

FEDERAL MEDIATION AND
CONCILIATION SERVICE

CASE NO. 05-01492

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In the Matter of the Arbitration :

OPINION AND AWARD

-between- :

MARILYN M. LEVINE, ESQ.
ARBITRATOR

AMERICAN FEDERATION OF :
GOVERNMENT EMPLOYEES :
LOCAL 940, AFL-CIO, :
Union, :

-and- :

DEPARTMENT OF VETERANS :
AFFAIRS, :
Employer. :

Regional Office Insurance Center :

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HEARING HELD: June 8, 2005, June 9, 2005, November 9, 2005
November 10, 2005

APPEARANCES:

For the Union

Martin Cohen, Esq., Attorney
Joseph Malizia, President, Local 940
Frank Russo, National Representative District 3

Grievants

Linda Owens
Jack Higgins
John Segata
Edwin Whitfield
Ruben Colon

For the Agency:

Don Taylor, Agency Representative
Thomas M. Lastowka, Director
Frank Matrone, Assistant Director for Regional Office Operations
Al Bocchicchio, former Assistant Veterans Service Center Manager
Lucy Filipov, former Staff Assistant
James Decker, Senior Veterans Service Representative (VSR)
Laura Rodan, Senior Authorizer, Veterans Service Center (VSC)
Diane Rivera, former Super Senior Authorizer, VSC
Robert Bonner, former Coach, VSC

ISSUES

Agency Issues:

1. Is the Union filing a Step 3 Negotiated Grievance?
2. If so, can the Union's Step 3 Negotiated Grievance filing achieve or constitute group grievance status absent an agreement by the Employer?
3. Is the Union's unilateral declaration of a Step 3 negotiated Grievance filing being a group grievance a proper filing?

Union Issue:

1. Was there just and sufficient cause for the discharge of the five Grievants? If not, what shall be the remedy?

BACKGROUND

At the conclusion of the Agency presentation of its case, the Union made a Motion for Judgment on the material presented by the Agency, based on a lack of a prima facie case on the Agency's part.

The Union asserted that the Agency failed to meet its burden of proof by a preponderance of the evidence as required.

The Union observed that five (5) people were fired with no advance notice; Management conceded that there was nothing in writing that informed the Grievants that if they did not conform to certain conduct they would be fired.

Based on the foregoing, the Union requested a bench decision in its favor.

The Agency objected, requesting that the undersigned arbitrator consider the full record, which encompassed three (3) days of hearing during which the parties made opening statements, the Union President of Local 940 testified at length, the Agency presented its case in chief including testimony by its eight (8) witnesses and submission of twenty-one (21) Exhibits. The Union submitted documents received in evidence as Union Exhibits 1 and 2, and Joint Exhibits were also received in evidence.

The Agency requested that the undersigned get the testimony of the Grievants and that consideration be given to the Douglas Factors.

The Agency asserted that the Grievants had been orally told about what they were expected to do, and that there is no requirement or obligation that puts a duty on the Agency to put information in writing.

The Motion by the Union was granted by the undersigned for the following reasons:

OPINION

With respect to the Agency issues which are: 1) Is the Union filing a Step 3 Negotiated Grievance?; 2) If so, can the Union Step 3 Negotiated Grievance filing achieve or constitute group grievance status absent an

agreement by the Employer?; and, 3) Is the Union's unilateral declaration of a Step 3 Negotiated Grievance filing being a group grievance a proper filing?; the following findings were made:

The Union saw a pattern of proposed removal letters being sent out to five of its members, all of whom worked as Veterans Service Representatives (VSRs) in the Pension Maintenance Center (PMC) during the period at issue. Four of the five individuals had the same coach.

The proposed removal letters contained similar language, and certain sentences in the letters were identical.

The Union filed this grievance initially as a group grievance. It could only be filed initially at the Step 3 level, since the action taken by the Agency had been carried out at the Step 3 level.

Had individual multiple grievances been filed initially, and the Union then subsequently determined it would prefer to consolidate the individual grievances into a group grievance, it would have needed the consent of the Agency to do so. That was not the case here.

The foregoing findings are in agreement with the Veterans Administration Supervisory Handbook: Veterans Administration-American Federation of Government Employees Master Agreement dated August 1982 (Union Exh. 1, pp. 18-20) which provides with respect to Section 10, as follows:

Initially, employees and the Union have the option of deciding whether grievances over the same issue will be filed individually or as a group grievance. There after, mutual consent is required in order to combine individual grievances so that one decision will apply to all.

With respect to the merits of this case, it is noted that this was a new program whereby benefits for needy veterans and their families would be centralized in three (3) locations, Philadelphia being the largest of the three.

The number of applications per day that could realistically be processed by Veterans Service Representatives (VSRs) was originally estimated to be twenty-eight. But it soon became apparent, thereafter, that a more accurate number that could reasonably be processed by each VSR per day, was eighteen. And this figure was mutually negotiated.

