#1951

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO DEPARTMENT OF AGRICULTURE
-AND-
OCSEA

APPEARANCES

For Department of Agriculture
Matthew Banal, OCB Labor Counsel
Donald Mills, Administrative Assistant, Labor Relations, HR
Paulette Robinson, Human Resources Administrator
Jesse Keyes, OCB Labor Relations Specialist

For OCSEA
Duane L. Murray, ODA Chief Steward
Darbha Subrahmanyam, Grievant
Barbara Fallraman, Staff Representative
Thomas B. Cochrane, OCSEA Associate Counsel
Phillip E. Anderson, ODJFS, Intumnn Policies Manager
Nikki Harris-Smith, Executive Assistant of Finance, DSW
Samuel Shihab, Attorney

CASE-SPECIFIC DATA
Hearing Held–July 25, 2007
Case Decided October 7, 2007
Subject: Expiration of H-1B Visa, Out of Status

Decision
Grievance: **Sustained in Part/Denied in Part**

Table of Contents

I. The Facts

The parties to this disciplinary dispute are the Department of Agriculture ("Agency" or "Agriculture") and the Ohio Civil Service Employees Association AFSCME Local 11 AFL-CIO ("Union"), representing Subrahmanyam Darbha ("Grievant").[1]

On December 6, 1999, the Agency hired the Grievant as a Plant Pest Control Inspector. In a letter dated June 16, 2000, Human Resources Administrator John Hix, and Attorney Samuel Shihab, (Attorney for the Grievant and the Agency) petitioned the Department of Justice for permission to hire the Grievant in a full-time position as an H-1B Nonimmigrant.[2] That petition was granted on September 8, 2000, and the Grievant received his H-1B visa. On July 29, 2002, the Agency promoted the Grievant to the position of Plant Pathologist, for which he was fully qualified. Also, Plant Pathologist qualified as a "specialized position" under immigration law. In 2003, Mr. Hix and Attorney Shihab again petitioned the Department of Justice to extend the Grievant's visa. That petition was granted on October 2, 2003. Attorney Shihab dispatched a letter dated November 4, 2003[3] to the Grievant and the Agency stating that the Grievant and the Agency needed to petition to amend the Grievant's H-1B status if he changed jobs properly.[4] The letter was properly addressed and mailed.[5] The Agency acknowledged receipt of the letter, but the Grievant denied receipt of either the letter or the accompanying notice of receipt. In fact, the Grievant claims he first saw the letter after his removal on October 23, 2006. Nevertheless, Attorney Shihab credibly testified that he sent the Grievant a copy of the letter.

On September 25, 2005, the Grievant accepted a lateral transfer within the Agency from Plant Pathologist to Network Services Technician ("NST"). Because that position did not qualify as a "specialized position"

---

[1] Hereinafter collectively referenced as "Parties."

[2] Attorney Shihab represented both the Grievant and the Agency.

[3] Joint Exhibit 4, at 6-7.

[4] I-94 Letter.

[5] Normally Attorney Shihab will mail an I-94 letter (Joint Exhibit 4, at 6) to the Agency with a copy to the Grievant. The Agency's letter contains two parts: The Agency retains the top portion, and gives the bottom portion to the Grievant for his files.

under immigration law, it deprived the Grievant of proper status under his visa. Furthermore, the Grievant neglected to notify Attorney Shihab of the transfer and avoided re-certifying his visa. The Grievant purportedly feared that as a probationary employee he could be transferred back into the position of Plant Pathologist, thereby sacrificing the funds invested in re-certification.

The Grievant claimed that in March 2006 he notified Human Resources Administrator Rick Corbin that his (Grievant's) visa would expire on September 30, 2006 and that the Agency needed to extend his visa. The Grievant also claimed that after Mr. Corbin failed to respond, he sent Mr. Corbin an e-mail in May 2006 reiterating the need for an extension. Also, the Grievant testified that after April 6, 2006 and for the remainder of the summer of 2006, he made almost daily visits to the office of Assistant Human Resources Administrator Nicole Harris-Smith reminding her of the impending deadline and the need to extend his visa.

