UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

PENSION BENEFIT GUARANTY CORPORATION Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party/Union	Case No. 3-CA-90456

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For the Respondent

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For the Charging Party/Union

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on April 5, 1989, by the National Treasury Employees Union, (hereinafter called the Union or NTEU), a Complaint and Notice of Hearing was issued on June 6, 1989, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Pension Benefit Guaranty Corporation, (hereinafter called the Respondent or PBGC), violated Sections 7116(a)(1) and (2) of the Federal Service

Labor-Management Relations Statute, (hereinafter called the Statute), by discharging employee David Power because he engaged in activities protected by Section 7102 of the Statute.

A hearing was held in the captioned matter on July 24, 25, 26, 27 and 28, 1989, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Charging Party, General Counsel and Respondent submitted post-hearing briefs on various dates in October 1989,[1/] which have been duly considered.[2/]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact[3/]

1/ In the absence of objection the Union's motion to correct transcript is granted.

2/ Subsequent to the hearing and prior to the date set for the filing of post-hearing briefs, a motion was filed with the undersigned by an attorney representing an employee of Respondent whose past disciplinary record had been introduced into the record in an attempt to establish disparate treatment with respect to the discipline accorded Mr. Power. The motion sought to have the employee's name deleted from the record and either a number or a letter of the alphabet substituted therefor in order to protect the employee's privacy. After a conference on the matter it was decided that the motion had merit and that the employee's name, as well as the names of all other employees whose names and disciplinary records also appeared in the record, for the purposes of attempting to establish disparate treatment with respect to Mr. Power's discharge, should have numbers substituted for their names in the record in order to protect their privacy. The record was thereafter so amended.

3/ The parties have submitted excellent post-hearing briefs in support of their respective positions. To the extent that parts of the factual summaries appearing in such briefs comport with the record evidence and my credibility findings, which in great part were based upon my observation of the witnesses and their demeanor, I have taken the liberty of incorporating same in this statement of facts.

Background

The Pension Benefit Guaranty Corporation (PBGC) is a wholly owned federal corporation that was established as a part of the Employee Retirement Income Security Act of 1974 (ERISA) to administer and enforce the provisions of Title IV of ERISA. In that capacity, the PBGC operates an insurance program that protects the defined benefit pension plans of over 40 million American workers. The PBGC is overseen by a Board of Directors, comprised of the Secretaries of the Treasury, Labor, and Commerce, and the day-to-day operations of the PBGC are managed by an Executive Director.

PBGC's legal work is handled by its Office of the General Counsel (OGC). OGC has approximately 100 employees, including 75 attorneys and paralegals who handle all of the PBGC's litigation, draft regulations, and provide legal advice to PBGC's Executive Director and the agency's departments. Because the PBGC has independent litigating authority, its litigation is handled by OGC, not by the Department of Justice. OGC's litigation docket is substantial. At the time of the hearing, OGC was handling over 600 bankruptcy cases, 78 cases in federal district courts, 11 cases in the federal courts of appeals, and two Supreme Court cases.

OGC is divided into two groups, each headed by a Deputy General Counsel (DGC). Each group is, in turn, divided into three sections, each of which is headed by an Assistant General Counsel (AGC). Each AGC supervises approximately 6-8 General Attorneys and paralegals. General Attorneys range in grade from GS-11 to GS-14, and each section is balanced, to the extent possible, with roughly equal numbers of attorneys at each grade.

David Power, a GS-14 General Attorney who had been with the PBGC since 1980, was assigned to Section C of Group II in OGC. His immediate supervisor was AGC Jeanne K. Beck, who has since been appointed DGC for Group II. Ms. Beck's immediate supervisor was Deputy General Counsel Carol Connor Flowe. PBGC's then General Counsel was Mr. Gary M. Ford, who resigned on January 31, 1989. In March 1989, Ms. Flowe was promoted to the General Counsel's position.

With respect to Mr. Power's employment history, the record discloses that he began his employment with the Respondent in 1979 as a law clerk. In 1980 Mr. Power obtained permanent employment as an attorney in the Office of the General Counsel. At the time of his discharge on April 3, 1989, he had reached the level of a GS-14 attorney.

During his tenure in the OGC, Mr. Power received five performance appraisals for the years 1983 through 1987 which stated that he "exceeds fully satisfactory." Additionally, Mr. Power received many commendations for his excellent legal work. Thus, in 1982 Respondent awarded him a Special Achievement Award along with a cash bonus for his work in a litigation matter. In 1984, Mr. Power received another Special Achievement Award along with a cash bonus. In 1986, he again received a Special Achievement Award and cash bonus for his work on three specific cases. This latter award was accompanied by a written statement summing up Mr. Power's exceptional legal skills which led to Respondent's victories in the named cases.

PBGC has approximately 560 employees, some of whom have been represented for purposes of collective bargaining by Chapter 211 of the NTEU since 1978. Mr. Power has been the President of Chapter 211 since 1984. In that capacity, Mr. Power has represented Chapter 211 members on numerous occasions, including contract bargaining, mid-term bargaining, submission of informational and data requests to the PBGC, the distribution of union literature to PBGC employees, and in the filing of grievances. As the Chapter 211 president, Mr. Power has filed a number of grievances and charges with the PBGC over the years, none of which have ever been filed against or specifically involved General Counsel Flowe, DGC Beck or Director of Corporate Policy and Research Department David C. Lindeman.

The PBGC is represented by Mr. R. Frank Tobin, the PBGC's Director of Personnel, in all labor relations matters and in all bargaining with Chapter 211 of the NTEU. Neither Ms. Beck, Ms. Flowe nor Mr. Lindeman have ever served as an agency representative or advocate in bargaining or third-party adversary proceedings with Mr. Power or Chapter 211. Because Mr. Tobin is not an attorney, and because there are no attorneys on his staff, Mr. Tobin sometimes solicits legal assistance from the OGC on personnel and labor relations matters. Working under the supervision of AGC Philip R. Hertz, various attorneys in the OGC render legal assistance to Mr. Tobin as needed, in addition to handling their regular ERISA caseloads. These OGC attorneys have included Mr. Harold Ashner, Ms. Deborah Stover-Springer, Mr. Rick Pearson, Ms. Carol Resch, Mr. Thomas Gabriel and Ms. Susan Parnell.

In connection with Mr. Power's activities as President of Chapter 211, NTEU, the record establishes that Mr. Power was a very aggressive and vocal representative who frequently distributed literature, pamphlets and flyers which were

highly critical of Respondent's managers. His face-to-face negotiations and/or dealings with Respondent's managers were marked by repeated insults and animosity on both sides. A typical exchange between Mr. Power and Mr. Tobin is best described by an Arbitrator who heard a grievance concerning a 1986 proposed three-day suspension of Mr. Power based on his alleged disrespectful conduct and use of obscene language during a negotiation session between Mr. Power, Mr. Tobin and AGC Philip Hertz.

Thus, the Arbitrator states:

> As background, for whatever the reason(s), grievant and Corporation Director of Personnel R. Frank Tobin, do not like one another. There seems to be little, if anything, one says to the other that is not met with suspicion or distrust. They are rude to each other. For example, grievant, in apparent furtherance of his First Amendment rights, once referred to Tobin as a "slimy, disgusting creature, a liar, a thief" in a local union newsletter as well as in a grievance and in a labor relations memorandum. By the same token, albeit some months later than the events which prompted the instant proceeding, Tobin communicated his displeasure with grievant's sarcastic comment by angrily replying, "F_ _ _ you, Dave." This is enough. Any further description of the relationship between grievant and Tobin either before or after the event in question would only serve to burden a record already too replete with evidence of behavior unworthy of persons charged with the public good.

