

VOLUNTARY LABOR ARBITRATION

In the matter of the Arbitration between)	
American Federation of Government)	
Employees Local 104)	
)	
"Union")	
)	National Agreement
and)	NRRA & AFGE
)	
National Personnel Records Center)	
)	
"Agency")	
)	

AWARD OF ARBITRATOR

The undersigned arbitrator has been designed in accordance with the arbitration agreement entered into by the above-named Parties, (effective April 11, 2002 through April 1, 2007) and having been duly sworn and having heard the proofs and allegations of the Parties, finds as follows:

STATEMENT OF ISSUE: Whether the National Personnel Records Center letter of removal issued to the Grievant, D. Banks, to be effective October 1, 2004, violated the Collective Bargaining Agreement, especially Article 22, Section 10. If so, what is appropriate remedy?

AWARD: The Union grievance is denied. There was no proof presented that the Agency did violate the Collective Bargaining Agreement. The notice of removal was for just cause.

I, Arnold Franke do hereby attest that the decision is consistent with the terms of this Agreement or any applicable law, rule or regulations.

Arnold Franke 9/28/05
Arbitrator's Signature (date)

State of Illinois)
County of Madison) ss:

On this *28th* day of *September*, 2005, before me personally came and appeared Arnold G. Franke to me known and know to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

Jo Ellen Wernsing
"OFFICIAL SEAL"
JO ELLEN WERNSING
NOTARY PUBLIC - STATE OF ILLINOIS
MADISON COUNTY, IL
MY COMMISSION EXPIRES NOV. 30, 2007

Distribution of Arbitrator's Award:

Two complete copies of the award sent certified, return receipt requested to the following individuals.

Union Representative

Mr. Brian Robinson
President Local 104
American Federation of
Government Employees
National Personnel Records
Center, Room 2515
9700 Page Ave.
St. Louis, MO 63132

Agency Representative

Ms. Sherry Valdez
Human Resource Services
National Personnel Records Center
9700 Page Ave.
St. Louis, MO 63132-5100

ARBITRATOR'S REPORT

Pursuant to the terms of the Collective Bargaining Agreement between American Federation of Government Employees, Local 104 (Union) and National Archives and Records Administration (Agency) (Joint Exhibit 1), the Company and the Union submitted the above-entitled grievance to Arbitrator Arnold G. Franke for final and binding arbitration.

The hearing was held on July 21, 2005 and continued on August 2, 2005, at the Records Center, 9700 Page Ave., St. Louis, MO. Post hearing briefs were submitted timely, i.e. postmarked on or before September 9, 2005.

JOINT EXHIBITS (There were a total of seven entered)

- #1 Collective Bargaining Agreement
- #2 NPRC letter of 10/21/04
- #3 Union letter to Agency 10/4/04
- #4 NPRC letter 9/22/04
- #5 Summary – Oral Reply Meeting 8/30/04
- #6 Notice of Proposed Adverse Action 8/16/04
- #7 NARA Personnel Manual – Personnel 300 Appendix 752A

AGENCY EXHIBITS (There were a total of ten entered)

- #1 NPRC letter 2/12/04 to Grievant
- #2 NPRC letter to Grievant 5/12/04
- #3 NPRC memo from Galli re Grievant
- #4 NARA work – Disciplinary and Adverse Actions
- #5 Douglass Factors
- #6 NPRC Performance Appraisal 11/17/03
- #7 NPRC Performance Appraisal 11/5/04
- #8 Quality Assurance
- #9 U.S. Court of Appeals, Fairall v. Veterans Administration
- #10 Certification of Personnel Action

UNION EXHIBITS (There were a total of sixteen entered)

- #1 Union File Folder pages 63-68 Performance
- #2 Union File Folder pages 49-58 Quality Assurance Program/Staff Bulletins/NARA Archives/Pacesetters
- #3 Union File Folder Grievant date of Appointment 8/20/79

- #4 Compilation of service requests, etc., etc.
- #5 NPRC letter to Robinson response to request 2/28/05
- #6 NPRC letter re warnings
- #7 NPRC letter re warning – misconduct
- #8 NPRC Counseling
 - Items 8/1 through 8/10 numerous copies of letters issued to correct improper performance.
- #9 1 NPRC 7/13/05 Proposal to suspend
 - 2 NPRC 8/11/04 Proposal to suspend
 - 3 NPRC 9/8/04 Proposal to suspend
- #10 NARA Staff Bulletin 10/04
- #11 PACESETTERS 10/04
- #12 PACESETTERS 5/04
- #13 Employee Performance by week 10/04
- #14 T. Jones 9/23/02 Meeting Scheduling
- #15 NRPC – Collection/Disposal documents 5/16/05
- #16 Grievant – FIOA/SSA

APPEARANCES OF THE PARTIES

Representing the Union:

Rayburn Wilkins, National Representative
Brian Robinson, Local Union President
Debra Banks, Grievant
Marsha Pointer, Union Steward L104



– Observer

Representing the Company:

Peter Themelis, Chief Employee Relations/Benefits
Sherry Valdez, H.R. Specialist
Darla Hetzel, H.R. Specialist
Jane Green, Manager NRPM2

Scott A. Levins, Assist. Dir./Military Records

[REDACTED]

Ronald Hindman, Director

The case for the Agency was presented by Peter Themelis. The case for the Union was presented Rayburn Wilkins.

All parties were present and afforded a full opportunity to present evidence, examine and cross-examine witnesses to make argument. Closing arguments were made by written brief.

STATEMENT OF ISSUE

Whether the National Personnel Records Center letter of removal issued to the Grievant, D. Banks, to be effective October 1, 2004 violated the Collective Bargaining Agreement, especially Article 22, Section 10. If so, what is appropriate remedy?