In mid-2006, Mr. Corbin and Mr. Hix transferred out of the Agency leaving Ms. Harris-Smith as the Acting Human Resources Administrator. In August 2006, Ms. Kimberly Harrison, an associate in Attorney Shihab's Law Office, informed Ms. Harris-Smith that the Grievant had transferred to the NST position and that his visa would expire at the end of September 2006. Ms. Harris-Smith was previously unaware of the Grievant's transfer.

The Grievant and the Agency shared responsibilities with respect to his visa-related problems. The Agency was responsible for initiating and completing procedures to amend the Grievant's visa. To keep the Grievant in proper status under his visa, the Agency was responsible for filing an application to amend his visa.

Irrespective of the Agency's responsibilities, however, the Grievant was at all times ultimately and solely responsible for remaining in status under his visa. Whenever the Grievant changed job duties he was solely responsible for verifying that his new job classification was re-certified as a "specialized position" and his

visa, amended. Thus, the Grievant had to remain vigilant, and to understand the rules[6] and regulations pertaining to his H-1B status. Finally, the Agency and the Grievant were obliged to notify Attorney Shihab if the Grievant slipped out of status.

In mid 2006, Ms. Nicole Harris-Smith was acting Human Resources Administrator overseeing all human resource functions. She admitted that the Agency did not carefully monitor employees' visa-related needs. She told the Grievant that it was his responsibility to apply for an H-1B extension. Nevertheless, Ms. Harris-Smith, Mr. Mills, and Ms. Harrison ultimately sought to extend the Grievant's visa but became bogged down trying to redefine the NST position as a "specialized position" under the immigration law. Consequently, they missed the deadline for extending the Grievant's visa. Thus, the Grievant was out of status under an expired visa.

Consequently, on October 10, 2006, the Agency placed the Grievant on administrative leave with pay and held a pre-disciplinary hearing on October 16, 2006, during which the Grievant was charged with violating Rule 33, "Failure to maintain licensure." The Agency's rationale for the charge was, "[A]s a result of a voluntary change from a Plant Pathologist to a Network Services Technician 1 the employee no longer qualifies for an H-1B... visa." The pre-disciplinary hearing office found that the Grievant had violated Rule 33 and that the Agency had just cause to discipline him, since he elected "to voluntarily change classifications from Plant Pathologist to Network Services Technician 1..."[7]

In a letter dated October 23, 2006, the Agency removed the Grievant for violating Work Rules Nos. 28, engaging in "misfeasance," "malfeasance, or "nonfeasance," and 33 "[F]ailing to extend your H-1B visa status..."[8] The Union challenged the removal through Grievance No. 04-00-2006-1103-0050-01-14 ("Grievance") alleging that the Grievant was discipline without just cause.[9] On January 4, 2007, a Step-3

---

[6] In this respect, the Grievant is charged with *constructive knowledge* of rules and regulations governing his responsibilities.

[7] Joint Exhibit 3, at 6.

[8] *Id.* at 7.

[9] Joint Exhibit 1, at 1.

Hearing Officer held that the Grievant violated Rules 28 and 33 because he had "advanced notice of the expiration date for the work permit and did not allow adequate time . . . [approximately six months] to complete the necessary steps for an extension."[10]

II. Relevant Contractual and Regulatory Provisions

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. . . .

24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline.
Disciplinary action shall be commensurate with the offense.
Disciplinary action shall include:

a. One or more oral reprimand(s) (with appropriate notation in employee's file);
b. One or more written reprimand(s);
c. Working suspension;
d. One or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB. Agencies shall forward a copy of any fine issued to employees, to OCB. Should a grievance be filed over the issuance of a fine and the grievance is settled prior to Step 4, the Agency shall forward a copy of the settlement to OCB. OCB shall maintain a database involving fines and share this information with the Union no less than quarterly.
e. One or more day(s) suspension(s);

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

Rule 28 prohibits violation of ORC Section 124.34 by "[i]ncompetence, inefficiency, dishonesty, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, failure of good behavior, acts of misfeasance, malfeasance, nonfeasance."