A review of the 1988 negotiations, which will be discussed, infra, reveal that the animosity above described by the Arbitrator still persists.

Instant Complaint

Mr. Power was discharged on April 3, 1989, for: (1) insubordination predicated on (a) failure to follow an OGC Concurrence Matrix, (b) refusal to accept computer messages from an immediate supervisor, (c) failure to supply

representative writing sample to the DGC; (2) Failure to cooperate in an official investigation; (3) Threatening an employee with physical harm and interfering with the employee's statutory rights; (4) Making a false statement in an official investigation; and (5) Conversion of government property.

Appraisal

An AGC is the first-line supervisor of OGC attorneys and is responsible for issuing performance appraisals to the staff attorneys in his or her group. The performance appraisal is then reviewed by the DGC, who oversees that section for "consistency," to make sure that one AGC is not being a harsher grader that other AGCs and to maintain some consistent grading curve throughout the group. After the DGC reviews and signs-off on the appraisal, which occurs regardless of whether the attorney grieves the appraisal, the appraisal is ultimately signed by the General Counsel.

On May 25, 1988, Mr. Power received his performance appraisal covering the period December 9, 1987 to May 12, 1988. Lonie Hassel, who preceded Ms. Beck as Mr. Power's supervisor, rated Mr. Power. As permitted under PBGC procedures, Mr. Power appended comments to the appraisal, which was then sent to Ms. Flowe, his then DGC, for review.

In order to review for consistency the rating that Mr. Power had received on Objective 2 of his performance appraisal, i.e., "communicates orally and in writing," Ms. Flowe sent a electronic office (CEO) message to Ms. Beck noting specifically that she was reviewing Mr. Power's performance appraisal and that she wished to examine a representative sample of his writing. Ms. Beck forwarded this CEO message to Mr. Power on June 15, 1988, and requested that he comply with Ms. Flowe's request. Mr. Power responded with a memorandum to Ms. Flowe, in which he professed to be perplexed about the purpose of her request for a representative sample of his writing and requested that she "let [him] know what direction and purpose is [sic] to the request for written material." Without offering to retrieve these documents, Mr. Power instructed Ms. Flowe that some of the materials that she had requested "may be located in the file room of the OGC."

The next morning, June 16, Ms. Flowe replied to Mr. Power that she was the "reviewing official on [his] performance appraisal" and directed him, once again, to comply with her request for a "representative sample of his writing" by 5:00 p.m. that day so that she could promptly complete her review.

Mr. Power responded by submitting 1,367 loose, written pages to Ms. Flowe that day. The following day, he submitted an additional 762 loose pages. This initial submission, which consisted of more than 2,100 unstapled papers, approximately a foot and one-half high, included lists of documents, many pages of court transcripts, letters to Mr. Power from opposing counsel, LEXIS printouts, and balance sheets of companies involved in cases assigned to Mr. Power.

Ms. Flowe, who was "appalled" at Mr. Power's response, returned the stack to Mr. Power on June 22. In a memorandum to Mr. Power explaining why the submission was unresponsive and useless to her review, she stated:

> I expressly asked for a representative sample of your writing, not for all, or even most written work you did during the rating period. Moreover, I asked only for samples of your writing, and not for copies of transcripts of court hearings, papers or correspondence prepared by others. The material you gave me includes both.

She requested, once again, that Mr. Power "exercise [his] judgment" to provide a "representative sample of [his] writing."

In response, more than one month later, on July 30, 1988, Mr. Power resubmitted the "identical stack" of materials to Ms. Flowe, indicating that it was being resubmitted as "2,129 pages of letters, memoranda, briefs, transcripts and other documents bearing on my performance during the rating period." In his cover memorandum accompanying this mass of material, Mr. Power also contested the validity of the "review process" itself and of Ms. Flowe's role as the reviewing official:

> [Y]ou may not properly refuse to consider any material that I submit to you as part of the alleged 'review' process. . . . [A]ll of the material I previously submitted is relevant and necessary to a full and objective 'review' of my performance. . . .
>
> If you refuse to consider these submissions, you effectively create a rule that 'employees must assist in the

> review process before grieving their appraisal, but employees may not influence the review process.' Now, in these waning days of Alice in Wonderland management of government legal personnel, such a rule would not be surprising. But it would be sad. And it will not be tolerated. . . .

In response, by memorandum dated August 8, 1989, Ms. Flowe again returned Mr. Power's submission, reminding him that her request was for a "representative sample" of his writing:

> I requested that you provide me with a representative sample of your written work (of your choice), as well as the Kaiser memoranda, in an effort to obtain additional information that would permit me to evaluate whether your rating on Objective 2 should be changed. To the extent, however, that I have questions regarding the propriety of your scores on other objectives, they do not require for their resolution a review of written materials from you. Consequently, I did not request, nor will I accept, the many hundreds of pages of non-responsive materials that you gave me.

On September 2, 1988, two and one-half months after he was first directed to provide Ms. Flowe with a representative sample of his writing, Mr. Power finally furnished Ms. Flowe with what he characterized as "approximately twenty-five (25) written documents created during my previous rating period." He noted, however:

> I disclaim any representations or characterizations of the enclosures as being a 'sample,' or that any such so-called 'sample' is in any way representative. In addition, the enclosures are not intended to, and in fact do not, have any bearing on what constitutes my 'best' written work during the rating period.

At this point, Ms. Flowe "gave up." Due to the passage of time and pressure from the personnel office to complete the

appraisal, Ms. Flowe reviewed Mr. Power's submission and, on the basis of that review, raised his rating on Objective 2.4/

OGC Matrix

The OGC maintains a "sign-off matrix" which requires supervisory concurrence on all correspondence, etc. The reason for this is to insure that everyone was handling the cases, etc. in the same manner.

Mr. Power was assigned to the Anthracite Fund case, in which he regularly was required to send out a cover letter, promissory note and security agreement to the Anthracite Fund Plan trustees. Ms. Beck's predecessor, Ms. Lonie Hassel, had warned Mr. Power on at least one occasion that her concurrence was necessary on the promissory note and security agreement before they were sent to the Plan trustees. When Mr. Power switched supervisors in the summer of 1988, he independently determined, without consulting his new supervisor, Ms. Beck, that the individual supervisors weren't that concerned about the letter that went to the trustees. Accordingly, on August 11, 1988, Mr. Power sent an unsigned promissory note and security agreement to the trustees for their signatures without Ms. Beck's prior review or concurrence. As soon as Ms. Beck discovered that Mr. Power had issued these documents without her review, she reminded him by CEO message of the mandatory nature of the OGC Concurrence Matrix:

> On August 11, 1988, a promissory note and security agreement was sent out in [the

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4/ The facts as presented above with respect to Ms. Flowe's request for a writing sample from Mr. Power are not in dispute. However, it should be noted that at the time of the request Mr. Power was involved in a formal grievance over the appraisal wherein he was contesting the scores awarded him on court room litigation skills, writing ability, legal research and legal analysis skills. According to Mr. Power's, inasmuch as he was under the impression that Ms. Flowe was reviewing his entire appraisal, as opposed to Objective 2 - Communicates orally in writing, he submitted the above described voluminous materials. Further, according to Mr. Power he did not discover exactly what Ms. Flowe was reviewing until August 8, 1988 when he then sent in approximately twenty-five written documents. According to Ms. Flowe, she did not consider the submission a representative writing sample.

