

# American Federation of Government Employees

AFFILIATED WITH THE AFL-CIO

## Local 2505

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February 27, 2009

Janis Jones, Assistant District Manager  
Social Security Administration  
2615 Villa Prom  
Oklahoma City, OK 73107

By Fax: (405) 605-3078

Dear Assistant District Manager Jones:

This constitutes the Union's 2<sup>nd</sup> response to the December 12, 2008 proposal to reduce Cxxxxxx Sxxxx in grade (i.e., demote her) from her position as a GS 9, Step 9 Claims Representative to a GS 8, Step 10, Service Representative. All of the arguments made in the first response are incorporated by reference into this response.

Extensions of time to Friday, February 20, 2009, and then to Friday, February 27, were granted. The Union requested additional information by email dated January 8, 2009.

**I. SSA responded to the Union's information request but failed to provide most of the information requested**

The proper administrative / legal concept in which to deal with SSA's willful failure to respond to information requests is called "adverse inference". That means that if the requested evidence had been provided to the requesting party, it would have proven the assertions of the requesting party. The adverse inference being made against the party failing and refusing to provide the

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evidence (SSA in this case) will result in a “summary judgment” in favor of the requesting party (AFGE in this case).

That is the situation we have here.

Please note that SSA is very familiar with this concept. The Union refers SSA to *Huey v. SSA* and *Johnson v. SSA*. Both were non-selection EEO cases from the Kansas City Payment Center. SSA destroyed the vacancy announcement packages. EEO drew an adverse inference; EEO, therefore, found merit to the claims of non-selection based on racial discrimination, and awarded both employees retroactive promotions with back pay.

SSA gives various reasons why it is NOT providing the information requested by the Union. Let us review those reasons.

A. SSA writes:

3 - The documentation which forms the basis of the cases and numbers of backlogged cases cited in the PA, OPS and Proposal.

**This information was released in the previous response to the December 15, 2008 7114 (b) (4) request.**

Please accept the Union’s apologies for the confusion. The Union was not asking for the SSA prepared summaries of the errors allegedly made by Ms Sxxxx. The Union was requesting the original documents upon which SSA wrote the summaries of Ms Sxxxx’s alleged errors. The Union still wants the original documents; we have SSA’s summaries thereof.

The Union’s particularized need is as follows: The Union cannot rebut SSA’s assertions that something was done incorrectly without the original documents.

B. SSA writes in response to most of the other requested items:

**The data requested in items 4-7, and 9-11 does not exist. The Agency is under no statutory duty to create a document, or reduce manager observations to writing. There is no contractual requirement for the Agency to maintain the information relied upon in rating an employee in written form.**

or

**Data does not exist. Employee was rated under current PACS guidelines only as outlined in PPM and the AFGE agreement. The Agency is under no statutory duty to create a document, or reduce manager observations into writing. There is no contractual requirement for the Agency to maintain the information relied upon in rating an employee in written form.**

or

**Data does not exist.**

B.1. Let us discuss “Data does not exist.”

The Union requested all the data that SSA says it may use to determine an employee’s performance. The items requested are listed in the contract and in Ms Sxxxx’s PACS initial discussion. SSA has clearly stated in writing that it has none of the data it told the Union and the employee it was going to use to determine employee performance. Okay, well...then SSA cannot justify any employee performance rating, including the level 1 rating it gave to Ms Sxxxx. So, please withdraw this proposed demotion!

Or perhaps, SSA means to say it doesn’t have any of the data it said it was going to use in the contract and PACS discussion but it has this other data which SSA provided the Union. The data SSA has is NOT the data SSA told the employee it was going to use to evaluate performance. SSA has, therefore, violated Article 21, Section 5.Expectation Discussions:

- B. The discussion will also include an explanation of the performance plan terminology, the method(s) to be used to determine the level of performance in each Element, *the nature and type of work product or other result to be counted, reviewed, or otherwise monitored.* (Emphasis added)

B.2. Let us discuss:

**There is no contractual requirement for the Agency to maintain the information relied upon in rating an employee in written form.**

Good luck trying to convince an arbitrator to uphold demoting an employee with summaries only and no underlying documents to support summary conclusions.

