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IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2859, and DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION. RE: Grievance of Beatrice Harnett	**OPINION AND AWARD** **of** **LUELLA E. NELSON, Arbitrator** February 22, 2006

This Arbitration arises pursuant to Agreement between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2859 ("Federation"), and DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION ("Employer"), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on December 6, 2005, in Tucson, Arizona. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs on or about January 23, 2006.

APPEARANCES:

On behalf of the Federation:

Steven W. Zachary, Esquire, P.O. Box 2512, Mesa, AZ 85214

On behalf of the Employer:

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STIPULATED ISSUE

1. Was the disciplinary action in this case taken for appropriate cause and was such cause just and sufficient and only for reasons as will promote the efficiency of the Service?

2. Was the penalty reasonable?

RELEVANT SECTIONS OF THE AGREEMENT

ARTICLE 31 Disciplinary and Adverse Actions

A. **Discipline Definition.** The disciplinary actions covered by the provisions of this Article are written reprimands and suspensions of fourteen (14) days or less.

...

H. **Discipline/Adverse Action Procedures.**

(1) **Just Cause.** The parties agree that letters of reprimand, suspensions of less than fifteen (15) days, and adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the Service.

...

(4) **Timeliness.** The Employer shall furnish employees with notices of proposed disciplinary actions at the earliest practicable date after the alleged offense has been committed and made known to the Employer. The parties recognize that certain investigations are beyond the administrative control of the Employer. Where investigations have been unduly prolonged, regardless of whether they are within the administrative control of the Employer, a reasonable extension of the response period to the proposed disciplinary action will be granted by the Employer, upon the request of the employee or his or her representative.

FACTS

Grievant is an Administrative Support Assistant, performing various clerical functions at the Employer's Douglas, Arizona, facility. She has worked for the Employer (including one of its predecessor agencies, the Immigration and Naturalization Service ["INS"])[1] since January 1997. Her performance has been evaluated each year as excellent or outstanding. She was suspended for two days, October 7-8, 2004, based on two charges of "disrespectful conduct" toward Assistant Port Director Ernestine Morris, her immediate supervisor. Specifically, she is charged with calling Morris a "fucking asshole" on March 28, 2003; and with asking Morris whether Morris was afraid of her and telling her she should be on April 1.[2]

[1] The INS and the United States Customs Service merged on March 1, 2003.

[2] Except as otherwise indicated, all dates refer to 2003

Grievant and Morris were the only participants in both of the disputed conversations. Grievant denies both allegations.

THE MARCH 28 CONVERSATION

On March 28, Morris released the two clerical employees in the front office about 15 minutes before the official end of the work day, then returned to her own office area. Grievant worked just outside Morris' office. Morris told Grievant she could leave, then admonished her about returning to work on time.

Morris testified she told Grievant "to please watch coming back from exercise."[3] Her recollection was that Grievant got up; asked what she meant; and yelled that she was not going to watch her time, was never late, and did not want to talk to Morris about it in public. Grievant asked to continue the conversation in Morris' office, and Morris agreed. Once in the office, Morris testified, Grievant again asked what she meant and called her a "fucking asshole." Morris testified she responded, "Thank you." Grievant commented it made her feel very good, and that she would say it again, then did so; Morris again responded "Thank you." Morris testified she let Grievant talk; she did not recall her own comments, but testified she said very little because she could see Grievant was angry. She did recall that, at one point, she commented on personal phone calls Grievant made from her desk; Grievant responded by accusing her of eavesdropping on her. She also recalled that Grievant asked at one point whether Morris brought such matters to other people's attention, and that she responded she did; Grievant then asked who, and Morris declined to tell her who else she had counseled. The meeting ended without any admonishment to Grievant about her comments.

Morris is a licensed officer, and is authorized to carry a weapon and to make arrests. She testified she did not have a weapon with her that day. On March 30, she prepared a memorandum regarding this incident. The memorandum alleged that Grievant had engaged in disrespectful conduct or used abusive language and created a hostile and unsafe working environment. It described the incident as follows:

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[3] Grievant participated in a Health Improvement Program under which she was allowed to exercise one hour per day, three days per week, on paid time. It is undisputed that she was 10 minutes late returning from exercise that day, and tried to call to report that she would be late, but Morris was busy and did not pick up the phone.