> Anthracite Fund case]. The yellow copy of the forwarding letter . . . does not indicate my concurrence and the agreement did not come through me. As you know, all matters require supervisory concurrence. All future agreements and related matters must go through me.

Seven days after issuing the documents in the Anthracite Fund case, on August 18, 1988, Mr. Power issued a memorandum in the case of Gulf & Western. The memorandum, which was addressed to Mr. Ronald Gebhardtsbauer, PBGC's Chief Actuary, and Ms. Juanita Nappier, a PBGC Auditor, both of whom are employed in PBGC offices outside OGC, went out without Ms. Beck's prior review or concurrence. Upon learning of this breach Ms. Beck immediately admonished Mr. Power in a September 9 memorandum:

> I write to remind you, again, that supervisory concurrence or approval is required before sending any material out of this office. Moreover, only by following established procedures in this regard can we ensure that proper files and records will be maintained.
>
> I expect to see all documents you prepare in connection with matters I am supervising before they are passed on to higher reviewing officials or sent out of this office. And, I am directing you to follow established procedures regarding concurrences and yellow copies with regard to all matters you are handling.

Thereafter, on November 29, 1988, Mr. Power sent two letters to opposing counsel in the case of PBGC v. Greene without the requisite supervisory concurrences. On this particular occasion, Mr. Power also specifically instructed a clerical staff person to disregard the concurrence requirement. In direct response to the clerical's specific request that he provide her with "the yellow copy," the sheet containing the supervisory concurrences before she sent the letters out, Mr. Power instructed her that a yellow copy was not necessary. Upon discovering the transmittal of the PBGC v. Greene letters, which she had neither seen nor concurred in, Ms. Beck checked first with another AGC, Frank H. McCulloch, with whom she and Mr. Power had consulted on the case, before mentioning the matter to Mr. Power. Mr. McCulloch also had neither seen nor concurred in the letters.

Because one of the two letters sent to opposing counsel in PBGC v. Greene on November 29 contained an error regarding the face value of the promissory note involved, Mr. Power was forced to issue a revised set of these letters to them. Mr. Power failed to obtain the concurrence of either Mr. McCulloch or Ms. Beck on these letters of correction as well.

Ms. Beck then sent Mr. Power a memorandum dated December 1, 1988, in which she recounted her previous admonitions regarding the import of the supervisory concurrence requirement and noted that Mr. Power's repeated noncompliance, coupled with his instruction to a staff person to disregard the established office policy, was "inexcusable."5/

Power's Refusal and Deletion of Ms. Beck's Computer Messages

On December 8, 1988, at 4:09 p.m., Mr. Power "refused" a CEO message that Ms. Beck had sent on November 28 regarding the scheduling of a case meeting between Ms. Beck and Mr. Power to discuss the status of Mr. Power's ERISA cases.6/ This was not the first occasion on which Mr. Power had "refused" a message from Ms. Beck. In a later CEO message, sent at 4:24 p.m. on December 8, Ms. Beck admonished Mr. Power for his 4:09 p.m. refusal and deletion, and noted

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5/ Although the record discloses that other attorney's had sent out legal correspondence, etc., without first obtaining the initials of their respective supervisors on the file copy, it appears that in all such instances the attorney's had previously obtained oral approval of the legal documents from their respective supervisors. To the extent one employee failed on one occasion to get the necessary concurrence, he was given an admonishment.

Mr. Power acknowledges that he failed to seek Ms. Beck's approval on the documents described above, but points out that they either had little legal effect, that the August 18, 1988 document had been put into circulation prior to receiving the admonishment from Ms. Beck, and that he had been working closely with his supervisors on the case which involved the November 29 documents. It appears that with respect to the November 29th document he thought that he had their approval.

6/ The computer which sends the message indicates when a message is erased from an employee's computer without being read.

that "this is the second or third time you have refused a message I have sent. I hope this has been accidental. Please do not reject any of my messages in the future." In this same CEO message, Ms. Beck informed Mr. Power that she was going to have to reschedule Mr. Power's case meeting. At 4:38 p.m., fourteen minutes after Ms. Beck sent this message specifically instructing Mr. Power not to reject any more of her CEO messages, Mr. Power refused it as well.

The following day, Ms. Beck sent Mr. Power yet another CEO message demanding that he provide her with a written explanation of his last two refusals of her CEO messages. Mr. Power responded by stating: "I was busy with the Kaiser brief the entire week. Was there something urgent you wanted?" Again the foregoing facts are acknowledged by Mr. Power. However, he attempts to justify his action on the ground that since he had deadlines to meet he was too busy to read his computer messages.

Failure to Cooperate in Investigation, Threats, False Statement and Conversion of Government Property

During the Spring, Summer and Fall of 1988, the Union and Respondent were engaged in negotiations on several topics, including office space and ergonomic furniture for the OGC attorneys. Mr. Tobin was the principal negotiator for Respondent. Mr. Philip Hertz and Mr. Tom Gabriel assisted Mr. Tobin and were present at all sessions during the mediation phase of bargaining with the permanent umpire Mr. Roger Kaplan.

In August 1988, the parties were at impasse on many issues including ergonomic furniture. The mediation/ arbitration sessions with Mr. Roger Kaplan, a mediator, began on August 1, 1988. On August 2, 1988, at the mediation session covering building renovations and ergonomic furniture, the discussion became heated. Respondent's agent, Mr. Gabriel, screamed at Union negotiators Ms. Debra Kolodny and Mr. David Power accusing them of bargaining in bad faith. At that point the Union team decided to come back to the table with a comprehensive package on everything, square feet per-person, library space, clerical work stations, smoking rooms, lockers and showers, air testing, indoor air quality and ergonomic furniture. The impasse continued. Thereafter, the Union negotiators met on August 23, 1988 to hammer out an agreement on ergonomic furniture for attorneys in the OGC. The Union wanted attorneys to have this special furniture because of the many hours each day the attorneys spent working at their computers. Respondent asserted that attorneys were not entitled to ergonomic furniture, since

they did not spend enough time at their computer terminals to warrant this special furniture. Mr. Power disputed Mr. Tobin's assertions.

On the afternoon of August 23, 1988, Mr. Power discovered that the OGC attorneys were delivering to Information Service Specialist, Mr. Donald Morrison, their individual responses to a computer use survey. Mr. Morrison, a GS-9 unit employee in the OGC, trained new employees on the computers and worked as a liaison with Respondent's Computer Shop (Information Management Resources Division (IMRD)). At IMRD's request, Mr. Morrison had sent out by computer mail a message asking all the OGC employees to complete an attached survey. It was explained that the purpose of conducting the survey was to determine computer usage by attorneys and define what improvements needed to be done to the present system. The employees were asked to fill in a blank setting forth the number of hours each day that they spent on each computer function and to return the completed questionnaire/survey to Mr. Morrison. Being of the opinion that this information was important for bargaining, Mr. Power then went about collecting the survey responses from the OGC employees. He asked his stewards to help him get the survey responses from the OGC employees.

