

**Social Security Administration and American Federation of Government
Employees, AFL-CIO, Local 1923**

Federal Arbitration

S. Jesse Reuben

BW-01-E-0006
0-AR-3544

April 3, 2002

Three Social Security Administration employees were given suspensions for inappropriately accessing the agency's computer to obtain information for nonwork-related reasons. The penalties for "unauthorized system access violations" were detailed in a memorandum sent by the commissioner. Also, all employees were asked to sign an acknowledgment statement.

The union filed grievances, claiming the suspensions violated the collective bargaining agreement. The union alleged the disciplinary actions were inconsistent with the concept of progressive discipline in the CBA. The union claimed the grievants were not aware they were doing anything inappropriate. Also, the suspensions were not consistent with the principles explained in the Douglas Factors, the union claimed. The Douglas Factors state: "Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. ... In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula."

The agency claimed its actions conformed with the CBA. Each of the employees admitted they accessed the agency computers for nonwork-related reasons. They all signed the acknowledgment form regarding unauthorized system access and received prior notices about the "importance of system security and the need for strict adherence to the rules regarding computer access."

The arbitrator opined that the discipline was based on the penalties outlined in the commissioner's memo and did not rely on or give due consideration to the Douglas Factors. The arbitrator ordered the grievance to be "remanded to the parties in order to afford the agency the opportunity to fully consider and apply the Douglas Factors in assessing the penalties in each of the cases."

Reuben, S. Jesse

APPEARANCES:

For Social Security Administration: Selena Gibson and Michelle Maxwell

For American Federation of Government Michael J. Snider, Esq. Employees,
AFL-CIO, Local 1923: and Jan Shpiegelman

Statement of the Case

This arbitration proceeding was held pursuant to the expedited arbitration procedures set forth in Article 25, Section 7 of the parties' 1996 National Agreement. The Arbitrator conducted the hearing in this matter on January 29 and 30, 2002, in Baltimore, Maryland. Both parties had the opportunity to examine and cross-examine witnesses, as well as present evidence in support of their respective positions. At the conclusion of their presentation of each of the cases involved herein, both parties made closing arguments.

Issue

While the parties did not stipulate as to issue or issues involved in this proceeding, it is clear from the record that the sole issue involved herein is whether the Agency's action in suspending the three grievants was appropriate under the terms of the parties' collective bargaining agreement.

Background

On June 22, 1998, the Commissioner of the Social Security Administration (SSA) issued a memorandum to all SSA employees notifying them that the Agency had "established a set of uniform Sanctions for Unauthorized System Access Violations because of the need to secure the integrity and privacy of the personal information contained in the SSA computers and to ensure that any violations of the confidentiality of our computer records are treated consistently." The Sanctions set up three categories of violations and specified the penalties for each category of violation. Employees were asked to sign an Acknowledgement Statement indicating that they had read and understood the Sanctions.

Previously, in February 1998, the Union had filed a grievance protesting the Agency's decision to issue a table of penalties for unauthorized system security violations contending that the issue was covered fully and extensively by the parties' existing collective bargaining agreement. The grievance proceeded to arbitration and on November 24, 2000, Arbitrator Joseph M. Sharnoff issued his award finding, in part, that the Union's grievance concerning the Agency's table of penalties was without merit. He noted, however, at page 24 of his award that,

the issue of whether a particular penalty meets the contractual just cause standard is a matter which must be resolved on a case by case basis in light of the particular facts involved. The Arbitration cases presented by the Union in

which the Arbitrator in each case set aside the discipline which had been issued pursuant to the Table of Penalties demonstrates that the Agency's right to discipline still is subject to arbitral review under the contractual just cause standard.¹

Facts

Nina E. Gilbert has been employed by the Agency for approximately 18 years. She is currently a GS-5 Claims Clerk in the Center for Material Resources Support, Office of Central Operations. On April 18, 2000, Ms. Gilbert's supervisor issued her a notice of proposed suspension for two calendar days. The notice indicated, among other things, that Ms. Gilbert's proposed suspension was based on her inappropriately accessing the Agency's computer claims system to obtain information for non-work related reasons. In this regard, it was noted that Ms. Gilbert had previously indicated to a member of the Agency's Security Operations Team that in December 1999, she had, in fact, queried the records of her daughter and her husband, as well as her own, to see if they were there or because she just wanted to look. Ms. Gilbert indicated that she had not given a copy of those records to anyone.