... As I approached the office, I observed Mrs. Harnett on the phone. I could hear by her part of the conversation that this was a personal phone call. At approximately 350 to 3:52 p.m. she hung up the phone and I advised her that she could leave for the day. I also advised her that she would have to watch her time in returning to work after her exercise program (Health Improvement Program) since today March 28, 2003 she arrived 10 minutes late and was still in her exercise clothing and had to change back into her working clothes.

When I mentioned this to Mrs. Harnett she immediately became angry and in a load [sic] tone of voice asked me what do you mean? She stated to me that she was never late and I advised her that this had been brought to her attention before, she then stated to me not to bring up the past. Mrs. Harnett asked that I speak to her in private because she did not want anyone else to hear; I stated to Mrs. Harnett that I was sorry and the [sic] I would in the future bring her into my office when I had something to say to her. (Due to Mrs. Harnett's past history of filing false complaints and I would like a witness each time I speak to her since I do not feel comfortable with her alone in my office).

I advised Mrs. Harnett that she asked to take her lunch break along with her HIP and she should be back at her desk by 12:30 p.m. ready for work. Mrs. Harnett stated to me that she does take her lunch break at that time but does not always eat lunch because she is entitled to a 15-minute break in the afternoon and if she wanted to eat her lunch at that time she could. I then asked Mrs. Harnett who's [sic] time is it when she makes several personal phone calls a day. This question upset Mrs. Harnett and she then asked me if I advise any other employee of their personal phone calls. I advised Mrs. Harnett than I do advise or have the supervisors advise each employee who is abusing the phone or who arrives late to work. At this time I did advise Mrs. Harnett that it was none of her business who I or any other supervisor counseled for phone calls or tardiness.

Mrs. Harnett became more angry and started yelling at me and started trying to use other clerks in how they use their breaks and lunch periods. After stating to me that she would not watch her time, Mrs Harnett called me a "Fucking Asshole". I responded to her "Thank You" At this time Mrs. Harnett opened the door to my office and we walked out.

Based on this allegation I feel Mrs Harnett has a propensity for violence and physical abuse. Mrs. Harnett has at least one arrest for domestic violence and was required to seek treatment by the court for anger management as part of her sentence.[4] Mrs. Harnett by her own admission to me has difficulty dealing with her anger, and has in the past conveyed information

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[4] Morris testified that, on July 4 of some year, she received a late night phone call from Grievant saying she had been arrested for domestic violence or had received a citation. It was her understanding that Grievant was later sentenced to take anger management classes She was unaware whether the domestic violence charge was dismissed.

Grievant testified she and her husband had an argument in July 2003. Her husband began packing to leave; they had just gotten married, and she believed her marriage might be over. Her husband (a uniformed officer) picked up his gun and entered their master bedroom carrying it. She became frightened and called the police, then left. She was arrested for domestic violence, and was required to go to domestic violence prevention education classes for 26 hours as a condition of having the domestic violence charges dismissed.

about past abusive relations within her family. I am in fear of Mrs. Harnett since she has a reputation for violence and misstating facts and out right lying to portray her side of the story.

Mrs. Harnett continues to create and sustain a hostile working environment with management when items are brought to her attention and she is advised to correct the deficiency, or advised to follow simple procedures such as showing up on time for work or returning from Administrative Assignment (Health Improvement Plan) attendance.

Grievant testified Morris told her she could go home, then added in a loud tone of voice, "You better watch your time." Grievant testified she had no idea what Morris was referring to, and that she was concerned they would be overheard by the public coming in or by staff coming in for the 4-12 p.m. shift. She asked what Morris meant and asked to discuss it in a private area. They went to Morris' office. Morris said Grievant had been 10 minutes late returning from exercise and had not informed her; Grievant responded she had tried to call but Morris was busy, so she left a message with an officer who answered the phone. Morris said she was supposed to receive the call; that she did not believe Grievant; and that Grievant was still in her exercise clothes when she returned. According to Grievant, Morris also commented that she was losing a lot of weight and should not be going to the exercise program; that she was the only one using the program; and that she was abusing it because she was not showing up on time. She testified Morris was in uniform, and rested one hand on her firearm while pointing with the other and commenting that Grievant had "better watch out." Grievant testified she asked Morris to keep her voice down because she was afraid Morris could be heard even though they were in a private office. She denied using the language to which Morris testified, or speaking much at all, because Morris would not let her get a word in.