Upon learning from a steward that Mr. Morrison was collecting the surveys, Mr. Power approached Mr. Morrison and asked him if he had the survey responses in his computer. Mr. Morrison told Mr. Power he had them but they were not very reliable. He said that IMRD was going to make a new survey because they did not think this one proved anything. In fact Mr. Morrison had been informed by Mr. Tom Hornada of IMRD that the survey was invalid due to the lack of an adequate response from the OGC. Mr. Power asked for a copy of the survey data. Mr. Morrison refused to make a copy available to Mr. Power. Later that afternoon, Mr. Morrison realized that the printer was malfunctioning and that he could not get his printout during his scheduled time at work. He saw Mr. Power standing at the printer waiting for his own work and asked him to retrieve the survey data when it came through the printer and put it on his desk.

On August 24, 1988, Mr. Power returned to the bargaining table with these computer survey printouts. Inasmuch as the issue of ergonomic furniture was an early item, Mr. Power took the computer survey printouts and placed them on the table and stated, "We know how much time the lawyers spend at the terminals. This proves that they spend more than half their time using the computers and that means they should get this ergonomic furniture because they need it to

be comfortable." Mr. Tobin looked at the surveys and shot back that he did not believe the surveys were reliable and questioned their significance. Mr. Power explained the survey's importance and significance and told Mr. Tobin that the surveys proved that attorneys spent a substantial part of their work day at their terminals. Mr. Tobin was not persuaded and no agreement on ergonomic furniture for the OGC employees was reached at the August 24, 1988 session. The parties then turned to other OGC building renovation issues.

Also on August 24, 1988, Mr. Morrison, who was out of the office, was angrily confronted on the telephone by his supervisor, Ms. Jan Hawkins, about the computer surveys. In this telephone conversation on August 24, 1988, Mr. Morrison was told by his angry supervisor that Mr. Power was witnessed retrieving the computer survey forms from the printer. She demanded an answer from Mr. Morrison as to how Mr. Power had gotten access to them. Mr. Morrison became afraid. He had been warned since his arrival at the OGC in April 1988, not to associate with Mr. Power in any way, shape or form because he was the Union President. He had also been cautioned about giving information to the Union. Mr. Morrison, being afraid of what would happen to him, told Ms. Hawkins that he did not know what she was talking about. Mr. Morrison told Ms. Hawkins that Mr. Power must have taken the surveys by accessing Mr. Morrison's computer. Ms. Hawkins told Mr. Morrison that when he returned to the office, she wanted a written statement from him on this. Shortly after attending a five day computer course and returning to the office, Mr. Morrison sent Ms. Hawkins a computer message with his fabricated version of how Mr. Power had acquired the surveys. Mr. Morrison reported that a week earlier he had given his access code to Mr. Power because Mr. Power's computer was down. This, he reasoned, is how Mr. Power got the surveys. Mr. Morrison also reported on the rumors spreading throughout the office at the time the survey was being conducted that if reported computer usage was too low, attorneys might lose their computers. Nothing further was heard about these computer survey forms until September 26, 1988, when Mr. Tobin issued a sharply worded memorandum to Mr. Power. Mr. Tobin accused Mr. Power of improperly securing the computer surveys through unauthorized access to Mr. Morrison's computer. Mr. Tobin attacked Mr. Power for dishonest and unprofessional conduct:

> Several things are clear from the above. First, you seem to feel you have license, personally or as Chapter President, to rifle desks of others in their absence. Second, you requested management information

> from a lower level bargaining unit employee whom you knew or should have known was not authorized to release it to you. Third, you knowingly used access to Mr. Morrison's IN-BOX, granted for the performance of PBGC work, to secure record information you had no entitlement to have.
>
> Your conduct certainly brings into question your integrity and judgment.

Mr. Tobin then ordered Mr. Power to return the survey responses by September 28, 1988. He closed his memorandum with: "I am requesting that OGC management consider restricting your access to Corporation office space to those hours where supervision is present." A copy of the memorandum was sent to Robert M. Tobias, National President, National Treasury Employees Union. According to the testimony of Mr. Tobin, Mr. Morrison and Ms. Beck, all requests for information are to be made to Mr. Tobin.

Later that week Mr. Morrison told Mr. Power he heard that management was going to hang him out to dry for the computer surveys. Mr. Power replied there was no problem with his having the surveys. Mr. Morrison then related to Mr. Power how he had told Mr. Tobin that Mr. Power got the surveys from his computer. Mr. Power told Mr. Morrison to go back to Mr. Tobin and tell him the truth. Mr. Morrison said he was worried that they would come after him. Mr. Power assured Mr. Morrison that if anything happened to him the Union would file a grievance or unfair labor practice charge. In the meantime, Mr. Tobin contacted Mr. Power's supervisor, Ms. Beck, and asked her to order Mr. Power to return the surveys to him. On October 3, 1988, Ms. Beck issued a memorandum to Mr. Power, ordering him to return the survey responses to Mr. Tobin by noon October 4, 1988, and to provide her with a written explanation as to why he had not complied with Mr. Tobin's order of September 26, 1988. The following day, Mr. Power went to Mr. Morrison to see if he had provided a corrected statement to Mr. Tobin. Mr. Morrison gave Mr. Power a copy of the corrected statement that he had provided to Mr. Tobin on the evening of October 3, 1988, wherein he admitted fabricating the story about how Mr. Power had obtained the surveys.

Mr. Power then attached Mr. Morrison's corrected statement to a memo he prepared for Ms. Beck. In the memorandum Mr. Power stated that with respect to her request for a

"written explanation" of why he had not complied with Mr. Tobin's memo, he considered such request an examination of him and he wanted a Union representative present. Mr. Power also said that the premise of Mr. Tobin's memorandum was incorrect, that he had not obtained the surveys through unauthorized access to Mr. Morrison's computer. Mr. Power closed his letter saying he would be available with his Union representative on October 6, 1988, if Ms. Beck wanted to persist with her investigation and examination of him.

Ms. Beck shot back a memo to Mr. Power on October 6. She ordered Mr. Power to return the surveys to Mr. Tobin that day.7/ She also disputed Mr. Power's asserted "Weingarten rights" saying they did not apply to a demand for a written explanation. Ms. Beck added Mr. Power could have a Union representative, "if and when a disciplinary interview of you takes place. . . ." With respect to Mr. Power's demand for a retraction of allegations of misconduct and dishonesty, Ms. Beck responded:

> Finally, you request a 'retraction of the allegations and accusations in Mr. Tobin's [September 26] memorandum.' I find this request to be, at best, disingenuous. As you are aware, on numerous occasions the PBGC has instructed you that any requests for information on behalf of NTEU be directed to Mr. Tobin, the Corporation's designated labor relations representative. Nevertheless, you were seen looking at management materials on the desk of a bargaining unit employee and you asked that employee to provide you with information. In case you have any lingering doubts on this matter, I am once again ordering you not to review management materials that happen to be in the possession of bargaining unit employees as a result of their duties, and I am ordering you to make any official document requests directly to Mr. Tobin.

7/ Mr. Power did provide Mr. Tobin on October 6 with a copy of the computer survey responses he had obtained from Mr. Morrison. He so informed Ms. Beck in a conversation on the evening of October 6.