Rule 33 subjects an employee to discipline for "[r]evocation of federal licensure.... required to perform duties."

III. The Issue

Whether the Grievant was removed for just cause? If not, what shall be the proper remedy?

IV. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. The Agency terminated the Grievant for just cause because he violated ODA's Disciplinary Action Guidelines Nos. 28 and 33. Violation of these Rules rendered the Grievant ineligible either to work or to live in the United States. Rule 28 contemplates violation of Section 124.34 of the Ohio Revised Code

[10] Joint Exhibit 2, at 3.

("O.R.C.") The Grievant violated Rule 28 by knowingly transferring from the position of Plant Pathologist to the position of NST, which stripped him of his visa authorization. Rule 33 involves "Revocation of federal licensure required to perform duties." The Agency's disciplinary grid calls for removal for the first offense under Rule 33.

2. Section 274 (A) of the Immigration and Nationalization Act (INA) and 8 U.S.C. Section 134 (a) (2007) prohibits any person knowingly to hire, recruit or refer for a fee any alien not authorized to work. Employers risk penalties for violating these sections.[11]
3. No applicable immigration law required the Agency either to renew the Grievant's visa or to sponsor him for permanent residency in the United States. Nothing in the immigration laws required to the Agency to petition for an extension of the Grievant's H-1B status. Specifically the H-1B Visa Reform Act, as incorporated into the Immigration and Naturalization Act provides that "[T]he period of authorized admission . . . for a nonimmigrant may not exceed 6 years."[12] Even though one-year extensions are available to H-1B aliens with current pending petitions for adjustment of status, employers are not obliged to obtain those extensions for aliens.[13] Mr. Philip Anderson and Attorney Shihab testified that employers have no duty to sponsor aliens for either visas or residency. The Grievant' visa expired, and his petition for adjustment of status failed due to his subsequent lack of employment.
4. The Union's remedy exceeds the explicit scope of immigration laws.
5. The Grievant hurt himself. His visa would have expired in September 2006, but he needlessly complicated the process of extending his visa and maintaining proper status thereunder by knowingly and voluntarily and prematurely slipping out of status by transferring to the NST position. Ms. Harris-Smith credibly testified that the Grievant told her that he avoided spending the time and incurring the expense of filing paperwork to extend his status because the Agency could have nullified his efforts by placing him back in the Plant Pathologists position. Instead of heeding the advice in Attorney Shihab's letter of November 23, 3006, the Grievant willfully disregarded his responsibilities and thus contributed to his loss of H-1B status and ultimately to his removal.
6. The Grievant's claim of ignorance of the requirements for extending his visa is unpersuasive for two reasons. First, he received *actual* notice regarding his duty to remain in authorized status and to extend his visa. Attorney Shihab's letter dated November 4, 2003 specifically notified the Grievant of the requirements for extending his visa and maintaining status thereunder. Even though the Grievant denied having received the letter, it was properly addressed and mailed to the Grievant. Second, the Grievant has constructive knowledge of his responsibilities under the immigration laws because ignorance is no excuse.
7. Nevertheless, the Agency bears some fault in this matter. When an H-1B employee changes jobs, the sponsoring employer must file a new Labor Condition Certification with the Department of Labor (DOL). In addition to sponsoring, the employer must file new H-1B paperwork with the United States Citizenship and Immigration Services (USCIS). Ultimately however the new position must meet the definition of "specialty occupation" and the employer must continue to comply with all H-1B requirements. The Agency should have followed the Grievant's visa status and fulfilled its filing duties when he transferred. Nevertheless, the Agency could not retain the Grievant as an employee once he lost his visa status.
8. For at least two reasons, the Agency cannot place the Grievant in an IT position: He is not qualified for an IT position; And IT positions do not qualify under immigration law as "specialized positions.'
9. Because the Grievant failed to mitigate his damages, he is entitled to no backpay. First, the Grievant contributed to the problem that triggered his dismissal. The Grievant's failure to avoid the situation that

---

[11] List of penalties omitted.

[12] Citing 8 U.S.C.S. § 1184(g)(4).