THE APRIL 1 CONVERSATION

Grievant was on leave on Monday, March 31. On Tuesday, April 1, Morris came to Grievant's desk to follow up on a workplace dispute between Grievant and Supervisory Customs and Border Patrol Officer Ann Glass. The second disputed conversation occurred while Morris was at Grievant's desk.

According to Morris, the dispute centered on difficulties Grievant had in getting information from Glass. Morris had instructed Grievant to come to her, rather than deal with Glass herself, to get the

information.[5] Morris testified Grievant turned and asked, "Are you afraid of me?" Morris testified she replied she was not, and Grievant then said. "Well, you should be." Morris asked if that was a threat; she did not testify to any response from Grievant. Morris called out for Port Director Charles Stemple, whom she believed to be in the area. When he did not respond, she called out for Glass. When Glass arrived, Morris told her Grievant had threatened her. Stemple walked in, and Morris said Grievant had just threatened her. Grievant said several times that she had not said anything. Stemple told Morris to go to her office and he would take care of it. Morris called the Office of Internal Affairs ("OIA") to report a threat of workplace violence. When she left her office after that call, Grievant had left. Morris prepared a memo the same day recounting the incident as follows:

> At approximately 12:30 p.m. Administrative Assistant Beatrice Harnett walked into my office and asked if she could speak with me. Due to an incident that occurred with Mrs. Harnett on Friday March 28, 2003 (Class 3 allegations filed with OIA on March 30, 2003) I did not want to speak to Mrs. Harnett alone and I relayed this to Mrs. Harnett.
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> ...
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> I was standing in front of Mrs. Harnett's desk completing the stamp inventory when Mrs. Harnett stated to me "Are you afraid of me?" I replied to Mrs Harnett "No". It was at this time that Mrs. Harnett stated, "You should be". I looked up at Mrs. Harnett and asked her if she was threatening me. I immediately looked into PD Stemple's office for a witness and PD Stemple was not in his office (located right outside Mrs. Harnett's working area). At this time I started yelling for Supervisor Glass who had just left the area. Supervisor Glass came back to Mrs. Harnett's working area as PD Stemple walked in the front door. I stated to both Supervisor Glass and PD Stemple that Mrs. Harnett had threatened me (APD Morris). At this time Mrs. Harnett looked up and said, "I didn't say anything" and repeated this several times. Mrs. Harnett stated that I (APD Morris) was lying.

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[5] Glass wrote a memo on the morning of April 1 regarding (1) an ongoing dispute over whether she or Grievant caused delays in getting money to the bank timely and (2) that day's dispute over Glass' use of a subordinate to instruct Grievant to write a memo explaining the reason for such a delay that day. The memo asserted that Grievant yelled at Glass and hung up the phone after complaining that Glass should have spoken directly to her.

Grievant testified Glass hindered her ability to get her work done by claiming her knee hurt or she could not bend whenever Grievant asked her to get money from the safe. Grievant testified that, in the incident discussed in Glass' memo, she asked Glass to help get the money out of the safe that day, and that Glass then asked an officer to tell Grievant that she (Grievant) needed to get the money ready. Grievant took that issue to Morris, who then instructed her to go through her to get anything she needed from Glass.

Glass testified she was talking to a clerical in an adjoining office area when Morris called her in and told her Grievant had asked if she was afraid of her and said she should be. Her recollection was that Morris was upset, agitated, and possibly frightened. Glass did not recall what happened next. She wrote a memorandum which described the incident as follows:

> ... APD Morris told me Bea had asked if she (APD Morris) was afraid of her.
>
> About that time, PD Stemple walked in from outside of the building. APD Morris told us that Bea had asked if she was afraid of her and that when she replied that she was not, Bea said that she should be. Bea denied saying anything.

Grievant testified she was sitting at her desk, and Morris was standing near her desk stamping a report she had retrieved from Glass at Grievant's request, when Morris suddenly began calling for Glass. When Glass approached, Morris claimed Grievant had asked whether she was afraid of her and had just threatened her. Grievant denied saying anything. Stemple entered; ordered Morris to go to her office; and ordered Grievant to pack her things and leave. Grievant testified that, when she asked why, he responded he could do anything he wanted and that she had to pick up her things and leave. She asked whether she was being fired, and why she had to pick up all of her things. He again said he could do anything he wanted. She then gathered her belongings and left.