REVIEW AND ANALYSIS

Post hearing briefs were submitted timely by both parties. The briefs were well developed and copies of those documents are attached. In addition, a copy of the Union Opening Statement of 7/21/05 is provided.

This arbitration proceeding was an evidentiary hearing. Information was presented. *All the evidence and testimony presented was considered.*

Both parties in this hearing referred frequently to the Douglass Factors. In recognition of both parties having identified the Douglass Factors as significant, understood by the parties as "precedent" - a brief examination of each of the factors follows:

THE DOUGLASS FACTORS

(Excerpt from the MSPB Decision in the Douglass Decision)

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty.

Without purporting to be exhaustive, those generally recognized as relevant include the following:

1. The nature and seriousness of the offense, and its relation to the employee's 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;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offense.
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Arbitrator's evidentiary analysis regarding the Douglass Factors is as follows:

1. The seriousness of the offense is at the highest level. The nature of the work is routine, not unique and the offense was not infrequent. Inadvertent release of protected information by an Agency employee to an unauthorized party places the Agency in a precarious position.
2. Appropriate GS-03 Archives Aid – regular assigned work of this classification.
3. The Grievant's past disciplinary record was fully detailed by the evidence.
4. The Grievant's work record was fully detailed by the evidence.
5. The effect of past discipline was not positive regarding Grievant's ability to perform satisfactorily. This incident created great concern and doubts.
6. There was no proof presented of other employees charged with "neglect of duty" were not penalized similarly. Also, the penalty is consistent with the table of

penalties. NOTE: The Union contends this is exclusively performance whereas in this matter the Agency viewed the action as "conduct." That is the issue!

7. The penalty is in accord with the agency table of penalties. See Personnel 300, Chapter 752 in part, "if an act of misconduct is unrelated to previous act or acts of misconduct the penalty falls under the second or third offense as appropriate."
8. The NPRC letter to Grievant dated May 12, 2004 clearly placed the Grievant on notice regarding severity and possible consequences. (While Grievant did not sign certifying receipt of the letter, she did admit under oath that she had seen the document. She had refused to receive a copy on 5/12/04.) The impact on the Agency reputation is readily apparent.
9. There should be no doubt that the agency, in writing and verbally, had given specific notice regarding the violation as well as the consequence of committing the offense, i.e. "Sending out the wrong documents is negligence that can result in a warning, suspension or removal."
10. The issue of rehabilitation has been carefully reviewed. Based upon the Grievant's record including numerous infractions and discipline, it is reasonable to determine that the Grievant's work habits include "neglect of duty." Grievant's poor performance in the past as evidenced by prior offenses supports a determination that the Grievant's past performance was marginal and the actions in this incident were considered to be "negligent." There are several key elements to a job. An employee's ability to produce a great quantity has no bearing on the employee's ability to provide quality. A possible civil suit filed by a person for theft of identity caused by improper release of personal data would be made against the Agency. The Agency must exercise its responsibilities in an appropriate manner.
11. There were not, in this Arbitrator's opinion, mitigating circumstances for the Grievant which would support a decision to remove the disciplinary action.
12. The actions taken are in accord with generally accepted and administered remedies.

DISCUSSION AND FINDINGS

The parties have selected the Arbitrator in accordance with the Collective Bargaining Agreement. The matter is appropriate for arbitration and the issue has proceeded to arbitration as provided in the Agreement. The Arbitrator has received post hearing briefs regarding the grievance as stated on the record as provided in the Agreement. The Agreement provides that the Arbitrator's decision is to be forwarded to the parties within 30 days of submission of post hearing briefs, which was September 9, 2005 (award due no later than October 10, 2005).

The Union's position was argued from several perspectives:

- The issue was an error in performance and not a conduct issue (the Agency did argue that the Grievant's negligence was the cause of her removal).
- The Grievant had received several Agency Awards for performance. The employee received performance award and recognition on one hand and was, on the other hand, removed for a performance error.
- Other employees who have committed work errors are disciplined for work performance – not misconduct.
- That the Agency action created a harmful procedure error thereby adversely affecting the Grievant.

It is the Arbitrator's opinion that the Grievant's conduct was negligent. Grievant performed assigned tasks very rapidly and she committed numerous serious errors. The Grievant had been properly instructed, and retrained, she was counseled repeatedly. The Grievant rejected the opportunity to receive a carefully, properly crafted document which was a final warning that her conduct could lead to her removal. At hearing, Grievant never acknowledged the gravity of her actions. Grievant withheld information and, only after long pointed questioning, did the testimony spoken by Grievant become somewhat forthcoming.

This Arbitrator attentively listened to two full days of hearing, received a great quantity of submitted evidence (exhibits), received and analyzed the post hearing briefs, and then again thoroughly reviewed all the evidence received, the Collective Bargaining Agreement and other applicable materials. My opinion is based upon the evidence and arguments provided by the parties.

There was no evidence presented which would support the decision/determination that the Grievant was improperly removed. The evidence presented supports the

determination that the Agency's actions with regard to the Grievant was not in violation of any provision of the Agreement or applicable law.

The negligent performance of assigned duties is specifically provided for in NARA Work Chapter 752 – Disciplinary and Adverse Action. The facts of the case, the Agreement, the Agency-wide rules/regulations provide the basis for the Arbitrator's decision to support the action taken by the Agency.

It is this Arbitrator's opinion that to rescind the Agency action would be a violation of the Arbitrator's oath/role to be consistent with the terms of the Agreement and applicable law, rule and regulation.

AWARD: The Union grievance is denied. There was no proof presented that the Agency did violate the Collective Bargaining Agreement. The notice of removal was for just cause.