On October 5, 1988, after Mr. Morrison sent his "corrected statement" to Mr. Tobin, he was subjected to an investigatory interview with his supervisor, Ms. Hawkins, and management lawyers, Mr. Philip Hertz and Mr. Tom Gabriel. Ms. Hawkins began the investigation telling Mr. Morrison they were there to discuss his "corrected statement" and the seriousness of filing a false statement with his supervisor. Ms. Hawkins told Mr. Morrison that the penalties for this could range from a verbal reprimand all the way up to removal. Ms. Hawkins then asked Mr. Morrison why he had initially filed a false statement. Mr. Morrison responded that he was afraid of what would happen to him if he had told the truth. Ms. Hawkins then turned the investigation over to Mr. Gabriel who discussed the two statements Mr. Morrison had provided management in the computer survey incident. Mr. Gabriel compared the statements asking Mr. Morrison which statements were true. Mr. Gabriel then asked Mr. Morrison if he had any problems with Mr. Power in the past. Mr. Morrison said yes and went on to recount an incident that occurred in July 1986 during an internal union election campaign. Mr. Morrison told Mr. Gabriel that he had been nominated to run for the position of Executive Vice President of the Union in July 1986. Within a few days, Mr. Power had called Mr. Morrison on the telephone and asked him why he was running for Union office and what were his qualifications. Mr. Morrison recounted that after explaining to Mr. Power why he was running for Union office, Mr. Power responded that if he continued to pursue it, Mr. Power would "cut his nuts off." After hearing Mr. Morrison's account of this matter, the meeting was closed.

The following day, October 6, 1988, Mr. Morrison reported as ordered to Mr. Gabriel's office. Mr. Gabriel informed Mr. Morrison he was to give management a statement covering what had been discussed the previous day. Mr. Gabriel then asked Mr. Morrison who else knew about the incident. Mr. Morrison told Mr. Gabriel that he had informed his supervisor, Mr. Ron Adams, of Mr. Power's July 1986 remark. Mr. Morrison also told Mr. Gabriel that Mr. Adams remarked that he (Adams) would not belong to a Union that had a leader that acted like that. Mr. Morrison then related to Mr. Gabriel that he immediately went up to the payroll office to cancel his dues withholding. Mr. Morrison also told Mr. Gabriel that employees Ms. Barbara Robinson and Ms. Lillie Connor also knew of this incident with Mr. Power because Mr. Morrison told them about it. Mr. Gabriel then asked Mr. Morrison how he could get in touch with these people. Mr. Morrison responded that Mr. Adams was working at the Passport Office and Ms. Connor was at the State

Department. Mr. Morrison told Mr. Gabriel he did not have their phone numbers. Mr. Morrison then told Mr. Gabriel that Ms. Robinson was now a supervisor in Respondent's Benefits Payment Division and he could get her number from the telephone directory. The meeting then ended and Mr. Gabriel told Mr. Morrison he would type up the statement and give it to him for his review. Later that day, Mr. Gabriel gave Mr. Morrison the statement he had prepared and Mr. Morrison signed it.

Mr. Gabriel contacted both Ms. Connor and Ms. Robinson by telephone after October 6, 1988. Both Ms. Robinson and Ms. Connor confirmed that Mr. Power had, in fact, made the remark to Mr. Morrison concerning his candidacy for Union office. However, Mr. Gabriel was also apprised by Ms. Robinson and Ms. Connor that Mr. Power had apologized to Mr. Morrison for making that remark. Thereafter, supervisors, Ms. Beck and DGC Flowe, were briefed on the results of Mr. Morrison's interview including the "threat." On October 13, 1988, Ms. Beck sent Mr. Power a notice telling him that on October 18, 1988, he would be investigated with respect to "his dealings with Donald Morrison" and he could have his Union representative present. Ms. Beck decided that at the October 18th investigatory interview, she would question Mr. Power about his July 1986 threat to Mr. Morrison.

During the period preceding the scheduled investigatory interview, October 13-18, 1988, Mr. Power engaged in a verbal battle with Executive Director Utgoff and Mr. Tobin over the reduction of parking fees for the unit employees. Mr. Power complained about the unilateral action of Respondent and Respondent sent a memorandum to the employees wherein it threatened to rescind the reduction in fees due to a threat of a ULP from Mr. Power. The parties exchanged highly critical memos which were brought to the attention of the employees. The employees were highly upset with the actions of Mr. Power, who, at the time, was running for reelection.

Mr. Power appeared, as ordered, at the investigatory interview on October 18, 1988. Ms. Jeanne Beck, Mr. Gabriel and Wayne Poll, Director, Internal Audit Department (IAD), were present for Respondent. Ms. Beck began the interview asking Mr. Power a series of questions concerning his acquisition of the computer survey responses. Mr. Power responded to these questions and provided further information as to how he got them, who he asked, where they were printed out, etc. These questions and answers proceeded

for a while. Mr. Power also made lengthy statements on why these surveys were important to the Union during the bargaining over ergonomic furniture. Mr. Power made statements concerning the motivation of Mr. Gabriel and his presence at the investigatory interview. Ms. Beck suddenly switched topics and asked Mr. Power if he had ever threatened Donald Morrison. Mr. Power replied, "no, what do you mean by threat?" Ms. Beck then followed up and asked Mr. Power if he ever told Mr. Morrison he might meet with physical harm if he pursued a certain course of action. Mr. Power then repeated Beck's question and said the answer is, "no, that is ridiculous." Ms. Beck then asked in connection with Mr. Morrison running for Union office in July 1986, did you make a statement to Don that he would meet with physical harm? Ms. Beck continued on and asked Mr. Power whether he had told Mr. Morrison he would cut his nuts off or words to that effect in connection with his entering his name as a candidate. Mr. Power asked "when?" Ms. Beck then repeated on about July 1986. Mr. Power responded saying that Ms. Beck was asking questions about a union political campaign, internal union matters. He continued saying he did not believe she had the right to ask about that. Ms. Beck responded saying she was not asking about the current election campaign, she said she wanted to know about what happened between one employee and another on the premises during the work day. Mr. Power responded that it was internal union business if it involved a union election campaign. Mr. Power then told Ms. Beck her questioning went beyond the scope of the Kalkines warning and he felt it was wholly improper to get into that area. He said that it involved events over two years old. Mr. Power became angry and stated, "don't confuse the issues with these questions, if you want to fire me, then fire me." Mr. Power then went into a lengthy explanation of how he had gotten the surveys from Mr. Morrison. He explained at length that although he had previously been given access by Mr. Morrison to his computer that access had been to a different system. Then Mr. Poll interjected with a question previously asked by Ms. Beck and answered by Mr. Power. Mr. Poll asked if Mr. Power had looked at documents on Mr. Morrison's desk. According to Mr. Power, because he had already answered that question earlier in the interview, he became agitated and said to Mr. Poll, "this is a hatchet job, you have your credible witness (Donald Morrison). If you are going to take action, do your thing." Ms. Beck then asked a number of questions about the survey. Namely, whether Mr. Power had copied it, what equipment was used to copy it, the location of the survey and whether Mr. Power intended to return the survey. Mr. Power responded by stating it's

internal union business. Shortly thereafter, the meeting ended when Mr. Power stated that he was finished answering questions and rose from his chair.8/

Respondent's management convened a meeting immediately after the interview with Mr. Power ended. Ms. Beck discussed with Ms. Flowe, the Deputy General Counsel, Mr. Power's interview and how he had "lied" when he responded no, he had not "threatened" Donald Morrison. A decision was made to have Mr. Gabriel draft up a notice of discipline for Mr. Power. Mr. Hertz assigned team member Mr. Rick Pearson to research a possible violation of the Landrum Griffin Act with respect to Mr. Power's "threat" to Mr. Morrison back in July 1986. Ms. Carol Resch was assigned the task of researching the issue of whether a "union privilege" existed in the context of an investigatory interview. Ms. Resch was also assigned to perform research into MSPB case law to determine the ranges of discipline. Mr. Hertz got together with Mr. Tobin to draft a letter to the Union's National President, Robert M. Tobias, as the internal union election at PBGC was only three weeks away (November 7), Respondent wanted to make sure that the Union's National Office had time to intervene. The letter was seen and concurred in by General Counsel Ford and/or Deputy General Counsel Flowe. On October 19, 1988, a letter was addressed to NTEU National President Tobias informing him of the threat from Mr. Power to Mr. Morrison. No action was taken by the Union. On November 7, 1988, Mr. Power was re-elected for another two-year term.