SUBSEQUENT EVENTS

Morris filed an application for a workplace restraining order against Grievant, which was granted. She testified she later learned she should have filed on behalf of herself rather than on behalf of the Employer. When she went to the judge to correct the error, he dismissed the restraining order. While the testimony on this point is unclear, while it was in effect, the restraining order apparently created some confusion over whether Grievant could come to work or talk to Morris while at work.

On April 28, Morris prepared and signed an annual evaluation for Grievant for the period ending March 31. The cover page of the evaluation referred to Grievant by her maiden name; the body of the evaluation referred to her by her married name. The evaluation rated Grievant "outstanding," including on the critical element of "communication." The first criterion for an "outstanding" rating on this element is

"Anticipates and avoids significant problems with staff, telephone callers, and visitors through courteous and/or timely communication." The evaluation did not mention the events of March 28; assert that Grievant had created and sustained a hostile working environment; had a reputation for violence; misstated facts; or lied. Morris testified she evaluated Grievant's performance as a separate matter from the events at issue here.

The Employer assigned Grievant to work in an area further from Morris' office. Although Morris remained her supervisor, Grievant was ordered not to speak to her unless someone else was present. In December 2003, Grievant attempted to patch up things by buying Morris a Christmas present. Morris still has the present, unopened, in her office.

THE DISCIPLINARY DECISION

On July 15, 2004, Port Director William Molaski notified Grievant of his intent to suspend her for five days for these events. Director of Field Operations Donna de la Torre testified the disciplinary response was delayed because the Employer underwent a massive reorganization and it was unclear who should be the deciding official.

The Federation filed a written response on July 28, 2004. It protested the delay in taking action. It also addressed each of the *Douglas* factors. In so doing, it asserted that Morris had made false accusations because of a personal vendetta against Grievant, and protested the lack of any inquiry into Grievant's side of the story. De la Torre's decision letter noted the response "indicated that the proposal is based on only one side of the story, and you never engaged in the misconduct as charged," but found Morris' statements to be credible "based on witness statements." De la Torre testified she relied on the memos from Morris and Glass, as well as a memo from Stemple (who did not testify), in concluding Grievant had engaged in misconduct. Her letter cited the following factors as the basis for the penalty:

> ... as an employee with Customs and Border Protection, you are expected to exercise good judgment regarding your conduct. You are expected to be pleasant, polite, and respectful in all activities that involve contact with coworkers and supervisors. Your conduct towards a supervisor was egregious, failed to meet the standards expected of you, and such conduct towards a supervisor will not be condoned. I also considered your failure to accept responsibility for your actions. In addition, I considered the time that has transpired since you

> engaged in the misconduct, your good job performance since engaging in the misconduct, your years of service, and your position and type of employment.
>
> As a civil servant and a uniformed Customs and Border Protection Officer, you have a responsibility to uphold and preserve the public trust. You must avoid any conduct that tends to have a negative impact on our law enforcement mission or the reputation of the agency. ...

De la Torre acknowledged that Grievant is not a "uniformed Customs and Border Protection Officer."[6] She testified she considered as aggravating factors the seriousness of the offense; the impact on efficiency and the Employer's ability to accomplish its mission; Grievant's critical support function in a law-enforcement agency; the expectation that an employee would know not to call a supervisor a "fucking asshole," as well as the specific notice from the fact that disrespectful conduct was listed in the table of offenses; and the impact on her confidence in Grievant's ability to conduct herself in a professional manner. Because the table of offenses cited as possible discipline for this offense anything from an official reprimand to removal, she considered a two-day suspension to be within the range of permissible discipline.

As mitigating factors, de la Torre testified she considered the lack of prior discipline; Grievant's seven years of good work and outstanding performance appraisals; the lack of notoriety of the offense; Grievant's good work since the offense; and the delay in taking action. She testified there had been no prior instances of disrespectful conduct toward supervisors under her purview, so she had no comparison to make with the discipline imposed in such instances, she acknowledged, however, that she would not necessarily be aware if an employee was merely counseled about such conduct.