The notice to suspend further indicated that Ms. Gilbert had been notified in the past, and had acknowledged being notified, of the requirement that SSA employees follow established security procedures. The notice to suspend also made reference to the SSA Commissioner's June 22, 1998, memorandum to employees, the penalties contained therein, and the fact that Ms. Gilbert had acknowledged, by her signature, that she understood that sanctions would be imposed for any violations.

By letter dated June 8, 2000, Ms. Gilbert was informed by Joan Steward-Stevens, Assistant Associate Commissioner for Management and Operations Support, that she had decided to suspend Ms. Gilbert for two calendar days effective June 12 through June 13, 2000. Ms. Steward-Stevens noted as aggravating factors the nature and seriousness of Ms. Gilbert's conduct and the fact that Ms. Gilbert had received several prior "warnings."² Ms. Steward-Stevens also indicated that she did "not find your [Gilbert's] satisfactory work performance or your years of Federal service sufficiently mitigating ... " and that she was "unaware of any other mitigating circumstances that warrant a less severe disciplinary action."

On June 14, 2000, the Union filed the subject grievance on behalf of Ms. Gilbert contending that the two-day suspension violated the parties' collective bargaining agreement. Thereafter, on November 16, 2000, the Agency's Associate Commissioner, Office of Central Operations, denied the grievance, essentially reiterating the rationale set forth in Ms. Steward-Stevens' June 8, 2000, decision letter. The Associate Commissioner noted that he had "also considered the Douglas Factors including your employment history with the Agency."

Miriam Rabinowitz has been employed by the Agency for approximately 19 years. She is currently a GS-11 Social Insurance Specialist (Retirement) Claims Authorizer. On December 9, 1999, Ms. Rabinowitz's supervisor issued her a proposed notice of suspension for two calendar days. The notice indicated, among other things, that the reason for Ms. Rabinowitz's proposed suspension was that she had inappropriately used her access to the Agency's computer system to obtain information for non-work

related reasons. In this regard, it was noted, among other things, that it was discovered that Ms. Rabinowitz had accessed her granddaughter's social security number on April 26, 1999. Ms. Rabinowitz had previously advised the Agency's investigating Security Specialist that she had, in fact, queried her granddaughter's name because she needed to obtain her granddaughter's social security number in order to get her a savings bond.

In proposing to suspend Ms. Rabinowitz, her supervisor noted that she had previously acknowledged receiving various Agency memoranda setting forth established security procedures. Also referenced was the SSA Commissioner's June 22, 1998, memorandum to employees, the penalties contained therein, and the fact that Ms. Rabinowitz had acknowledged, by her signature, that she understood that sanctions could be imposed for any violations.

By letter dated June 2, 2000, Assistant Associate Commissioner Joan Steward-Stevens informed Ms. Rabinowitz that she had decided to suspend Ms. Rabinowitz for two calendar days. Ms. Steward-Stevens noted, among other things, the uniform set of Sanctions for Unauthorized System Access Violations set forth in the Commissioner's June 22, 1998 memorandum to Agency employees, which Ms. Rabinowitz, by her signature, had acknowledged she understood. For the reasons set forth in the December 9, 1999, proposal to suspend letter and after considering all the evidence "including the Douglas factors," Ms. Steward-Stevens advised Ms. Rabinowitz that her suspension would be effective June 13 and June 14, 2000.

On June 12, 2000, the Union filed the subject grievance on behalf of Ms. Rabinowitz, contending that the two-day suspension violated the parties' collective bargaining agreement. Thereafter, on November 1, 2000, the Agency's Associate Commissioner, Office of Central Operations, denied the grievance, essentially reiterating the rationale set forth in Ms. Steward-Stevens' June 2, 2000, decision letter. The Associate Commissioner noted also that in reaching his decision, he "considered your representative's arguments regarding progressive discipline, the Douglas Factors, and disclosure of the information...[and] also considered your employment history with the Agency."