On January 19, 1989, Mr. Power was served with a Notice of Proposed Removal setting forth five specific charges of misconduct. Ms. Beck proposed that Mr. Power be removed from Federal service, in part, because of his conduct towards Mr. Morrison. Thus, Ms. Beck concluded that Mr. Power did tell Mr. Morrison during the July 1986 internal union election campaign that "if he continued to pursue it, he would cut his nuts off." Because of this remark, Mr. Power was charged with "Threatening An Employee With Grave Physical Harm" and "Interfering With, Restraining,

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8/ The foregoing is in the main based upon the credited testimony of Ms. Beck and Joint Exhibit No. 2 which was introduced into evidence without any qualification. To the extent that Mr. Power's testimony conflicts with that of Ms. Beck and Joint Exhibit No. 2, I have credited the latter.

Or Coercing An Employee In The Exercise Of Statutorily Protected Rights." Ms. Beck also proposed Mr. Power's removal based on her conclusion that he had lied during the October 18, investigatory interview when he was questioned on the remark to Mr. Morrison. Ms. Beck had asked Mr. Power whether he had ever indicated to Mr. Morrison that he might meet with physical harm if he pursued a certain course of action. Mr. Power replied, "No, that is ridiculous." Thus, Ms. Beck considered this response a lie so she charged Mr. Power with "Making A False Statement In An Official Investigation." With respect to the computer survey incident, Ms. Beck proposed that Mr. Power be removed because he had obtained the surveys through an "unauthorized source" and "ignored the established procedure between the Corporation and NTEU Chapter 211 for requesting information." Thus, based on Mr. Power's acquisition of these surveys and refusal to return his "original copy" he was charged with "Conversion Of Government Property." Ms. Beck also proposed that Mr. Power be fired because of his "Failure To Cooperate In An Official Investigation." Ms. Beck set forth eight specific instances where she said Mr. Power refused to answer her questions. Accordingly, Ms. Beck concluded that this "precluded the agency from fully carrying out its investigation of apparent misappropriation of agency files, apparent compromise of policies and practices designed to safeguard computer data and management information, apparent assault of an agency employee, apparent interference with, restraint, or coercion of an employee engaged in statutorily protected activity, and apparent misuse of government equipment and supplies." In developing this particular charge, Ms. Beck relied on an IAD (Internal Audit Department) "Summary" of the October 18th investigatory interview finally produced by Mr. Wayne Poll. In fact, Mr. Poll took notes at the interview on October 18, as did Ms. Beck and Mr. Gabriel. Both Mr. Poll and Mr. Gabriel circulated their notes to Ms. Beck. A rendition was developed by Mr. Poll and this was used as the "official record" of the proceeding. The "official record" (IAD Summary) was never provided to Mr. Power or the Union at any time after the interview. It was, however, attached to the Notice of Proposed Removal where Mr. Power and the Union saw it for the first time.

According to Mr. Power, the "Summary" prepared by Mr. Poll with input from Ms. Beck and Mr. Gabriel did not accurately reflect what had transpired at the investigatory interview on October 18. Thus, he claims that there were significant omissions, misstatements and mischaracterizations.

Although there is no set procedure for handling disciplinary actions against PBGC attorneys,9/ Mr. Power's case was handled in the same manner as was used with Employee No. 1, the sole other OGC attorney who had been disciplined for misconduct by the PBGC with a penalty of suspension or greater. The procedure is as follows: (1) the attorney's supervisor issues a Notice of Proposed Disciplinary Action; (2) the opportunity for an oral or written reply is permitted; (3) an Oral Reply Official is designated to hear the oral reply; (4) the Oral Reply Official submits a Recommendation on the proposed disciplinary action to the Deciding Official; and (5) the Deciding Official renders the Final Decision.

After the investigatory interview, in which Mr. Power refused to answer a number of Ms. Beck's questions, Ms. Beck asked that a notice of proposed discipline be drafted, listing the various incidents of insubordination and his failure to cooperate in the investigatory interview, but without specifying the discipline to be imposed. Mr. Gabriel was given this assignment, working under the supervision of AGC Philip Hertz. According to Ms. Beck, while the various attorneys in the OGC were researching such issues as the appropriate discipline, union privilege, etc., it came to her attention that Mr. Power was continuing, despite her orders to the contrary, to delete messages from his computer without reading same, and failing to adhere to the matrix which required prior supervisory approval on certain documents.10/ Because of such behavior, coupled with what had occurred at the interview, she determined that removal was the appropriate remedy. In making her decision, she consulted her immediate supervisor, then-Deputy General Counsel Flowe, and Mr. Hertz.

The Notice of Proposed Removal was served on Mr. Power on January 19, 1989. Inasmuch as Ms. Flowe had already accepted the offer to become General Counsel, and thus would be the deciding official on the case, she asked Mr. David Lindeman, an attorney and Director of the PBGC's Corporate Policy and Research Department, to serve as the Oral Reply Official. Mr. Lindeman was chosen for the position for the

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9/ OGC attorneys, as nonpreference-eligible, excepted service employees, are not covered by the PBGC's Disciplinary and Adverse Action Procedures Directive.

10/ The facts concerning these two alleged indiscretions are set forth, supra.

following reasons: (1) he was new to the PBGC, and hence had no prior history of dealings with Mr. Power as a union official; (2) the department that he heads is completely independent of the OGC; and (3) he was an attorney.

Mr. Power chose to respond to the charges via an oral reply. Accordingly, on February 10, 1989, Mr. Power and his representative, Jefferson D. Friday, National Counsel, NTEU, presented the oral reply to Mr. Lindeman. Based on notes taken by Mr. Tobin and Ms. Paula Connelly, an OGC attorney, Mr. Tobin prepared a draft summary of the oral reply which was given to Mr. Lindeman for comment. A final copy of the summary was given to Mr. Friday for comment.

Mr. Lindeman asked for the OGC's assistance in drafting his recommendation. After the oral reply, Mr. Lindeman reviewed the summary and transcript several times, and then consulted with Ms. Carol Resch and Mr. Harold Ashner, the two OGC attorneys assigned to assist him with the drafting of his recommendation. In his preparation of the recommended decision, Mr. Lindeman met with a group of AGC's to discuss Mr. Power's allegation that there were routing departures from the OGC Matrix supervisory concurrence requirements, and was assured by each that this was not the case. He also consulted with Mr. Tobin about other employee discipline and Mr. Power's allegation of disparate treatment. Finally, he spoke with Ms. Beck regarding the allegation of anti-union animus and whether and how she had lost confidence in Mr. Power as an attorney under her supervision. Ms. Resch primarily prepared the draft recommendation, based on specific instructions from Mr. Lindeman. Mr. Lindeman withheld his decision on the appropriate disciplinary measure to be imposed against Mr. Power until the end of the interviewing and drafting process.