OTHER FACTORS RAISED BY THE FEDERATION

Federation President Joseph Martin testified that in his 11½ years as a Federation officer he has never seen discipline of this magnitude for conduct of this nature. In most such instances, he testified, the employee is merely counseled. Prior to the 2003 agency merger, while working in Immigration, he was

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[6] Molaski's notice of intent to suspend commented, *inter alia*, that "the Officers' Handbook requires you to behave in a manner in which your conduct will be above reproach." In the written reply, the Federation pointed out that Grievant is not an officer and does not have the Officers' Handbook. De la Torre's decision letter made no reference to that Handbook.

counseled and ordered to apologize after a verbal exchange with a Customs Supervisor in which he commented "This is a bunch of bullshit" and told the supervisor, "I don't work for you; you don't sign my check." He testified that, where there is a substantial delay in taking action, the Employer historically has mitigated the penalty substantially.

POSITION OF THE EMPLOYER

The contractual standard for discipline and adverse actions is virtually the same as that established in Merit Systems Protection Board ("MSPB") case law. The Arbitrator must apply the same substantive standards the MSPB would apply if the matter had been appealed. The Agreement uses the same just cause standard for both discipline and adverse actions, so MSPB and Federal Circuit case law is appropriate.

The Employer has the burden of proof to show, by a preponderance of the evidence, that (1) Grievant did what she is charged with doing; (2) there is a nexus between what Grievant did and disciplining her to promote the efficiency of the Service; and (3) the penalty was reasonable. The Employer need not prove the penalty is best, or most reasonable penalty, but only that it is within the tolerable bounds of reasonableness. The penalty should not be disturbed unless it is "so harsh and unconscionably disproportionate to the offense as to amount to an abuse of discretion."

Although Grievant denies the misconduct, the evidence supports a finding, by a preponderance of the evidence, that she committed the misconduct and that there is a nexus between the misconduct and the efficiency of the Service. The evidence also supports a finding that the penalty is reasonable.

Morris wrote memos contemporaneous with each of the events outlining those events. She also credibly testified regarding the events. The fact that she got a restraining order against Grievant corroborates that she was concerned about Grievant's behavior toward her. Although Glass did not hear the second incident, she observed Morris' demeanor immediately after the second incident, and she wrote a contemporaneous memo verifying the events. Stemple also submitted memos corroborating what Morris reported to him.

Grievant admitted she was upset when Morris spoke to her on March 28. The evidence shows she has difficulty controlling her anger and speaking appropriately. Both incidents with Morris were disrespectful. She also had a confrontation with Glass on April 1. In addition, she was arrested for domestic violence and had to undergo domestic violence prevention and education. This further corroborates that Grievant had difficulties with anger management or controlling her temper.

No evidence supports a motive for Morris to fabricate the incidents. No evidence exists of bias or other improper motive. Morris had no animus against Grievant; she gave her an outstanding performance appraisal for the period that included the first incident of disrespectful conduct. Misconduct and the performance appraisal were separate matters.

There is a clear nexus between Grievant's misconduct and the efficiency of the Service. The misconduct occurred in the workplace; was directed toward a supervisor; and occurred after the supervisor tried to discuss work-related issues of tardiness and personal telephone calls. It is against the efficiency of the Service to have an employee be disrespectful to a supervisor.

A two-day suspension is a reasonable penalty. De la Torre mitigated the proposed five-day suspension after considering the *Douglas* factors. The Arbitrator should defer to her decision

POSITION OF THE FEDERATION

The Employer bears the burden of proof that Grievant committed the alleged misconduct; that a sufficient nexus exists between the misconduct and the efficiency of the Service; and that the penalty was appropriate. The Employer has proven none of these things.

Grievant denies both allegations. To prevail, the Employer must show that Morris was more credible than Grievant. It cannot meet that burden.

Morris, not Grievant, acted inappropriately on March 28. Morris dismissed Grievant from work, then engaged her in an after-hour, off-duty conversation counseling her regarding her leave to attend an exercise

program. When Grievant felt the conversation was a counseling session and other employees might hear, she demanded that Morris conduct herself in a professional manner and have the conversation in private.