Imagine we are in traffic court. We are challenging a speeding ticket. The officer swears that we were doing 95 mph in an 75 mph zone. (Uh...for the record, this is not that difficult for me to imagine). The officer says he clocked it on radar. We acknowledge that the officer told us that; HOWEVER, the officer did NOT let us see the radar display. Furthermore, we ask to see the radar technician’s documentation that the proper tests were administered on the radar to calibrate it so that it correctly determines speed. We also ask to see proof that the officer was properly trained on the use of the radar gun. The officer swears he was trained and that the radar was properly and recently calibrated. Sadly, the documentation was all misplaced and is no longer available. The speeding ticket is going to be thrown out by the judge, just as SSA’s proposed demotion of Ms Sxxxx will be overturned by an arbitrator. Why go there? SSA messed up. SSA will know better next time.

B.3. Let us discuss:

**Memory joggers are for the exclusive use of the management official that prepared them and must not be shared with anyone in accordance with Article 3 of the AFGE agreement.**

The record clearly shows that management had memory joggers and used them. Therefore, SSA must provide them to the Union.

For instance, SSA dated an OPS Discussion on 09/16/08. It is signed and dated by Ms Sxxxx and OS Anderson on 9/23/08. On page 1, SSA writes: "On 09/04/2008 you took a ... claim on XXX-XX-1090..." Does SSA mean to assert that it can review something on 09/04 and remember the SSN and other details 12 days later when the OPS Discussion was being written without memory joggers? Please!

Or, how about the 7/18/08 OPS Discussion: "Total reviews as of 07/18/05/08: 139 cases" Does SSA mean to assert that it can review 139 cases and remember everything that Ms Sxxxx did wrong without memory joggers? SSA couldn't even get the date of the review correct, writing "07/18/05/08". Was the review done, without notes, from July 5 through July 18? If SSA can get something as simple as the date wrong, imagine how many errors SSA made in looking at infinitely more complex claims material! We need and have a right to see what management saw.

Management memory joggers have been used. Article 3, Section 4. D states in relevant part:

These personal notes or memory joggers will not be used to circumvent timely disclosure to an employee, nor may they be used to retain information that should be properly contained in a system of records such as the SF-7B file. If any of these conditions are broken, these personal notes are no longer mere extensions of the supervisor's memory and become records subject to the Privacy Act.

Management's notes and memory joggers provided the basis for all of the PA and OPS discussions. Everything has been seen by the supervisor, the ADM, the DM and unknown staffers in RO. The Union, trying to defend her, is entitled to as much information and the same kinds of information as is management which is prosecuting and persecuting Ms Sxxxx, in its original form, not the sanitized, summarized version which only has the information SSA believes supports its proposal.

B.4. Let us discuss:

**The Agency is under no statutory duty to create a document, or reduce manager observations to writing.**

The Union respectfully disagrees. Reduction to writing is required by Article 21, Section 6.B, which reads in relevant part: "Supervisory conclusion based upon observations of an employee by management will be timely communicated to the employee."

Please see the above speeding ticket analogy. SSA claims errors. If SSA was not proposing to demote Ms Sxxxx, every one would say, "Uh huh" move on with a mental note to be alert to such things in the future. Since SSA is proposing the most severe action it could, short of removal, the Union, disputes those claims -- respectfully, as always -- and wants to see the source documents from which those claims arise.

#### B.5. Let us discuss:

21. Copies of all documents, correspondence, studies or plans; including those maintained on computer, which were created by Agency employees and/or private contractors, and which consider and/or in any way reference Ms Sxxxx's performance. This includes documents created or maintained in SSA Central Office in Baltimore, any Regional and/or Area and/or Local office. This request also includes all meta-data relating to the aforementioned data which is stored on or in any way retrievable from Agency servers or in the possession, custody or control of the Agency. What the Union is specifically seeking, in this meta-data request, is other versions of her PACS, all the discussions, the PA, OPS and proposal to demote as well as the emails through which the Microsoft word documents were exchanged between various SSA officials.

**After careful consideration of the information the union requested, as well as the applicable case law as it relates to our statutory obligations under 5 USC 7114 (b), we have determined that the agency is unable to furnish the information requested due to the union's failure to specifically articulate the type of information needed, the overly broad nature of its requests, particularly the request for supporting documentation, and its failure to make a connection between how the information requested will help in fulfilling the union's representational responsibilities under the Statute. Therefore, the union has not established a particularized need to the material requested. Moreover, the agency asserts a counter failing anti-disclosure interests in its internal, intra-agency, pre-decisional, deliberate decision making process.**

It is not overly broad. It is limited to OKC and those in the AD's office, RO and CO with whom management has been running its PA, OPS, OPS discussions and the proposal to demote.