Vincent Ford is a GS-11 Social Insurance Specialist in the Office of Central Operations, Division of Direct Service Operations. On April 19, 2000, Mr. Ford's

supervisor issued him a notice of proposed suspension for 14 calendar days. The notice indicated, among other things, that the reason for Mr. Ford's proposed suspension was that he had inappropriately used his access to the Agency's computer system to obtain information for non-work related reasons. In this regard, it was noted, among other things, that it was discovered that Mr. Ford had queried the system on behalf of a relative in an effort to check the system to see if the designation of a payee had changed. Mr. Ford indicated to the Agency's Security Specialist that he had, in fact, accessed the system and shared the information obtained with the family's attorney.

The notice to suspend further indicated that Mr. Ford had been notified in the past, and had acknowledged being notified, of the requirement that SSA employees follow established security procedures. The notice also made reference to the SSA Commissioner's January 22, 1998, memorandum to employees, the penalties contained therein, and the fact that Mr. Ford had acknowledged, by his signature, that he understood that sanctions would be imposed for any violations.

On or about August 3, 2000, Assistant Associate Commissioner Steward-Stevens advised Mr. Ford that she had decided to suspend him for 14 calendar days based on Ford's inappropriate use of his access to the Agency's computer claims system to obtain information for non-work related reasons. Ms. Steward-Stevens noted, among other things, the uniform set of sanctions for unauthorized system access violations set forth in the Commissioner's June 1998, memorandum to Agency employees, which memorandum Mr. Ford, by his signature, had acknowledged he understood. For the reasons set forth in the April 19, 2000, proposal to suspend letter and after considering all of the evidence, "including the Douglas factors," Ms. Steward-Stevens advised Mr. Ford that his suspension would be effective August 13 through August 19, 2000, and August 27 through September 2, 2000.

On August 4, 2000, the Union filed the subject grievance on behalf of Mr. Ford, contending that the 14-day suspension violated the parties' collective bargaining agreement. Thereafter, on November 9, 2000, the Agency's Associate Commissioner, Office of Central Operations, denied the grievance, essentially reiterating the rationale set forth in Ms. Steward-Stevens' letter. In denying the grievance, the Associate Commissioner noted that during the oral presentation the Union had raised several Douglas Factors; however, he did not indicate that those Factors were considered in reaching his decision to deny the grievance.

Agency's Position

The administrative actions taken against the grievants in this matter were appropriate and were for just cause within the meaning of Article 23, Section 1 of the parties' collective bargaining agreement. In each of the cases herein, the grievants admittedly made inappropriate use of the Agency's computer claims

system and obtained information for non-work related purposes. Moreover, in each of the cases herein, the grievants had several prior notices from the Agency concerning the importance of system security and the need for strict adherence to the rules regarding computer access. They also had acknowledged by their signatures that they were aware of a June 1998 memorandum from the Commissioner to all SSA employees which established a set of Sanctions for Unauthorized System Access Violations. In order to maintain the trust that the Agency has earned over the years, the Agency contends that its actions in disciplining the grievants in this matter were appropriate to assure the public that it is maintaining the confidentiality and security of the information held in its records.

Union's Position

The Union contends that the disciplinary actions taken the grievants in this matter were inconsistent with the concept of progressive discipline set forth in Article 23, Section 1 of the parties' collective bargaining agreement. It further asserts that the evidence establishes that the grievants did not know the rules prior to the imposition of the penalties against them. Moreover, the Agency's position that, in effect, it had no discretion when it imposed the penalties as prescribed in the Commissioner's June 22, 1998, memorandum to SSA employees constituted a failure to exercise appropriate discretion in the selection of an appropriate penalty consistent with the principles set forth by the Merit Systems Protection Board in *Curtis Douglas, et al. v. Veterans Administration, et al.*, 5 MSPB 313 (1981).

