two days for "unauthorized access to the record of a co-worker's

relative and disclosure of information from the record to the authorized individual." (Jt.Ex.6; Union Brief, p.6) The grievant was invited to make "A written and/or oral reply ...to the deciding official...Or, ...you may contact Helene Jones..." A phone conversation ensued with the Dallas office on March 3, 2004 followed by a letter dated March 8, 2004, to Earl Melebeck, the deciding official, complaining of the "mechanical application of the Agency table of penalties so that mitigating factors are ignored." (Union Ex.3) The grievant's oral and written responses to the letter of proposal were rejected.

By letter dated May 26, 2004, over the signature of Earl Melebeck, the grievant was notified that, "it is my decision that a two (2) day suspension is warranted to promote the efficiency of the service...you will be suspended effective Tuesday, June 8, 2004 through Wednesday, June 9, 2004...If you...need further assistance, you may contact Ms. Helene Jones..."(Jt.Ex.7)

The Union filed a grievance dated June 2, 2004, complaining that, "SSA's actions violate Articles 1,2,3,18 and 23 of the National Agreement. SSA's actions are reprisal for Ms. Norton's protected activities and are also a violation 5 U.S.C. 71." The Union requested as relief:

- (1) Back pay with interest;
- (2) All records expunged of any

and all references of the suspension and the events which led up to it; (3) A posting to all employees that SSA will not discriminate or take reprisal based on sex and/or protected activities." (Jt.Ex.8)

By letter dated September 7, 2004, over the signature of Edward Vela, Deputy Regional Commissioner, the grievance was denied. Vela observes that, "As previously stated, the action was taken only after Mr. Melebeck considered all evidence and factors and determined that a two day suspension was warranted...it is my decision to sustain the action of the deciding official." (Jt.Ex.9)

The dispute proceeded unresolved to arbitration and the parties have now placed the matter squarely before the arbitrator.

V. POSITIONS OF THE PARTIES

THE AGENCY - "The Agency submits that the security and privacy of sensitive information in its databases is critical. This includes concern for the appearance of impropriety, conflict of interest or unfair advantage." (Agency Brief, p.20) The position of the Agency with respect to the dispute is that, "Despite all these admonitions, instructions and notices...Norton admitted that on October 3, 2003, she accessed the Agency's computer system and released information to a co-worker's relative,

which thereby violated Category IIA of the Sanctions Policy." (Agency Brief, p.4) The Agency asserts its right to manage and discipline employees and to that end has "established a table of sanctions to ensure that equal penalties are assigned for similar cases." (Agency Brief, p.20) The Agency maintains that the grievant was repeatedly given "adequate notice," that the "Sanctions Policy is reasonable," that "a fair investigation was conducted," that the grievant "was afforded the opportunity to respond and defend," that the "proof was substantial," that the grievant "received equal treatment," and that "the penalty was not so harsh and unconscionably disproportionate to the offense that it amounted to an abuse of discretion." (Agency Brief, pp.21, 22)

According to the Agency, "There is no merit to the claim of anti-union animus," nor is there probative evidence of sex discrimination. (Agency Brief, p.17, 18) The Agency asks that the grievance be denied.

THE UNION - It is the position of the Union that the grievant's two-day suspension was without just cause. The Union argues that in all fairness and according to Agency practice and policy, Bill Miller, as perpetrator of the incident, ought to have been disciplined likewise. (Union Brief, p.8) Instead, the grievant was punished; Miller was

not. The Union insists that the discipline may have been mitigated by proper consideration of all Douglas factors, to include: the employee's past disciplinary record; work record; the effect upon the employee's ability to perform his job; the notoriety or its impact upon the agency's reputation; potential for rehabilitation; and, other mitigating circumstances. (Union Brief, p.17) Moreover, the Union claims that, in fact, the grievant was acting upon "authorized access," such access having been authorized by the minor child's mother. (Union Brief, p.19)

The Union argues that the disciplinary process is inherently unfair in that the same individuals "wrote the proposal," performed the review, "wrote the decision," and denied the grievance. The Union argues that the disciplinary procedure is absent the required independent review fundamental to due process considerations. According to the Union, the grievant's substantive due process rights have been reduced to "a meaningless, ministerial, futile act." (Union Brief, p.21, 22)

