

In the Matter of the Arbitration between

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United States Department of Labor,  
Employer,

OPINION

and

and

National Council of Field Labor Locals  
AFGE, AFL-CIO,  
Union

AWARD

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FMCS Case No. 050816-05233-7 (Shaw)

Before

Wendi F. Weill, Esq., Arbitrator

Appearances:

For the Employer Deborah DePompeo, Labor Relations Officer

For the Union – Hugh Smith, NCFLL Treasurer

Courtesy of the  
National Council of Field Labor Locals  
<http://www.NCFLL.org>

## BACKGROUND

On August 16, 2005, Marcie Shaw, an Office Automation Clerk with the Employment and Training Administration of the U.S. Department of Labor (hereinafter referred to as the "Employer"), filed with the Civil Rights Center an informal claim of discrimination which included an issue of a June 13, 2005 suspension for failure to complete an assignment. (Agency Exh. 13) On October 18, 2005, she filed a formal claim of discrimination with the Civil Rights Center which mentioned the facts which lead to the suspension as one of the "actions that gave rise to this complaint". (Agency Exh. 3). The claim was accepted by the Civil Rights Center on December 19, 2005. (Agency Exh. 4).

On February 17, 2006, Ms. Shaw's Union representative, Sigmund Kozierachi, wrote to Ms. Barry-Perez, the Employer's Chief of the Office of Enforcement, that "for some unknown reasons, Ms. Shaw's arbitration on her proposed suspension was incorporated into her EEOC complaint. Ms. Shaw only provided the information about her pending arbitration to the EEOC investigation for background information. For whatever reasons, this arbitration had become [sic] part of her EEOC complaint." He continued that Ms. Shaw wished that "all references to the arbitration be removed." (Agency Exhibit 5) Ms. Barry-Perez responded that

*Ms. Shaw must withdraw, in writing, the claim at issue (proposed suspension). To withdraw the claim, she must understand such action must be of her own volition without coercion or duress. Further, she must understand that withdrawal occurs with prejudice to refile in the EEO or other administrative/legal channels. When a claim is withdrawn, it is considered abandoned..."*

(Id.) Ms. Shaw then submitted a signed withdrawal on February 21, 2006 which stated:

*This constitutes withdrawal of my claim of discrimination concerning a proposed suspension dated June 13, 2005. I understand that by withdrawing this claim from the administrative EEO process, I may be prejudiced from refiling in this or other adjudicatory processes."*

(Agency Exh. 6.) Thereafter, Ms. Shaw submitted an affidavit to support her EEO claim which mentioned the facts which lead to her suspension as part of her claim of a hostile work environment. (Agency Exh. 8)

The National Council of Field Labor Locals, AFGE, AFL-CIO (hereinafter referred to as "the Union") grieved Ms. Shaw's suspension. The Employer claimed that the grievance is terminated based on her filing of a formal EEO complaint and that Ms. Shaw waived her right to refer her suspension to the Union for arbitration. The matter remained unresolved and was submitted to the undersigned for arbitration.

## ISSUE

The threshold issue to be decided in the arbitration is, as agreed to by the parties:

Is the grievant's suspension arbitration terminated based on her filing of a formal EEO complaint?

Did the grievant waive her right to refer her suspension to the Union for arbitration?

## POSITIONS OF THE PARTIES

### The Employer

The Employer maintains that Ms. Shaw's suspension is neither grievable nor arbitrable in accordance with the parties' collective bargaining agreement. Article 15, Section 2E states:

In the event that an EEO complaint and a grievance are both filed concerning the same set of facts or on the same issue(s), the filing of an EEO complaint shall have the effect of terminating the grievance. ~~In the event the Department dismisses the EEO complaint on a technicality or for a non-substantive reason, the Union or the affected employee may resurrect the grievance in connection with any non-EEO issues within 30 calendar days of receipt of the Department's EEO complaint decision by notifying the appropriate management official at the last processed step of the grievance procedure.~~

The Employer maintains that the issue must be non-arbitrable because first, the Union acknowledged that the EEO complaint had many of the same issues in it that were related to the grievant's suspension action. It notes that Ms. Shaw's withdrawal of her suspension claim was done, with her knowledge that, "when a claim is withdrawn, it is considered abandoned." (Agency Exh.-5 and 6). Since Ms. Shaw's EEO complaint was not dismissed for a non-substantive reason, and since the EEO complaint was not dismissed on a technicality, Ms. Shaw has not satisfied either condition required by Article 15 Section 2E for resurrecting a previously-terminated matter.

Additionally, although Ms. Shaw withdrew her suspension from her formal EEO complaint, she never removed the underlying facts upon which the suspension was based from her formal EEO complaint. Legal precedent, the Employer urges, supports its position that the issues that still remain open in Ms. Shaw's formal EEO complaint are not separate from the suspension.

Based on the above, the Employer urges that the matter of Ms. Shaw's suspension be deemed non arbitrable.