When I was talking to an individual in RO about various matters, that person told me that SSA would be getting me information on the adverse actions SSA had proposed to take against the Little Rock 3. I asked if I could be expecting additional information regarding SSA's proposed demotion of Ms Sxxxx. That individual said someone else was working on that.

So, there you have it: the universe of people who are actually involved in Ms Sxxxx's demotion is NOT everyone in RO. Lots of folks there may know about it, but the email trail the Union seeks is a much smaller universe and is NOT overly broad.

Furthermore, it is NOT every document. Every document I have received from management has Ms Sxxxx's name in the subject field. SSA obviously is using a

unique, personal identifier, her name. It should not be too difficult to pull up emails with her personal identifier, her name.

Additionally, Ms Sxxxx and the Union were told that YOU will be making the decision in consultation with DM Williams. Now, we see from this information denial that many, many more people in SSA have been involved. How could they have been properly briefed on what was going on unless personal notes, memory joggers and documents were shared with them? Yet, SSA denies the Union's information requests.

The Union has articulated the type of information / documents needed: anything SSA has in electronic form.

The Union's need for the information and documents is to see what was added or deleted and by whom. For example, PACS requires in 5.18.1. Requirements for Performance-Based Actions: "Supervisors will initiate a performance-based action". What the Union is hoping to find in the previous, electronic versions of the proposal to remove is that the action was initiated by the ADM or DM or some one in the AD's office or RO. That document will prove that SSA has violated its PPM S430, 5.18.1 and that SSA's proposed demotion of Ms Sxxxx is defective and deficient.

In the case of Melanie Dinwiddie, *Local 2505, AFGE and SSA, Area V, McAlester, OK*, DF-2005-R-0055, Arb. Patrick Halter, 10/20/06, the document which turned up was an email from the DM to RO asking if the DM could just go ahead and fire the employee without giving her the promised opportunity to improve without getting caught in an unfair labor practice. Frankly, that is the kind of document the Union is hoping to discover in this information request. SSA's right to internal, intra-agency secrecy does not include the right to cover up discrimination or reprisal as alleged by Ms Sxxxx.

Now, SSA knows what the Union is looking for and how the Union will use that in fulfilling its representational duties to Ms Sxxxx in this matter.

The Union respectfully requests that SSA supply that data / information / documents and grant a further extension of time after the Union receives that information to evaluate it before responding to this proposal.

#### B.6. Let us discuss:

22. A list of all the mentors for all the employees in Ms Sxxxx's training class, names, dates, areas of expertise.

**After careful consideration of the information the union requested, as well as the applicable case law as it relates to our statutory obligations under 5 USC 7114 (b), we have determined that the agency is unable to furnish the information requested due to the union's failure to specifically articulate the type of information needed, the overly broad nature of its requests, particularly the request for supporting**

**documentation, and its failure to make a connection between how the information requested will help in fulfilling the union's representational responsibilities under the Statute. Therefore, the union has not established a particularized need to the material requested. Moreover, the agency asserts a counter failing anti-disclosure interests in its internal, intra-agency, pre-decisional, deliberate decision making process.**

Is SSA serious in its claim that the Union has failed to “specifically articulate the type of information needed”? What is not specific about “A list of all the mentors for all the employees in Ms Sxxxx's training class, names, dates, areas of expertise”? The Union was clearly specific about what specific information it wanted.

Is SSA serious in its claim that “A list of all the mentors for all the employees in Ms Sxxxx's training class, names, dates, areas of expertise” is “overly broad”? It is not!

Is SSA serious in its claim that “A list of all the mentors for all the employees in Ms Sxxxx's training class, names, dates, areas of expertise” can't be provided because the “agency asserts a counter failing anti-disclosure interests in its internal, intra-agency, pre-decisional, deliberate decision making process”?

The various OPS discussions which SSA provided all reference Ms Sxxxx's mentors. The Union has asserted in its previous response that they were prejudiced, had pre-judged her, were hostile and didn't help much because they were new to Title II. The information we requested will give us evidence that her mentors lacked sufficient program experience. As we noted in the previous response, bad mentoring can result in a demotion being overturned at arbitration. We need the dates to show how long Ms Sxxxx had to endure being mentored by mentors who lacked Title II program knowledge.