The Union contends that, "Judy Norton's protected activity was the motivating factor in SSA's decision to suspend her for two days..." (Union Brief, p.41) It also contends that, "Judy Norton has established a *prima facie* case of sex discrimination." (Union Brief, p.41) The Union

asks that the grievance be sustained, that the grievant be made whole, that the incident be completely purged from her work record, and that the SSA be sanctioned for its violations of the General Agreement. (Union Brief, p.42)

VI. DISCUSSION AND OPINION

At the time of this incident, the grievant had worked for twenty-seven years as an Agency employee. From initial jobs as Administrative Aide and Data Transcriber, she has steadily worked her way up to the position of Claims Representative. In fact, it was District Manager Joe Deschaine who in 1996 selected the grievant for promotion out of the Odessa, Texas office. Since then, the grievant has won several in-house performance awards, and on occasion has served as officer-in-charge. Her long work history is unblemished by disciplinary action. She states that she has "never had a problem with access." But, on October 3, 2003, the grievant accessed the system at the behest of Bill Miller and on behalf of his daughter obtaining the social security number of her infant son having been enumerated at birth. The grievant released the infant's social security number to the mother, which, on the surface, seems an innocuous and benign event, as there can be no record for the infant to be protected other than the social security number.

As To Bill Miller's Complicity

Bill Miller perpetrated this incident; his culpability is undeniable. But, while the grievant was asked for a statement the day of the incident, it was more than a month later that Deschaine approached Miller requesting a statement and telling him of the grievant's two-day suspension. Miller states on direct-examination that Deschaine threatened him with a two-day sanction, but purposefully forestalled and deliberately averted disciplinary action knowing that Miller's interim appointment was ending December 31, 2003. (Jt.Ex.5; Union Brief, p.9) Miller perniciously seeks to distance himself from the situation, stating,

...I do not understand how I can be assessed a sanction since I did not access a record nor did I disclose information from a record...Not to minimize what I did nor to put the 'blame' on someone else, as an employee of the Social Security Administration, I, or anyone asked to access a record, have the right and obligation to refuse to access a record. The responsibility rests on the shoulder of the person to access/disclose information. (Jt.Ex.5)

With friends like Bill Miller, who needs enemies? The grievant was issued a two-day suspension; Miller went free. Clearly, the grievant relied to her detriment upon Miller's judgment in seeking assistance for his daughter. Miller's complicity is self-evident. But, Deschaine states on direct-examination that Miller "left before I could deal

with him." Billy Williams is Deputy Director for Employee Relations. He states on direct-examination that, "Normally, a person who causes a violation would also be disciplined ...had he remained, he would have gotten a two-day suspension...in like kind." Earl Melebeck agrees that the "person who causes the problem ought to be punished" as a matter of policy. The Union observes that it is the policy of the Agency that, "everyone involved in an incident get the same discipline." (Union Brief, p.15) Article 3, Section 2 of the Agreement promises that, "All employees shall be treated fairly and equitably in all aspects of personnel management..." But, it didn't happen that way, and you've got to wonder why?

Joe Deschaine is the Muskogee District Office Manager. He has twenty-one office personnel under him, seventeen of whom he has hired since becoming manager in 1996. Yet, he states that he is not authorized to administer discipline, and that he merely proposes the action while the Dallas office makes the decision. (The record speaks to the fact that Dechaisne did not even make the proposal, it was made for him as well as the piece of paper provided for his signature by the Dallas office.) Of course, that is the reason it took several months between October 3, 2003 and June 8, 2004 to effect the two-day suspension at issue.

(Has no one heard of the Hot Stove Rule?) And, that is mainly the reason given for not having disciplined Bill Miller - "he left before I could deal with him," Deschaine states. Billy Williams observes on direct-examination that, "had he remained, he would have gotten a two-day suspension, same as the grievant."

Bill Miller's tour ended December 31, 2003. He could have been disciplined anytime between October 3, 2003 and December 31, 2003, a three-month period, but for what is described as an inordinately "time-consuming process."

(Agency Brief, p.7) The Agency insists that, "...any rush to impose discipline would have merely been punitive in nature and not to 'correct and improve behavior.'" (Agency Brief, p.8) The fact of Miller's short time frame does not in and of itself render such action "punitive," as characterized by the Agency. All agree, he did the deed; he ought to have been punished. (Agency Brief, p.8) And, it's not as though Miller was cut some slack, clearly he was spared for purposes of expediency. In a similar matter, Arbitrator E. Frank Cornelius observed: "The Agency's glib explanation, that it was Grievant who actually accessed the SSA database, does violence to the concepts of suborning, inducing, conspiring, and aiding and abetting...The Agency has been neither fair nor equitable in its handling of this

matter and has discriminated against Grievant." (Union Brief, Ex.38) So it is here. Miller ought not have been spared and therein partially lay the crux of the matter. There is more.