Grievant testified credibly to what was said in the office. The Agency presented no evidence that she has a pattern of untruthfulness. Morris' testimony was not credible. Her assertion that she felt threatened is preposterous given her response to the alleged threat. She never asked Grievant for an apology for anything that was said in the office; never stopped Grievant from talking; never told Grievant she would be disciplined for anything she said; and never told Grievant anything she said was inappropriate.

Morris is a licensed officer with legal authority to respond to threatening behavior. She is authorized to use deadly force, use various weapons, or to arrest someone if she feels threatened. She did not use any of these techniques on March 28 or April 1.

Later that year, Grievant attempted to resolve the apparent conflict with Morris by extending the "olive branch" of a Christmas present. This is not the conduct of one who has such disdain for another person that she would threaten her with bodily harm or use vulgar language toward her. In response to this gracious overture, Morris acted like a person with a vendetta. Instead of receiving the present with thanks, she took the present and left it unopened in her office. The obvious conclusion is that Grievant is a kind, gracious person and Morris is prone to maintain a vendetta. It is more likely Grievant is telling the truth.

The Arbitrator should not sustain claims made by a supervisor without corroborating testimony or an admission by the employee about statements made in a private conversation. Such a conclusion would have a chilling effect on employees attempting to have counseling sessions held in private. Supervisors could discipline any employee they did not care for simply by making an unfounded, unsupported allegation. The employee would have no recourse but to accept the discipline. Putting the employee at the mercy of management in this manner could not have been contemplated by labor management relations law.

The Employer has not shown that the alleged misconduct had any impact on the effective operation of the Service. Grievant did not engage in disruptive, insubordinate or unproductive conduct between April 2003 and October 2004, when the Employer decided to suspend her. The performance review Morris

prepared rated Grievant's overall performance "outstanding." Grievant, not Morris, tried to resolve whatever differences grew between them. She reached out to Morris in an attempt to bring harmony to the office. Morris refused to open her gift; it remains on a cabinet in her office. The proposition that Grievant needed to be suspended in order to have an effective operation is improper.

Suspension was an improper penalty. The *Douglas* factors are analytical tools in determining the appropriate penalty. An arbitrator may rescind a penalty if the *Douglas* factors were ignored or improperly used, even if the charges are sustained. The failure to consider even a single significant mitigating circumstance is sufficient to overturn a penalty.

The Employer improperly applied the *Douglas* factors. De la Torre's decision letter made it clear what factors she considered. She considered only four of the 12 *Douglas* factors. One critical factor she did not take into account was the consistency of the penalty with those imposed on other employees for the same or similar offenses. Had she done so, the penalty imposed would have been counseling. Martin gave himself as a good example of a similar case.

De la Torre's decision letter indicated she viewed Grievant as a uniformed Customs and Border Protection Officer. This assumption was incorrect. The employee's job level and type of employment is one of the *Douglas* factors de la Torre was required to take into account. There is a distinct difference between a clerical and a uniformed officer. Had de la Torre taken into account the correct job level, she might have come to the appropriate penalty of counseling.

De la Torre claimed to have taken into account the length of time between the offense and the penalty. Martin testified he had never seen anything take this long, and when an investigation took a long time the Employer usually mitigated the proposed penalty to the point where there would not be a union contention. Here, the acceptable mitigation would have been counseling.

The Arbitrator should order the suspension rescinded and all references to it eliminated from the personnel file. She should grant all back pay with interest and benefits Grievant would have received but for the unjustified personnel action, as well as all other appropriate relief. If the suspension is mitigated to

a lesser sanction, relief should be ordered consistent with the lesser sanction. The Arbitrator should retain jurisdiction to resolve any question of attorney fees to which the Federation may be entitled.

OPINION

PRELIMINARY MATTERS

The Employer bears the burden of proving, by a preponderance of the evidence,[7] that its removal decision was warranted. In this regard, the Employer must establish three things:

(A) the misconduct complained of occurred as charged;

(B) the proven misconduct impairs the efficiency of the service; and

(C) removal is the appropriate penalty for the proven misconduct and is not arbitrary, capricious, or an abuse of discretion.

In determining whether the Employer has met its burden on each of these points, the Arbitrator must apply the same legal standards as the Merit Systems Protection Board ("MSPB"), including applicable MSPB precedent.