Additionally, the involvement of Ms Sxxxx's bargaining unit mentors in SSA's “internal, intra-agency, pre-decisional, deliberate decision making process” which resulted in the proposal to demote Ms Sxxxx certainly is outside of the scope of any bargaining unit employee's performance plan or position description. Please note that the performance standard “Assists in Managing Performance) found in PPM S430.5.6.6 and the performance standard for “Manages Performance” found in PPM S430.5.6.7 are for NON-bargaining unit positions.

Since management has misused bargaining unit employees -- in the demotion process for which they were not trained and for which they are not appraised -- as Ms Sxxxx's mentors, the Union needs to know who they were and when they were improperly mentoring her. The way management has misused Ms Sxxxx's mentors violates Article 16, Section 8. The information requested by the Union is needed to prove this contractual violation, which is so severe, that it warrants the nullification of her PA, OPS and proposed demotion.

N.B.: Since Ms Sxxxx is contesting her demotion, any further discussions of her performance with them by management constitute “formal discussions”. The Union wishes to have advanced notice and the opportunity to attend all such formal discussions per Article 3, Section 6.E of the AFGE National Agreement. I am the Union’s representative for all such formal discussions. As it takes me about 2 hours to get to OKC from Tulsa and as I have other obligations as Local President and other representational responsibilities, please insure sufficient advanced notice so that I may rearrange my schedule and day in order to attend all such meetings.

## II. Other

A. Exhibit 2, attached to SSA’s January 8, 2009 email responding to the Union’s information request, is the revised **Performance Expectation Discussions for New Hires (Rev. 8/18/08)**. This document and the end of year performance expectations it contains violates several parts of Article 21.

SSA revised Ms Sxxxx’s performance expectations but failed to hold another performance discussion with her as required by Article 21, Section F: “Subsequent expectation sessions should be held when there is a change in the work situation...”

SSA’s revision of Ms Sxxxx’s performance expectations violates Article 21, Section 6: Appraisal Period Mechanics:

A. Issuing Performance Plans

Supervisors will issue performance plans to employees no later than 30 days from the beginning of their appraisal periods.

Since this was not issued to Ms Sxxxx within “30 days from the beginning of” her appraisal period which began on 10/1/2007.

This revision violates Article 21, Section 5 - Expectation Discussions

- A. At the beginning of the appraisal period, the appraising official and the employee will meet to discuss the performance expectations so as to attempt to arrive at a full and complete understanding of what is required to achieve the successful contribution performance level described in the plan.

Obviously, revisions dated 8/18/08 could NOT have been provided at the beginning of the appraisal period (which began 10/1/07) as required by Article 21, Section 5.A.

This revision violates Article 21, Section 5:

- C. An employee shall not be rated on a performance standard that was not disclosed to him/her as part of a written performance appraisal plan.

This document was not in Ms Sxxxx's SF-7B Extension File. This document was not provided to Ms Sxxxx. Yet, this is part of the basis of her demotion by SSA. That clearly violates the provision of the contract which prohibits rating an employee on a performance standard that was not disclosed to her as part of the written performance appraisal plan which was given to her 10/22/2007.

B. SSA gave Ms Sxxxx her PACS-NHT Performance Plan on October 22, 2007. That violated Article 21.

Ms Sxxxx was promoted on July 8, 2007. Article 21, Section 9, Special PACS Provisions for New Hires and Trainees (PACS-NHT) requires:

D. PACS-NHT Performance Plans

Supervisors will issue PACS-NHT performance plans to new employees and trainees no later than 30 days from their entrance on duty into their new positions.

Per Article, 21, Section 9.D, SSA was required – the word used in the contract is “will” – to issue her performance plan by August 7, 2007. SSA did not do so. SSA issued Ms Sxxxx's performance plan two and one-half months late.

C. There is nothing negative in the file from Ms Sxxxx's first supervisor, Heath Tebow.

Clearly, he had no problems with Ms Sxxxx's performance which he felt were worth mentioning, putting in writing or deserving of a PA or OPS.