Mr. Lindeman then submitted a written recommendation on the matter to the deciding official, General Counsel Flowe, on March 29, 1989. Mr. Lindeman recommended that Ms. Beck's findings be upheld in their entirety, and concluded that the proposed penalty of removal was warranted and should be implemented. In so doing, he noted specifically that he found no evidence to suggest that the charges pending against Mr. Power had been made in retaliation for Mr. Power's activity as NTEU Chapter 211 president.

After reviewing the entire record in the case, including Lindeman's recommendation, Ms. Flowe issued her Final Decision on April 3, 1989, in which she upheld the proposed removal. In reaching her decision, Ms. Flowe considered the need for public trust and confidence to carry out the PBGC's

mission, Mr. Power's demonstrated lack of judgment and integrity, Mr. Power's persistent pattern of flouting supervision, the need for supervisory review to ensure the consistency of agency decisions, Mr. Power's disregard for a co-employee's (Morrison) statutory rights, the complete absence of remorse by Mr. Power, and Mr. Power's instigation of other employees to violate established policies. She balanced these factors against the facts that Mr. Power "had been with the agency for a long time, that he had a good work record, and he does have some real considerable legal talents." After weighing the severity of the misconduct of Mr. Power, an attorney in a responsible position and held to a high standard of conduct, against the mitigating factors, Ms. Flowe concluded that Mr. Power was either "unable or unwilling to conform his behavior to that high standard." Mr. Power's removal was effectuated on April 7, 1989.

With respect to the imposition of discipline, the collective bargaining contract provides in Article 22 as follows:

ARTICLE 22
Disciplinary Action

Section 22.1

A. No disciplinary or adverse action shall be taken against an employee except for such cause as will promote the efficiency of the service.

B. For the purpose of this Article, a disciplinary action is defined as a written reprimand or a suspension of fourteen (14) calendar days or less.

C. For the purpose of this Article, an adverse action is defined as a suspension for more than fourteen (14) calendar days; a furlough for thirty (30) calendar days or less; a reduction in grade or pay; or a removal.

D. The standard of proof in any arbitration over an action covered by this Article shall be the preponderance of the evidence.

Section 22.2

A. Where corrective action can be appropriately accomplished through closer supervision, on the job training or oral admonishments, formal disciplinary/adverse action should not be taken. Such action should be taken in a timely fashion.

B. After counseling, disciplinary action, to correct offending employees and to maintain discipline and morale among other employees, shall normally be applied in order to correct offending employees prior to initiation of an adverse action. Removal actions shall normally be preceded by such progressive measures as reprimands, suspensions of less than fourteen (14) calendar days and suspensions exceeding fourteen (14) calendar days, unless the matter giving rise to the removal action is so flagrant and/or serious that discharge for the first or second offense is warranted under Douglas vs. Veterans Administration, 5 MSPB 313 (1981).

C. Disciplinary action normally will be initiated by the employee's immediate supervisor.

With respect to the discipline meted out to other employees for insubordination, fighting, use of Government resources, etc., the record reveals that Employee No. 9 who engaged in a fight during working hours with another employee was first given a notice of proposed removal, which was later reduced to a 60-day suspension. The insubordination charge was based upon Employee No. 9's refusal, prior to the fight, to return to his place of work. While, the other participant in the fight was found to have struck the first blow, the deciding official further concluded that Employee No. 9 had ample opportunity to cease fighting, but declined to do so. The deciding official was unpersuaded by Employee No. 9's argument that the penalty was too severe since he had only received warnings rather than suspensions in the past for his indiscretions.

Employee No. 10 who used extremely vulgar language and engaged in a fight with his supervisor (Employee No. 7) was

given an 14-day suspension which was held in abeyance pending the completion of a rehabilitation program.

Employee No. 7, a supervisor, who engaged in the fight with Employee No. 10 was given a proposed seven-day suspension which was later reduced to a three-day suspension based on his record of "congeniality" and the fact that he had only been a supervisor for a short time.

Employee No. 8, a GS-12 Auditor, was first suspended for two days for calling his supervisor filthy names. Eventually after continuing such insubordinate conduct he was suspended for sixty days. When he continued his insubordinate conduct for a period of approximately four months, he was finally discharged.

Employee No. 1, an attorney in the Office of General Counsel, received a 45-day suspension for utilizing sick leave for purposes of performing legal work for personal gain, using government telephones, messenger services, computers and secretarial typing services in connection with private litigation for personal gain, and lying in response to questions regarding the use of such equipment or services.

The record reveals that none of the principals involved in the discharge of Mr. Power, other than Mr. Tobin, had any connection with the above described disciplinary actions. With regard to Employee No. 1, it appears that the final action on the appropriate discipline to be meted out to him was up to former General Counsel Mackiewicz, who at the time was about to leave Respondent's employ and did not want his last official action to be the discharge of an employee. For this latter reason he opted for the 45-day suspension. Mr. Gary Ford, who succeeded Mr. Mackiewicz as General Counsel, disagreed with the discipline meted out to Employee No. 1. However, he declined to change the penalty upon being informed that in order to do so he would have to go back to the beginning and start the disciplinary action anew.

Discussion and Conclusions

The General Counsel and the Charging Party, relying on a credibility determination in Mr. Power's favor, take the position that his discharge was predicated solely upon his participation in activities protected by the Statute, namely, being Union President and aggressively representing both the Union and the employees in grievances and collective bargaining negotiations. In support of their position they point to Respondent's animus towards Mr. Power because of his participation in the above mentioned Union activities,

the fact that a number of items set forth as grounds for his discharge were in fact either internal union matters or closely related thereto, the fact that many of the alleged indiscretions were de minimus, outdated and/or unintentional. Additionally, they take the position that the penalty accorded Mr. Power was much more severe than the disciplinary penalties accorded other employees, particularly Employee No. 1, for more serious indiscretions, thereby establishing disparate treatment which, according to them, was predicated upon Mr. Power's protected activities.

Based upon the aforementioned considerations, among others, it is the position of the General Counsel and the Charging Party that Mr. Power's discharge for the reasons set forth by Respondent was a pretext and that his discharge was in fact in retaliation for his open and notorious union activity.

Respondent, on the other hand, which challenges the Authority's jurisdiction over Mr. Power's discharge since he is an excepted service employee with no appeal rights, denies that Mr. Power's union activities played any part in his discharge. In support of its position, Respondent notes that neither Ms. Beck nor Ms. Flowe, who were the responsible parties for his discharge, at no time were involved with Mr. Power's union activities. Thus, according to Respondent they would have no reason to retaliate against Mr. Power for his participation in such activities on behalf of the Union. In support of its decision to discharge Mr. Power, Respondent relies on Mr. Power's continuing indiscretions and insubordinate activities during the six months preceding his discharge, which, according to Respondent convinced his supervisors that Mr. Power was not capable of rehabilitation into a responsible employee. Further, it is Respondent's position that the penalties accorded other employees for their respective indiscretions were not relative to the instant controversy since they were not of the same type and involved different supervisors.11/

Contrary to the contention of Respondent, I find that the Authority does have jurisdiction in this matter.