In determining whether the misconduct occurred, it is not sufficient that the Employer had sufficient evidence to convince it of the wrongdoing at the time it acted. It must submit that evidence so its veracity can be tested. Where conduct could be innocent or wrongful, the Employer must establish that it was wrongful. This does not mean the evidence must rule out every conceivable explanation other than employee wrongdoing. However, for an employer to prevail, the alternative explanations must fail to offer a more logical and believable picture of events. Put another way, the principal risk of uncertainty falls on the Employer, not on the accused employee.

Fundamental due process requires an employer to make a reasonable and fair investigation of the alleged misconduct before making a decision to discipline. The ultimate decision-maker must be privy to all relevant information uncovered in the investigation at the time the disciplinary decision is made. It is

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7 The "preponderance of the evidence" standard is a common standard of proof. The shorthand explanation of that term is that the Agency must show its version of events was more likely than not

difficult to conduct a fair investigation without interviewing the employee or otherwise soliciting the employee's account of events. Looking at both sides of a dispute discourages jumping to conclusions based on partial knowledge. It also makes it more likely that evidence bearing on the employee's justifications will be collected while it is fresh. Learning the employee's side of the story, even where fault exists, allows the employer to measure the proposed penalty against the offense in light of all relevant circumstances, and to consider what response will best address the misconduct.

Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), is the key MSPB decision setting forth the factors to be considered in assessing the appropriate penalty for proven misconduct. If it is concluded that misconduct has occurred, the *Douglas* factors provide an organized method of analyzing the level of appropriate discipline, by delineating possible aggravating and mitigating factors. They come into play only if misconduct is shown to have occurred.

CREDIBILITY

The testimony in this case presents factual conflicts requiring a credibility resolution. Morris and Grievant cannot both be accurately reporting what Grievant said on March 28 and April 1. Only if one credits Morris' account can one conclude that Grievant said anything improper on either date.

Demeanor is a relatively unreliable basis for assessing credibility. The Arbitrator is unfamiliar with the witnesses' usual demeanor. The hearing process itself puts witnesses in an unnatural situation that affects demeanor for reasons unrelated to veracity. Therefore, credibility is best tested by evaluating the internal consistency and logical probability of the testimony, as well as the consistency with known facts and the recollections of unbiased witnesses. In assessing credibility, the Arbitrator is mindful that sudden exciting events may be difficult to recall with precision even at the time, much less months after those events.

Some arbitrators apply a presumption that an individual grievant charged with misconduct is more likely than other witnesses to lie or shade the truth. In the Arbitrator's view, that presumption is highly questionable. Witnesses on either side of a dispute may shade or distort their testimony for any number of reasons, not all of which may be uncovered in an investigation or revealed in an arbitration hearing. Where

the investigation does not include a contemporaneous inquiry of the accused employee, it is particularly unlikely that such evidence will be secured.

THE MERITS

A central problem in resolving this dispute is the impact on the quality of the record from the Employer's delay in investigating the disputed incidents – or even notifying Grievant (1) that a continuing concern existed regarding those incidents or (2) that she was considered to have a "history of filing false complaints," a "propensity for violence and physical abuse," a "reputation for violence and misstating facts and out right lying," or "continue[d] to create and sustain a hostile working environment." All of these allegations in Morris' March 30 memo were very serious charges. On this record, Grievant had no opportunity to make a timely or effective response to either those general allegations or the specific charges in this case On the contrary, events combined to make it unlikely she would preserve the evidence necessary to make an effective response.

Grievant was not admonished in any fashion about her alleged comment of March 28 or notified that an investigation was ongoing as to either event. Stemple sent her home without asking for her version of the April 1 conversation. Certainly, the managerial responses on April 1 suggested that both Morris and Stemple took that event seriously that day. However, later events suggested that concern had dissipated.

Within a month after the disputed events, Morris prepared an evaluation which rated Grievant "outstanding" in all critical elements, including one that was the logical place to report concerns about communications with co-workers and superiors. The lack of any mention of calling her supervisor a "fucking asshole," much less "filing false complaints," "misstating facts and out right lying," or "creat[ing] and sustain[ing] a hostile working environment" when confronted about deficiencies – all serious allegations Morris had already reported by the time of this evaluation – deprived Grievant of notice that she should seek contemporaneous evidence to show that events could not have occurred as Morris testified or were not as serious as they appeared, nor that she should convey that evidence to Molaski or de la Torre so it could be considered along with the memos from three managers At this late date, one can only speculate on what

evidence she might have been able to preserve or present had she known at the time that Morris had made such serious allegations. One also can only speculate on how persuasive de la Torre would have found the managers' memos had she had contemporaneous accounts of both sides of the story.