The Grievance Procedure promises "an orderly, prompt and equitable manner" for the settlement of grievances. Here, there is nothing orderly, nothing prompt, and nothing equitable about the manner of disciplinary procedure at issue. The two-day suspension is not orderly in the sense of conformity to the contract; it is not prompt in the sense of being timely; and it is not equitable with respect to Miller's complicity. The Agency's action constitutes violation of contract and an abuse of discretion. For these reasons, the grievance will be sustained. But, there is still more, much more.

Along with a promised "orderly, prompt and equitable manner," the parties agreed to make "Every effort...to settle grievances at the first level of supervision." Joe Deschaine is the first line supervisor. He states on direct-examination that he "has no authority to issue discipline." Thus, the Agency has made this promise *illusory* by stripping the Branch Manager of authority to settle grievances. Hence, it is not possible for the parties to settle grievances at the first level of

supervision. Even worse, this rather innocuous and benign incident is answered first by management at Step 3, an arcane result and manifestation of a distressed and collapsed grievance procedure.

According to the Agency,

Prior to June 1998, an Agency employee's second-line supervisor was the management official who would determine how the employee would be disciplined. This resulted in disparate treatment of different employees for like offenses. However, after impositions of the Sanctions Policy, the determination of how to discipline each employee committing an infraction would be made by only one person in each region, the Assistant Regional Commissioner for Management and Operations Support. (Agency Brief, p.10)

Thus, Step 1 and Step 2 of the grievance procedure have been rendered moot by improper actions of the Agency, which effectively deny the bargaining unit access to those first two steps. These initial steps are so important because that's where the wrinkles are usually ironed-out. Here, all opportunity for accord and settlement early on are eliminated.

The Agency rationalizes the bypassing of Step 1 and Step 2 in the interest of "uniformity" and because of "the **severe nature** of the behavior." (Jt.Ex.1, p.154; Agency Brief, p.10) (Emphasis added) But, there is nothing severe about the grievant's behavior. In fact, I cannot imagine a more miniscule, less traumatic violation of the particular

rule at issue, by a more responsible employee, herein charged with improperly accessing the system and releasing to the mother her newborn's enumerated-at-birth social security number for purposes of the father's employment.

The Agency has a quest for "consistency," such that Earl Melebeck has "never mitigated a grievance." Here, there is barely the semblance of a grievance procedure, only the Agency's brand of "justice." I am more inclined to support Arbitrator Sylvester Garrett who intimates that, "equality of penalties does not represent equal justice." Elkouri and Elkouri, How Arbitration Works, 5th Ed., BNA, 1997, p.937.

A collapsed grievance procedure *nullifies* terms of the contract promising that, "...in seeking adjustment of grievances...Employees and their representatives will be unimpeded and free from restraint, [and] interference..." Simply put, there is no adjustment of grievances at the first level of supervision, or otherwise. Thus, the Union is impeded, restrained and interfered in seeking adjustment of grievances, initially by the fact that the first level supervisor is without authority to process and adjust grievances, and secondly due to the grievance procedure having been collapsed, clearly contractual renditions and violations in the Agency's quest for consistency.

It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault or mitigating or aggravating circumstances affecting some but not all of the employees). *Id.*, p.934.

Although recognizing the necessity of consistency, renowned Arbitrator Benjamin Aaron nevertheless instructs: "Absolute consistency in the handling of rule violations is, of course, an impossibility..." Benjamin Aaron, "The Uses of the Past in Arbitration," Proceedings of the 8th Annual Meeting of NAA, 1, 10 (BNA Books, 1955). What faces us today is the Agency's whimsical quest for absolute consistency and "the goal of zero tolerance" over several hundred employees scattered over 134 divisions across the Southwest United States. (Jt.Ex.9) It must be noted that any notion of zero tolerance is trumped by the requisite of just cause.