11/ While the foregoing is merely a short summary of the parties respective positions, it should be noted that in their respective post-hearing briefs all the parties went into an extensive analysis of the record exhibits and testimony in an attempt to justify their respective positions.

Section 7116(a)(1) and (2) of the Statute provides, among other things, that it shall be an unfair labor practice to discriminate against employees with regard to tenure or other conditions of employment based upon their union activities. Section 7102 gives employees the specific right to act for a labor organization. Finally, Section 7103 defines an "employee" as any individual (a) employed by an agency, or (b) where employment has ceased because of any unfair labor practice. While Section 7103 specifically excludes certain categories of employees from the definition of an "employee," attorneys are not included in such categories.

Accordingly, I find that excepted service employees, particularly attorneys, are included within the definition of "employee" within the meaning of the Statute. See, Equal Employment Opportunity Commission and Edgard Martinez, 24 FLRA 851, where the Authority entertained a similar complaint alleging the discriminatory discharge of a General Attorney by the Equal Employment Opportunity Commission. To the extent that Respondent relies on the Supreme Court's decision in United States v. Fausto, 484 U.S. 439, I find such case to be distinguishable. Fausto stands for the proposition that an excepted service employee has no right to appeal an adverse action of an agency. Here, as distinguished from Fausto, we have a prohibited personnel action which is being pursued.

With respect to the merits of the instant controversy, there are certain facts over which no dispute exist. Thus, all parties agree, and I so find, that Mr. Power is an extremely bright and capable lawyer when it comes to his knowledge of the law and court procedures. The record further establishes that Mr. Power in his capacity as Union President, was an extremely aggressive union advocate who did not hesitate to challenge management, and on many occasions, both orally and in writing, was highly critical of certain management representatives, particularly Mr. Tobin and Mr. Gabriel. His actions and those of Mr. Tobin and Mr. Gabriel in retaliation, resulted in deep seated hostility between Mr. Power, Mr. Gabriel and Mr. Tobin.

The record also established that Mr. Power, on a number of occasions violated the Concurrence Matrix, deleted messages from his computer without first reading them, ignored numerous communications from the General Counsel concerning a request for a writing sample, and ignored numerous requests from Respondent's representatives to return the original copy of the computer survey which he had obtained from Mr. Morrison's computer. The record further

establishes that Mr. Power continued to violate the Concurrence Matrix and delete unread messages from his computer despite being cautioned about such actions by his supervisor.

Turning now to the investigatory interview concerning Mr. Power's actions in connection with the computer survey and his relations, past and current, with Mr. Morrison, the record establishes that Mr. Power did deny threatening Mr. Morrison with physical harm and also refused to answer a number of questions on the ground that such questions concerned internal union activity.

Based upon all the foregoing indiscretions, the Respondent claims that it decided to discharge Mr. Power. In Respondent's view, Mr. Power's continued insubordinate activity convinced the supervisory hierarchy that he was passed the stage where he could be rehabilitated into a responsible employee. Accordingly, they decided to discharge him.

The General Counsel and Counsel for the Charging Party do not deny that Mr. Power committed the indiscretions relied upon by Respondent as grounds for discharging Mr. Power, but takes the position that they were of such a minor nature that a responsible employer would not opt to discharge an employee as bright and talented as Mr. Power, but for his participation in activities protected by the Statute. In support of such position they point to the indiscretions committed by Employee No. 1 who utilized many of the Respondent's facilities and manpower in furtherance of his private law practice and the fact that he only received a 45-day suspension, the fact that the surveys were not considered accurate and as such were of little or no value, the fact that the threat to Mr. Morrison occurred several years ago and was known to his supervisor, and that many of the questions for which answers were sought at the investigatory interview involved internal union matters.

Having analyzed the record evidence, including the testimony of the various witnesses for each side, and observed the demeanor of the respective witnesses while on the witness stand, I find that the General Counsel has failed to establish the allegations of the Complaint by a preponderance of the evidence.

In reaching this conclusion, I credit the denials of Ms. Beck, Ms. Flowe and Mr. Lindeman that Mr. Power's union

activity played any part in the decision to discharge him.12/ While I have found that animosity did exist between Mr. Power and certain management representatives because of the aggressive manner in which he pursued his union representational activities, the record fails to support a finding that, other than performing certain ministerial functions in connection with the preparation of the recommended and final decisions to discharge Mr. Power, they, Mr. Tobin and Mr. Gabriel, played no part in the actual decision.

While it is true, as pointed out by the General Counsel and Counsel for the Charging Party, that many of the indiscretions charged to, and admitted by, Mr. Power, standing alone, might well be classified as minor or innocuous in nature, in the aggregate, however, I find that they establish a continuing pattern of insubordination. Moreover, it is the continuation of the indiscretions as well as the nature of the indiscretions which distinguishes the discipline applied to Mr. Power from that meted out to the other employees. To the extent that Employee No. 1 was only given a 45-day suspension for his actions in utilizing Government time, equipment and personnel in furtherance of his private practice, I find that but for timing of his actions, i.e., just prior to the resignation of General Counsel Mackiewicz who declined to have as his last act the discharge of an employee, and the fact that Mr. Ford, the successor to Mr. Mackiewicz, would have had to start Employee No. 1's disciplinary action all over again if he decided to change the penalty awarded him, Employee No. 1 escaped discharge.

Additionally, inasmuch as the officials and department handling the discipline of Mr. Power were different than those handling the discipline meted out to the other employees involved in the various cited discretions, it is difficult to sustain a finding of disparate treatment. This is particularly true when one compares the indiscretions of Employees No. 7, 8, 9 and 10 with those committed by Mr. Power.

With regard to the incidents involving Mr. Morrison, i.e. alleged physical threat and computer survey, while I

12/ In this connection it is noted that Ms. Flowe, despite undergoing a frustrating time with Mr. Power in her attempts to secure a writing sample in connection with her review of his appraisal, did see fit to raise his mark on the appraisal after finally receiving a representative writing sample.

question whether any of Mr. Power's activities in connection therewith falls within the protection of "internal union activity," I find that despite the contention that the survey was of little if any value, the fact remains that the survey was the property of Respondent which had been obtained from a source other than the person designated to provide such information to the Union. Additionally, even if the survey was highly pertinent to the ongoing negotiations between Union and Management, such pertinence did not give Mr. Power, in his capacity as Union President, the right to appropriate Respondent's property from an unauthorized source and then refuse an order from his supervisor to return same. It appears that this latter act, along with his refusal to answer certain questions during the subsequent investigation, which was the straw that the broke the camel's back, since such activities occurred just about the time that Ms. Beck became aware that Mr. Power had, despite prior admonishments, failed to follow the Concurrence Matrix.13/

Accordingly, based upon the above considerations, I find, as stated above, that the General Counsel has not sustained the allegations of the complaint by a preponderance of the evidence and recommend that the Authority adopt the following order dismissing the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the Complaint, should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., April 9, 1990

BURTON S. STERNBURG
Administrative Law Judge

13/ To the extent that one might conclude that the alleged physical threat to Mr. Morrison designed to dissuade him from running for a union office fell within the protection of "internal union activity," I find that the inclusion of such incident as a ground for Mr. Power's discharge does not serve to invalidate the aforementioned findings and conclusions since I am convinced that irrespective of the threat to Mr. Morrison, Mr. Power would have been discharged for his other indiscretions, i.e. continued insubordination. See: Internal Revenue Service, 6 FLRA 96 (1981) and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).