The record contains no direct evidence of an incentive by either Grievant or Morris to falsify or exaggerate events. Although the Federation has asserted throughout the processing of this grievance that Morris was engaged in a "vendetta," the genesis of that alleged vendetta is not in the record. There is some indication of friction between Grievant and Morris beyond the two disputed conversations, as reflected in the serious general allegations in Morris' March 30 memo.[8] The factual basis for those allegations is missing from this record.

What the record does make clear is that in seven years of service Grievant had never before been disciplined, nor even evaluated as anything less than "excellent." If she had a "history of filing false complaints," a "propensity for violence and physical abuse," a "reputation for violence and misstating facts and out right lying," or a pattern of "creat[ing] and sustain[ing] a hostile working environment" when confronted by supervision about shortcomings, one would expect that this record would have been reflected either in discipline or in her annual evaluations. Its utter absence casts doubt on Morris' reliability in recounting events involving Grievant.

No other percipient witness exists to either disputed conversation. Few other tools are available for assessing credibility. Morris engaged in some actions that were consistent with her account – e.g., seeking a restraining order -- but others that were inconsistent – e.g., the lack of any admonishment during or after

[8] Morris' March 30 memo refers to Grievant's having been arrested for domestic violence as an indicator of her alleged violent propensities and difficulty dealing with anger. Grievant testified this arrest occurred in July 2003; Morris recalled that it was in July, but did not recall the year. If Grievant is correct about the year, then a memo prepared at the end of March 2003 could not have referred to that arrest. Such a discrepancy would cast serious doubts on the provenance of Morris' March 30 memo. Grievant placed the arrest shortly after her marriage. She was married by the time of the disputed events, as reflected in the annual evaluation Morris prepared in late April 2003. That marriage had occurred within that annual evaluation period; the record does not reflect whether it had occurred by the previous July. The Arbitrator therefore cannot determine on this record whether Grievant was arrested for domestic violence before or after the date on Morris' memo.

the March 28 conversation and omission of that conversation in evaluating Grievant's "communications" during the evaluation period that included March 28. While Morris immediately made vigorous charges on April 1, Grievant immediately denied those charges. Grievant acted consistently with her denial of any improper remarks on both occasions. The record reveals no incidents of similar conduct before or after the two disputed events. No evidence exists of any factors that would have led an employee with an outstanding work record to insult and threaten her supervisor in two closely-spaced incidents. In summary, in this case of "she said, she said," the weight of the evidence favors Grievant. While the matter is not free from doubt, the Employer has not shown by a preponderance of the evidence that Grievant engaged in the alleged misconduct.

For all the above reasons, it is concluded that the disciplinary action was not taken for appropriate cause, nor for just and sufficient cause, nor for such reasons as will promote the efficiency of the Service. Because no penalty was reasonable absent proven misconduct, the suspension was not a reasonable penalty. Accordingly, the suspension shall be rescinded; all reference to it or the underlying charges shall be expunged from Grievant's personnel record and other files; and Grievant shall be made whole for all loss of earnings and benefits occasioned by her suspension. As requested by the parties, the Arbitrator will retain jurisdiction over the remedy and any disputes arising therefrom, including any attorneys' fee application.

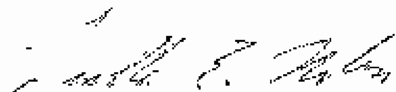
AWARD

1. The disciplinary action in this case was not taken for appropriate cause and such cause was not just and sufficient nor only for reasons as will promote the efficiency of the Service.

2. The penalty was not reasonable.

3. As a remedy, the suspension shall be rescinded: all reference to it or the underlying charges shall be expunged from Grievant's personnel record and other files; and Grievant shall be made whole for all loss of earnings and benefits occasioned by her suspension.

4. The Arbitrator retains jurisdiction over the remedy and any disputes arising therefrom, including any question of attorneys' fees to which the Federation may be entitled.



LUELLA E. NELSON - Arbitrator