Discussion and Analysis

As noted above, while the Agency's establishment of Sanctions for Unauthorized System Access Violations in June 1998 was found by Arbitrator Sharnoff not to be violative of the parties' collective bargaining agreement, Arbitrator Sharnoff also concluded that this finding did not preclude the resolution on a case by case basis of issues as to whether a particular penalty in a particular situation meets the contractual just cause standard.

The grievances at issue in the matter involve three grievants with long, unblemished employment records at the Agency. Each of them admittedly made an inappropriate limited use of the Agency's computer claims system and thereafter apologized for his or her conduct.

As a result of their conduct, the Agency, utilizing the categories of system security violations and the required administrative actions for the offenses set forth in the attachment to the Commissioner's June 22, 1998, memorandum to SSA employees, suspended Grievant Gilbert and Grievant Rabinowitz for 2 days under Category I (Access Without Third Party Disclosure) and suspended Grievant Ford for 14 days under Category II (Misuse/Disclosure).

It has long been held in the Federal sector that in the selection of an appropriate disciplinary penalty, agencies exercise responsible judgment in each case based on individual considerations rather than acting automatically on the basis of generalizations unrelated to the individual situation. See Curtis Douglas, et al v. Veterans Administration, et al., cited above. In setting forth the so called "Douglas Factors," the Merit Systems Protection Board noted that while not all of the factors will be pertinent in every case, "Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case." Additionally, the Board indicated that, "In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula." (emphasis added.)

The evidence in the subject cases does not establish that the Agency officials who selected the disciplinary penalties looked to any factor beyond those contained in the Sanctions for Unauthorized System Access Violations attached to the Commissioner's June 22, 1998, memorandum to SSA employees. Thus, in her testimony in each of the cases, Assistant Associate Commissioner Steward-Stevens confirmed (despite her passing references to the Douglas Factors in her decision letters) that once it was established that there had been unauthorized access, the sanctions contained in the Commissioner's June 22, 1998, memorandum automatically came into play without regard to the consideration of any relevant Douglas Factors. Moreover, the grievance decisions by the Agency's Associate Commissioner, Office of Central Operations, did not clearly indicate that the Douglas Factors were considered at that level. While, in passing, the Associate Commissioner (who did not testify in this matter) stated baldly that he considered the Douglas Factors in the Nina Gilbert and Miriam Rabinowitz cases, there was little or no evidence to support this assertion.³

Under all of these circumstances, I find that the evidence is insufficient to establish that the Agency gave due consideration to the Douglas Factors in assessing the penalties in the subject cases. Consequently, I shall order the grievances in this matter be remanded to the parties in order to afford the Agency the opportunity to fully consider and apply the Douglas Factors in assessing the penalties in each of the cases. After careful consideration and application of the Douglas Factors, the Agency should expeditiously reissue its decisions with respect to the subject grievances.⁴

Order

It is hereby ordered that the subject grievances be, and they hereby are, remanded to the parties in accordance with the above decision.

¹The Union's exceptions to Arbitrator Sharnoff's award were denied by the Federal Labor Relations Authority in 57 FLRA No. 85 (September 20, 2001).

2These "warnings" refer to a series of memoranda issued by Agency to SSA employees dating back to 1992, concerning the importance of protecting the privacy of personal information in Agency files.

3In the Vincent Ford case, while noting that the Union representative raised the Douglas Factors at the third step grievance meeting, the Associate Commissioner did not mention that he considered the Douglas Factors in his disposition of the grievance.

4In the event the Union disagrees with any of the Agency's reissued decisions on the subject grievances, it may again invoke arbitration in accordance with Article 25 of the parties' collective bargaining agreement.

Mr. S.JesseReuben

American Federation of Government Employees, Local 1923 and Department of Defense, Navy, 102 FLRR 2-1052 (January 30, 2002); Appealed (O-AR-3517)(Arbitrator Irwin R. Kaplan)(The Arbitrator Ordered A Retroactive Promotion Since The Grievant Performed The Grade Controlling Duties Of A Higher Grade At Least Twenty-Five Percent Of The Time. The grievance was sustained and the arbitrator found that the grievant was entitled to a retroactive temporary promotion with back pay since grievant performed the grade controlling duties of a higher grade position at least twenty-five percent of the time).