Here, the disciplinary process is a staff dominated function with little meaningful input from line management. In this particular case, all the staff players are in the Dallas office, far from Muskogee, OK. Helene Jones gathered the information, and wrote the proposal letter for review by Billy Williams. Jones' proposal letter was then sent to line manager Joe Deschaine for signature only. Earl

Melebeck executed the decision letter. Finally, Edward Vela formally denied the grievance. These individuals all work in the same Dallas office such that there is no source or opportunity for independent review, a traditional safeguard of due process. In fact, Melebeck admits that he reviews the proposal letter before it's sent out. Moreover, he states that he will not tolerate "incomplete staff work - they understand because they have to face me, too." It's a one-way street, and it appears that everybody's on-board right from the start. Consider that Melebeck "is only presented sanctions violations cases in which the facts demonstrate just cause that discipline would be appropriate and justified..." (Agency Brief, p.12) That one sentence speaks volumes about operations of the Dallas office. By the time it gets to Melebeck, it's a done deal - there is no independent review. As acknowledged by Melebeck, "he has not reduced any sanctions violation penalties to less than a two-day suspension..." (Agency Brief, p.12) Likely, it is a case of complicit collegiality, the end result, each lending his signature to the effort for the sake of noble appearance. But, make no mistake about it; their common mission as noted above is absolute consistency, zero tolerance, and foreclosure of just cause considerations. The grievance procedure is frozen and distressed.

In a remarkably similar matter, Arbitrator Andrew M. Strongin, determined that:

...disciplinary actions issued under the Sanctions remain subject to the just cause standard...mechanical application of the Table of Penalties to a given act of misconduct is no guarantee of, or replacement for, just cause under Article 23, Section 1. Alternatively stated, "The Agency cannot substitute a 'table of penalties' for the 'just cause' standard." (Union Brief, Ex.30, p.8)

As To Mitigating Circumstances

Earl Melebeck states that he has been the deciding official in "over 100 disciplinary cases." He candidly states on cross-examination that, "I've never mitigated a case." Actually, what that means in this context is that he has never overruled himself. Now, what has happened here is that all authority over disciplinary actions has been centralized in the Dallas office. There, the facts are gathered from field offices, assessed and evaluated by Melebeck's staff, and gauged against the Sanctions Policy for disciplinary result. That's the way it happened here with respect to Joint Exhibits 3, 4 and 5. No one outside the Dallas office had input concerning the grievant's two-day suspension, not even her supervisor.

In his decision letter dated May 26, 2004, Earl Melebeck states,

In arriving at a decision, consideration was given to the reason and supporting evidence presented in the

proposal letter, and the written and oral replies. Consideration was also given to the nature and seriousness of the offense and its relation to your duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. I considered your past work record, including length of service, performance on the job, and dependability. I also considered the consistency of the penalty with those imposed upon other employees for the same or similar offenses. Lastly, I considered all of the documents you were furnished, including memos and emails regarding sanctions violations. (Jt.Ex.7)

It's a safe bet that this language is boilerplate and appears in every one of the 100 or so decisions made by Melebeck - a meaningless partial rendition of the Douglas protocol. As found by Arbitrator Strongin above, "Here, the record is clear that Management issued the two-day suspension because it was the minimum penalty established by the Sanctions, and not because Rabinowitz [Melebeck] considered the entire record..." (Union Brief, Ex. 30, p.8) So, let's look at the record with a view to mitigating factors.

Initially, there is the inequity concerning differential treatment of fellow worker Bill Miller whose complicity has been demonstrated. There is no excuse for the disparate treatment of the grievant and the Agency's failure to discipline Miller for his actions. Grievant's disciplinary suspension is violative of the contract.

The evidence does not support as serious a violation as claimed by the Agency. Indeed, the violation was not of a "severe nature" as proclaimed by the Agency, nor as contemplated by Article 23, Section 1 of the General Agreement. The grievant's actions are found to be innocuous and benign, and importantly, incidental to her normal job duties. If anything, a discrete woodshedding would have sufficed.

The grievant's actions on October 3, 2003 are found to generally comport with the Agency's Policy Instruction dated August 28, 2004. Therein, is noted: "Effective immediately: Do not release SSNs...based on telephone requests if the caller does not provide the SSN." By way of "Background" the memo furnishes another view:

In order to serve those people who could not easily come to a Social Security office, **SSA has had procedures for providing information over the telephone if appropriate measures were taken to ensure that the caller was entitled to receive the requested information...**We are issuing these instructions to clarify that SSNs should not be released over the telephone...at the request of a caller when the caller does not have the SSN." (Agency Ex.3, p.2) (Emphasis added)

On the record, there is no doubt but that the grievant was acting within past parameters by taking appropriate measures to ensure that Bill Miller's daughter was entitled to receive the social security number of her newborn son.