Clearly, the change in supervisors disadvantaged Ms Sxxxx as her new supervisors had different performance expectations than did Mr. Tebow. Unfortunately, SSA failed to communicate them in a documented PACS discussion as anticipated by Article 21, Section 5.F. The Union believes yet another change in supervisors from one who want her to succeed as opposed to ones who wants to document her failure, would result in dramatically improved performance such that this proposed demotion is not justified.

D. SSA's OPS is deficient.

The requirements of the OPS are found in PPM S430 5.17.1.

SSA in its 07/08 OPS, informed Ms Sxxxx in writing that “Your performance in the element(s) of Engages in Learning is not satisfactory.”

That violated the PPM which requires:

5.17.1. **Written Notice**

To institute an OPS plan, the supervisor must provide written notice to the employee that includes:

- The critical element(s) for which performance is unacceptable;

As I recall, “satisfactory” has NOT been used in performance appraisal lingo since SSA went to Pass / Fail in 1994.

Next: in the OPS, on page 2, SSA lists 10 sub-elements in Engages in Learning. On the subsequent pages, SSA identifies 6 of the 10 sub-elements in which SSA has “specific concern”. Still, SSA did not clearly state that Ms Sxxxx’s performance in any of those 6 sub-elements was unacceptable or “not satisfactory”.

Is that important? IT IS CRUCIAL!! In Ms Sxxxx’s final appraisal, dated 12/4/08, SSA wrote: “The areas that I would still like you to work on are...” and then lists FOUR specific concerns. Yet, SSA rated Ms Sxxxx’s performance in the element “Interpersonal Skills” as “Successful Contribution”. Therefore, the Union can conclude that expressing specific concerns does NOT equate to unacceptable or “not successful” performance.

The Union must conclude that Ms Sxxxx’s performance in 4 of the 10 sub-elements was “satisfactory” since SSA had no specific concerns.

The Union and Ms Sxxxx are in a quandary as to what she was expected to do and the level of performance she had to achieve to be rated as “successful contribution.”

Specifically, SSA failed to explain in how many of the sub-elements Ms Sxxxx would have to improve in order to reach “successful contribution.”

In the 12/12 Proposed Reduction in Grade, SSA ONLY cites errors in four sub-elements. Therefore, the Union concludes she improved in two sub-elements. So, management had no expressed, specific concerns in six out of ten sub-elements. The Union believes that the six sub-elements in which her performance was “successful”, when weighted, demonstrates that her performance, overall, was “successful” in the element Engages in Learning.

SSA had an obligation to explain in the OPS if any one sub-element was so important and so heavily weighted that “unsuccessful performance” in that sub-element would result in the overall rating of “unsuccessful” for the entire element of Engages in Learning.

SSA had an obligation to explain in the OPS if all the sub-elements were weighted equally. SSA had an obligation to explain how many of the sub-elements would have to have “successful” performance in order for the rating in the entire element Engages in Learning to be rated as “successful”. The PPM

states that to be rated "Outstanding" in a performance element, an employee needs only to perform a "substantial" number of the bullets listed in "outstanding." "Substantial" isn't defined. Having failed to define it in the PPM and having failed to define it in the OPS, it is only fair that the benefit of the doubt should be given to Ms Sxxxx and that "substantial" be found to be 50% plus 1. That would be six out of 10. She has performed "successfully" in 6 out of 10. Therefore, SSA is not justified in demoting her.

### **III. Conclusion**

SSA has not met its burden of proof; and, there is insufficient evidence to support its proposed demotion of Cxxxxxx Sxxxx for unacceptable performance.

The proposed demotion should be withdrawn with prejudice.

Ms Sxxxx's records should be expunged of all information related to the PA, OPS and proposed demotion.

The rating of "1" in the performance element "Engages in Learning" should be changed to a "3".

All WIGIs and career ladder promotions to which Ms Sxxxx would have been entitled should be retroactively granted.

Ms Sxxxx should be paid for all the overtime she could have worked but was barred from working because she was improperly considered "not in good standing."

Ms Sxxxx should be credited with credit hours she could have worked had SSA not improperly considered her "not in good standing."

On behalf of Ms Sxxxx and AFGE

Sincerely,

Ralph C. de Juliis, President  
AFGE Local 2505

Cc: Cxxxxxx Sxxxx  
Local 2505 Executive Board  
Patricia McGowan, Esquire