

January 31, 2011

David Wood, FACHE, Director
Oklahoma City VA Medical Center
921 N.E. 13th St.
Oklahoma City, OK 73104-5028

Re: Vicki M, Social Worker
Step 3 Grievance

Dear Director Wood:

Pursuant to Article 42 of the Master Agreement, please accept this letter as AFGE Local 2562's Step 3 Grievance to challenge the January 24, 2011 decision to remove Vicki M. The Union is filing this initial grievance at a Step 3 pursuant to Article 42(7)(Note 5) of the Master Agreement. In short, the Union asserts that the Agency did not have just or sufficient cause to remove Ms. M and that her termination is in unlawful retaliation for her union activity, EEO activity, and Whistleblower activity.

The Agency is in violation of Article 13 of the Master Agreement for it did not have Just or Sufficient Cause to terminate Ms. M.

Although the Agency has charged Ms. M with seven reasons for the proposed removal, most of those reasons refer to one incident, specifically, Ms. M's alleged retrieval of unprotected files and her notification of this security breach to VISN 16 Privacy Officer Mary Jones through her union representative Chris Sanford. Ms. M denies that her actions were misconduct. Ms. M is required – as all DVA employees are – with reporting Privacy Act violations; this is exactly what she did. Additionally, Ms. M denies that she was absent without leave on October 12 and 13, 2010. Ms. M was prevented from requesting leave herself on October 12, 2010, due to her arrest. Notwithstanding, Ms. M requested leave for both days through her union representative. Article 32(1)(D) and (E) of the Master Agreement is clear that leave shall not be denied for the

purposes of discipline and that no arbitrary restraints on requesting leave shall be imposed.¹ Since Ms. M did not violate any agency policy by her actions, the Decision to terminate her is without just and sufficient cause.

The Agency is in violation of Article 2 and Article 13(6) of the Master Agreement for its termination is in retaliation for statutorily protected conduct.

Article 2 and Article 13(6) of the Master Agreement requires the Agency to follow all laws in its disciplinary actions. However, the Agency has not done so in this Decision as the removal is in retaliation for Ms. M's statutorily protected (1) EEO activity, *see* 42 U.S.C. § 2000e *et seq.*, (2) whistleblowing activity, *see* 5 U.S.C. § 2302(b)(8), and (3) her union activity, *see* 5 U.S.C. § 7116(a)(1), (2), (4) and (8). Therefore, Article 2 and Article 13(6) of the Master Agreement have been violated.

The Agency is in violation of Article 16(1) and Article 17 of the Master Agreement for its termination is in retaliation for protected EEO conduct.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for EEO activities. It is undisputable that Ms. M has engaged in recent, protected, EEO activity. Similarly, there can be no doubt that Mark Huyke (the proposing official) and you (the deciding official) were aware of Ms. M's protected activities. Lastly, there is a temporal nexus between the proposed termination, termination and Ms. M's protected activities. Therefore, Ms. M has presented a *prima facie* case of retaliation with respect to the proposed termination. The Agency's alleged legitimate reasons as documented in the proposed termination² are pretextual.

¹ Therefore, the Union asserts that Article 32 has also been violated by the Decision.

² Although Ms. M submitted a comprehensive written opposition to the proposed termination, the January 24th Letter of Decision does not address any of her points. In fact, the Decision does not explain on what basis or even which of the charges were sustained. Instead, it merely concludes that "the sustained charges against you are of such gravity, mitigation of the proposed penalty is not warranted." Therefore, the only alleged legitimate reasons remain those documented in the proposed termination.

Because Ms. M's actions were not only consistent with the Agency's policy and/or VISN's express directions, discipline for the specifications outlined in the proposed termination is pretextual. Therefore, Article 16(1) and Article 17 of the Master Agreement have been violated.

The Agency is in violation of Article 16(9) of the Master Agreement for its termination is in retaliation for protected whistleblowing conduct.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for whistleblowing activities. Ms. M engaged in whistleblowing activity when she collected the evidence of supervisory misconduct, contacted Ms. Jones via her union representative, and by making a protected disclosure by forwarding the evidence to Ms. Jones. It is undisputable, given that five alleged reasons for the proposed termination are related to said disclosure, that the disclosure was a contributing factor in the agency's decision to propose the termination. As applied herein, Ms. M had a reasonable belief that her disclosure to the VISN Privacy Officer was a disclosure of unlawful activity or gross mismanagement by her supervisor. Notwithstanding VISN 16's assurances that no disciplinary action would result, Ms. M has now been issued a Decision of termination. Therefore, Article 16(9) of the Master Agreement has been violated.

The Agency is in violation of Article 16(1)(C), (2), and (5) of the Master Agreement for its termination is in retaliation for protected union activities.

In addition for violating the Master Agreement in its protection against unlawful retaliation, the Agency also violated the Master Agreement in its own protection against retaliation for union activities. Ms. M was open and public about her union activities beginning with her support for Mr. James' election as the new local president of AFGE Local 2562. On June 27, 2010, the Union held elections and that evening, Mr. James was elected and he appointed Ms. M to union steward. The very next day, the Agency issued Ms. M a disciplinary action which was mitigated to an admonishment. In early August 2010 the Agency again issued proposed discipline but this proposal was rescinded. Thereafter, on or about August 17, 2010, the Agency issued a proposed 10-day suspension for alleged failure to follow a supervisory instruction which was mitigated to

written reprimand.³ This termination is yet another in the litany of meritless disciplinary actions that have begun since the day Ms. M assumed any role in the union. Therefore, Article 16(1)(C), (2) and (5) of the Master Agreement have been violated.

Alternatively, the Agency failed to properly address *Douglas* factors.

Ms. M began employment with the Agency on or about February 9, 2004. In September 2008, she was promoted to be the supervisor of the geriatric and extended care social work service. From her hire through mid-2009, Ms. M has consistently received awards for her performance and contributions. Many of her awards were listed in her written opposition to the notice of proposed removal and total thousands of dollars. Similarly, Ms. M received the best performance appraisal ratings possible within the Agency, i.e, “outstanding” with much praise in the narrative portions. Ms. M’s employment history and lack of discipline through February 2010 – before the filing of her first EEO complaint, her nomination to a union position, and her whistleblowing activity – are all factors which mitigate against the imposition of any adverse action. Nevertheless, in the Decision to terminate Ms. M’s employment, you expressly declined to evaluate mitigating facts and instead concluded “the sustained charges against you are of such gravity, mitigation of the proposed penalty is not warranted.” Your failure to consider mitigating factors is a violation of the Master Agreement, case law, and public policy.

CONCLUSION

The Agency has not and cannot establish that Ms. M violated Agency regulation or policy as outlined in its proposed termination. Furthermore, the proposed adverse action is in retaliation for protected activities. Therefore, for the foregoing reasons, Ms. M respectfully requests that the January 24, 2011, Decision to terminate Ms. MacEntire be rescinded with prejudice and she be restored to her position without restriction.

Sincerely,

³ The September 2010 formal EEO complaint was amended to include this disciplinary action as a basis for retaliation.

Gony F. Goldberg, AGC
Office of General Counsel
202-639-6424
202-639-6441 (fax)
friedg@afge.org

cc: Frank James, Local President

Alma Lee, President, AFGE NVAC