It seems that she simply got caught up in the transition from old protocol to new protocol, possibly also did Bill Miller. It's a matter of excusable neglect and ought never have risen to the level of a two-day suspension.

The grievant's candor and forthrightness about her conduct is a mitigating factor worthy of consideration. She never attempted to cover-up the facts of the matter, and she has been entirely open, candid and honest about the circumstances, including immediate reporting of the incident to her supervisor.

Here, we have a grievant now with thirty years of service and a clean disciplinary record, yet, there is no hard evidence that her work record was considered as a mitigating factor. Joe Deschaine candidly admits on direct-examination that he failed to consider her work record. It is axiomatic that, "The level of discipline imposed must be based upon the nature of the offense and the disciplinary record of the employee." Discipline and Discharge in Arbitration, Norman Brand, BNA, 1998, p.80. And, according to Arbitrator Dworkin, "A penalty that flows from incomplete analysis of both the misconduct and the individual employee is arbitrary." *Clow Water Sys. Co.*, 102 LA 377, 380 (1994) Here, the Agency has narrowly focused on the Sanctions Policy and has impermissibly disregarded the

circumstances of the individual employee. Arbitrator Nicholas Duda, Jr. observes generally that, "To apply discharge without considering other elements [circumstances] is a rigid interpretation [of rules] that has long since been rejected in the field of Labor Relations." *The Timken Company*, 88-1 ARB 3263 (1967) The Agency was remiss in its failure to consider all relevant circumstances in its desire to "protect the integrity of the system." Just cause considerations extend to all relevant circumstances that touch and concern the grievant's employment history.

Finally, the Agency touts the effectiveness of its Sanctions Policy by the fact that since its inception in 1998, the absolute number of systems violations has steadily decreased. From about fifty violations in 1999, the number of violations has steadily decreased to eight in the year 2005. (Jt.Ex.12) The Agency attributes the sharp decrease in systems violations to consistent and rigid application of penalties. I suggest another explanation, that perhaps it is due to understated reporting. Quite simply, employees in the field are refusing to provide fodder for the Dallas gristmill.

According to behavioral theorists, it is observed that as the organization tightens the screws on employee

behavior, employees resist. Further tightening leads to increased resistance. Here, the field hands are resisting by not feeding the Dallas office with violations as occur. I think that's a viable explanation and deserving of Agency attention. (And, that's for free.)

To improve the situation, the Agency may consider institution of peer review boards in the District Offices. The peer review boards would function as Step 1 of the grievance procedure. At Step 2, delegate sufficient authority to District Managers to deal with disciplinary matters. Of course, what we're talking about is decentralization of the disciplinary process - back it down to its lowest level, as promised by the contract, and as practiced generally in the world of labor relations. (That's for free, too.)

On the record, the arbitrator finds no sex-based discrimination and no anti-union animus by which to suggest bargaining unit discrimination.

As discussed, the grievant's two-day suspension was unfair, arbitrary and capricious such as to constitute an abuse of discretion. It is unfair as lying outside the explicit promises of the Agreement, and lying wholly outside the reasonable bounds of just cause; it is arbitrary as unsupported by the nature of the offense; and,

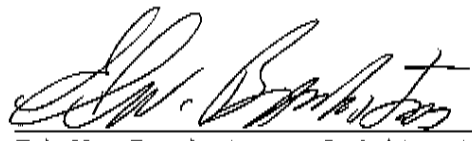
it is capriciously based on the Agency's deferential obsession with its Sanctions Policy as opposed to just cause requirements of the Agreement. Simply put, the grievant did not get a "fair shake." *Hiram Walker & Sons, Inc.*, 75 LA 889 (Belshaw).

VII. A W A R D

For all the reasons set forth and discussed above, which all are encouraged to read with care, it is the Award of the undersigned Arbitrator that the grievance is SUSTAINED.

The Grievant is to be made whole with respect to her loses, including back pay with statutory interest. The two-day suspension shall be expunged from grievant's record. The Union is awarded reasonable attorney's fees for successful prosecution of the grievance.

The arbitrator retains jurisdiction to resolve any and all disputes arising with respect to this award.


Ed W. Bankston, Arbitrator

January 11, 2007