The Union

The Union notes that the intent of the grievant, as indicated by her actions and those of her investigators, was that her suspension be arbitrated. The information regarding her suspension was just provided as background in her EEO complaint.

Moreover, the intent of the parties was always to allow both the informal EEO investigation and the arbitration to go forward together. When it came time for her formal EEO investigation, Ms. Shaw withdrew her "claim of discrimination concerning a proposed suspension dated June 13, 2005". Agency Exh. 6.

The Union notes that the Employer holds open the possibility, but does not warrant, that it will deal with the suspension within the formal EEO process. And it does not warrant that it will review the suspension for just cause. On the formal complaint, Ms. Shaw specifies remedies [she] believes will resolve [her] complaint: stop harassment, address my disabilities, address front desk issues, grant or consider my medical leave request." (Agency Exh. 3). As pointed out in the testimony of Sigmund Kozierachi, she does not include the issue of suspension in her remedies. The grievant's case must therefore be heard by an arbitrator.

The Union urges that Article 15, Section 2E was never intended to prevent a claim from being heard at all. Rather, it was drafted so as to prevent a grievant from having "two bites at the apple." Here, the suspension facts contained in the formal EEO complaint are merely to serve as background for her discrimination case. Their existence in that document should not preclude an arbitral review of whether there was just cause for the Employer to suspend her.

For the above-mentioned reasons, the Union urges that Ms. Shaw's grievance be deemed arbitrable.

#### DISCUSSION AND OPINION

The pertinent contract language states that

"In the event that an EEO complaint and a grievance are both filed concerning the same set of facts or on the same issue(s), the filing of an EEO complaint shall have the effect of terminating the grievance."

The Employer has argued that this language forbids Ms. Shaw's grievance of her suspension to be arbitrated because the facts underlying it were included in her EEO complaint. The Union has argued that this language does not forbid the arbitration of the suspension because Ms. Shaw withdrew her claim of discrimination concerning the suspension from her formal EEO complaint. Both parties presented excellent testimony and evidence to support their positions. However, the Undersigned believes that the contract language and the specific facts of this case support the Union's claim that Ms. Shaw's grievance of her suspension was not terminated and may go forward to arbitration.

The grievance will determine whether the Employer had just cause to suspend Ms. Shaw on June 13, 2005. The grievance concerns a copying assignment that Ms.

Shaw was given on May 31, 2005. The Employer suspended Ms. Shaw because, it claimed, she failed to follow supervisory instructions regarding the copying assignment. (Agency Exh. 10). Ms. Shaw believes that her treatment on that day was one in a series of examples of harassment of her by her Employer resulting from her disability. Her Formal EEO Complaint was stated, in relevant part, as

Whether the Employment and Training Administration (ETA) discriminated against you and created a hostile work environment based on... disabilities (non-specified vision, mental retardation, and homocystinuria)....when, among other actions: 1) during early summer 2005, your Regional Administrator allegedly made the statement “[I] will do anything to get rid of Marcie” to the President of the AFGE Local 664; 2) on June 13, 2005, you received a proposed 10-day suspension from the Director of the Office of System Performance; and 3) on a continuous basis – “over the past two or three years,” your Regional Administrator and Immediate Supervisor allegedly failed to address work and health related issues...

(Agency Exh. 4) The Union informed the Office of Enforcement Chief that this information was “only provided... for background information”, was to be removed from her EEO claim and that the Union would be resubmitting Ms. Shaw’s proposed suspension for arbitration (Agency Exh. 5.) The Employer responded with information on how to withdraw the claim at issue, and went on to explain that “withdrawal occurs with prejudice to refile in the EEO or other administrative/legal channels. When a claim is withdrawn, it is considered abandoned.” (Id.) The Employer made no response to the Union’s resubmission of the suspension for arbitration.

Ms. Shaw withdrew the issue of her proposed suspension in writing, in reliance upon Ms. Naomi Barry-Perez’s guidance. (Agency Exh. 6) However, the Employer, by Ms. Barry-Perez, notes that, notwithstanding this withdrawal, the suspension and its underlying facts will be considered in the EEO investigation.

The grievant cannot be prevented from having her claim heard. The Employer was informed that the grievant was withdrawing her claim from the EEO forum so that it could be heard at an arbitration. After the grievant’s written February 21, 2006 withdrawal, any investigation of the suspension of June 13, 2006 by the Employer, as a claim, was done without the grievant’s consent. After the grievant’s written withdrawal, she was released from the limitations of Article 15 Section 2E because she no longer had “filed” an EEO complaint and a grievance concerning the same set of facts.

Marcie Shaw withdrew her claim in reliance upon Ms. Barry-Perez’s direction. She should not have so relied to her detriment.

## AWARD

The grievant’s suspension arbitration is not terminated based on her filing of a formal EEO complaint.

The grievant did not waive her right to refer her suspension to the Union for arbitration.

February 24, 2007



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Wendi F. Weill, Esq., Arbitrator