[13] P.L. 106-313 § 106(a).

triggered his removal is equivalent to a failure to mitigate. For example, the Grievant remained silent about his transfer to the IT position. That silence consumed precious time that could have been used to try to extend his visa. Thus, but for the Grievant's silence, his visa could have been extended. The Grievant's reasons for remaining silent are self-serving. Finally, as an illegal alien, the Grievant is not entitled to damages (Hoffman Plastics).

10. The immigration laws do not require the Agency to reimburse the Grievant for his travel expenses. Reinstating the Grievant will not lead to a status adjustment and a permanent residence so that he might obtain a green card. On August 17, 2007, the USCIS will no longer accept employment-based applications for status adjustment. Consequently, there is insufficient time to complete that process.

B. Summary of the Union's Arguments

1. The Agency bears the burden of proof in this disciplinary dispute and, given the severity of the removal on the Grievant's life, the measure of persuasion should be clear and convincing rather than preponderance of the evidence. The consequences include: Deprivation of livelihood; reduced chances for green card; begin classified as "presently unlawful" under immigration law; and risking deportation without guarantee of re-entry.
2. The Agency had a duty to extend the Grievant's visa in a timely manner.
3. The Grievant's removal is without just cause, since the Agency contributed to the problem that triggered the Grievant's removal.
4. Even where other grievants have deliberately and seriously misbehaved, arbitrators have sustained their grievances where employers shared the blame for the misconduct.[14] In contrast, the Grievant's misconduct is considerably less serious and lacks any element of willfulness.
5. The Grievant bares no blame for the expiration of his visa, since he did all that he could to get the Agency to renew it.
6. Lack of experience hindered any efforts by Ms. Harris-Smith, and Ms. Harrison to define NST position, which was not authorized under the Grievant's visa. Had the Grievant notified Attorney Shihab or Ms. Harrison earlier, the visa might have been successfully. Apparently, Ms. Harris-Smith was confused by Attorney Shihab's representing the Grievant and the Agency because she vainly sought advice from DAS, the Attorney General, and the Internet.
7. Although the Grievant shares no blame for the tardy completion of the visa extension, he shares *some* blame for being out of status, which in turn contributed to the Agency's untimely initiation of the extension procedure. The Grievant should have notified the Agency when he thought his status was about to expire. Attorney Shihab testified that primary responsibility for maintaining visa status lies with the Agency given its greater knowledge and power.
8. The Grievant can be no more than equally liable with the Agency in this case, and since the Agency is more responsible for renewing employees' visas, it must shoulder the greater blame here. The Grievant's share is smaller because he: Acted in good faith to assist the Agency in extending his visa; bore only secondary responsibility because he went out of status.
9. For the most part, "Miscommunications and misunderstandings" triggered the Grievant's removal. Based on the division of responsibility and fault and on the Grievant's discipline-free record, he deserves a make-whole remedy that includes backpay.

---

[14] Citations omitted.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this is a disciplinary dispute, the Agency has the burden of persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce preponderant evidence in the arbitral record as a whole showing that more likely than not the Grievant engaged in the alleged misconduct. Because the Agency has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish the alleged misconduct in the first instance, it cannot prevail, irrespective of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Burden of Proof

The issue here is whether a higher measure of persuasion is applicable in the instant dispute. The Union argues for application of the clear and convincing standard in lieu of the preponderance standard and seeks to support that position with the following quotation:

> The usual exception to the normal quantum is when the offense charged would seriously damage an employee outside the immediate employment relationship. Discharge for illegal or immoral conduct, for example, could destroy an employee's reputation in the community and could do far more harm to his or her future employment prospects than would discharged for any other reason.[15]

Relying on this passage, the Union argues that the discharge unduly burdened the Grievant. Thereby warranting imposition of the clear and convincing (rather than the preponderance) standard as a measure of persuasion in this dispute. The Agency does not address this particular issue.