Computers at the individual work stations had been programmed to count only newly completed application requests toward production numbers.

When authorizers returned work to VSRs for corrections, it was referred to as work that had been "n"ed.

VSRs received no credit toward their production numbers when they corrected and resubmitted the rejected applications to their authorizers.

Rejected applications were kept in boxes at work stations, on top of and beneath the VSRs' desks, in full view of supervisory personnel.

The finding is made that the Grievants had good reason to focus on accomplishing work in the first instance, by processing new applications in order to keep production up.

While correcting "n"ed applications promptly was certainly imperative, Grievants were not corrected when they failed to do so. Proper supervision was lacking.

It was not unreasonable for Grievants to interpret the emphasis on production to mean that "n"ed work, or rejected work, was not on the front burner in terms of their required duties.

This is not a situation where individuals concealed work in the hope that it would go unnoticed.

Rather, the standards to be used in processing work were never reduced to writing.

Nor were any of the five (5) Grievants ever issued any written warnings or disciplinary suspensions prior to the receipt of the proposed removal notices.

Although certain Grievants acknowledged they had heard of the requirement of correcting "n"ed work within 24 to 48 hours, others did not, and they all saw that while lip service may have been given to this goal, it was never enforced.

Four of the five Grievants had unblemished records of employment prior to their ultimate removal.

The fifth Grievant had been suspended for an unrelated reason.

There is no evidence that Grievants were not working, or that they were wasting time, or engaging in non-work related activities.

Fundamental due process requires that individuals have some knowledge of the fact when they are putting their jobs in jeopardy.

I find that the Grievants had good reason to believe they were properly performing their job duties.

Among the 21 Agency exhibits submitted in evidence, there is unfortunately no mention of the requirement that "n"ed work be corrected and resubmitted within 48 hours or two (2) business days.

While it is absolutely imperative that needy veterans and their families receive their proper benefits in a timely manner, it is unfair to remove employees who had good reason to believe that they were doing the right thing when they focused on "keeping production up" by spending their time processing new applications.

While there is no requirement or obligation that the Agency put information in writing, it is grossly unfair to remove employees who were led to believe by supervisory personnel that they were doing the right thing

when they focused on keeping production up by processing new applications, and were not corrected or disciplined in any way when they delayed processing "n"ed work that had been returned to them.

It is noted that four of the five Grievants had the same coach who subsequently took a different position at a lower pay grade.

In the seminal case, Enterprise Wire and Independent Enterprise Union Co. and Independent Enterprise Union, 46 LA 359, 1966, the importance of employees being put on notice of what is expected of them was enunciated by Arbitrator Carroll Daugherty in his seven (7) tests for determining the existence of just cause for discharge.

The first test enumerated by Arbitrator Daugherty is whether or not the employee was "forewarned of the consequences of his actions."

Similarly, the Merit Systems Protection Board in its landmark decision in Douglas v. Veterans Administration, 5 MSPR 280 (1981) describes twelve (12) criteria for determining appropriate discipline.

Among the Douglas Factors, the ninth Factor is "the clarity with which the individual was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question."

In this case, the finding is made that the Grievants were not clearly on notice that they were violating any rule when they focused on keeping production numbers up by processing new applications.

The Grievants accumulated a back log of "n"ed applications without every being put on notice or warned that their focus on processing new applications could lead to their removal.

I find that there was not just and sufficient cause to remove the Grievants for following supervisory directives to keep their production

numbers up, since the only way for the Grievants to keep their production numbers up was to process new applications.

It is also significant that overtime was only to be used for processing new applications, and not for the correction of "n"ed work.

The boxes of "n"ed work were in full view for all to see. No effort was made by the VSRs to conceal the backup of "n"ed work.

The Employer has the burden of establishing a prime facie case in a disciplinary matter. Supervisory failure to adequately instruct the Grievants concerning the turn around time for the correction and resubmission of rejected applications for benefits is patently clear. The failure to immediately correct misconceptions concerning the obvious emphasis on processing new applications misled the Grievants into working at what they reasonably believed was their proper assignment; i.e., to focus their attention on keeping production numbers up by processing new applications, which resulted in the delay in correcting and resubmitting rejected applications. Testimony from the Grievants under the facts and circumstances in this case is not warranted.

Having carefully considered the evidence presented and arguments advanced by the parties, I find that the Agency has not met its burden of proof by a preponderance of the evidence; i.e., the group grievance was properly filed, and there was not just and sufficient cause for the discharge of the five (5) Grievants.

Accordingly, the following Award is rendered:

AWARD

1. The grievance was properly filed.

2. There was not just and sufficient cause for the discharge of the Grievants. They shall be reinstated to their positions and rendered whole.

DATE: *December 22, 2005* *Marilyn M. Levine*
MARILYN M. LEVINE, ESQ.
ARBITRATOR.