For the following reasons, the Arbitrator does not find the Union's position persuasive. First, the quoted passage suggests that a higher measure of persuasion is proper only where the particular *charge* in question will likely stigmatize the Grievant. In other words, the quotation focuses on the *nature* of the charge, which

---

[15] Union's Post-hearing Brief, at 13, citing THE COMMON LAW OF THE WORKPLACE 179-80 (Theodore J. St. Antoine, ed., 1998).

has been the pivotal factor in virtually all arbitral decisions to elevate the measure of persuasion. In the instant dispute, the Agency seems to have charged the Grievant with violation of Rules 28 and 33. Rule 28 implicates Section 124.34 of the Ohio Revised Code, which in turn implicates "malfeasance, misfeasance, and nonfeasance"[16], and Rule 33, focuses on "Revocation of licensure required to perform duties."[17] Within that framework, the Agency specifically removed the Grievant for having violated both Rules 28 and 33.[18] However, neither Rule 28 nor Rule 33 involved the illegal or immoral conduct referenced in the foregoing quoted excerpt. The call for a higher measure of persuasion in that quotation presupposes the existence of charges involving *illegal and/or immoral* conduct.

In fact, the quotation's rationale is consistent with the views of most arbitrators. Traditionally, arbitrators have elevated the measure of persuasion for charges involving criminal conduct (theft, etc.) fighting, use or possession of controlled substances, and sexual harassment.[19] The charges in the instant case neither fall within any of the foregoing categories nor carry inherent stigmas or other inordinate burdens.

The Union's Post-hearing Brief proffers the following list of consequences that the Grievant's removal will likely visit upon him: (1) deprivation of his livelihood, (2) reduced chances to obtain a green card, (3) classified as "unlawfully present," (4) expelled from the United States for one year without guarantee of return. [20] The Union misses the mark by targeting the consequences of the removal rather than the nature of

---

[16] Joint Exhibit 2, at 3.

[17] *Id.* The Arbitrator notes in passing that the Agency seems to have sent mixed signals regarding the nature of the charges leveled against the Grievant. For example, the Step-3 Hearing Officer found the Grievant guilty of violating Rules 28 and 33. (Joint Exhibit 2, at 3). However, the Pre-disciplinary Hearing Notice mentioned only the violation of Rule 33. (Joint Exhibit 3, at 2). Similarly, the Pre-disciplinary Hearing Officer's Report discusses only Rule 33. (Joint Exhibit 3, and 5). In contrast, the Removal Notice specifically cited Rules ***28*** and 33, even though the Pre-disciplinary Hearing Officer neither discussed nor made any specific findings regarding Rule 28. At the very least, it is unclear, based upon this record, whether the Parties Discussed Rule 28 at the pre-disciplinary hearing. Finally, assuming, arguendo, that the Parties actually discussed Rule 28, which involves the charges of malfeasance, misfeasance, and nonfeasance, it is unclear which of these specific charges were leveled against the Grievant. Because these three charges are not synonymous, the Agency should have specifically identified which of them the Grievant allegedly violated, thereby affording him a full and fair opportunity to defend against that specific charge(s).

[18] Joint Exhibit 3, at 7.

[19] Elkouri and Elkouri, How Arbitration Works, 949-952 (Alan Miles Ruben Ed., 6th ed. 1997).

[20] Union Post-hearing Brief, 14.

the underlying charges. First, loss of economic livelihood is a consequence of any removal, irrespective of the charges. Moreover, the last three consequences listed above are a function of the Grievant's *alien status* in the United States rather than a function or consequence of Rules 28 or 33. In other words, as an alien in the United States, the Grievant would likely suffer the last three consequences if he were removed from his "specialized occupation" for any charge whatsoever, since his right to remain in the United States turns on his continued employment in a "specialized occupation." In light of this analysis, the Arbitrator cannot adopt the Union's argument for a higher measure of persuasion in this dispute.

C. Agency's Duty to Extend Visa

Here the issue is whether the Agency had any *affirmative* duty to extend the Grievant's visa. Attorney Shihab testified that under immigration law the Agency was *solely responsible* for extending the Grievant's H-1B visa.[21] The Agency disagrees and insist that nothing in immigration law affirmatively required it to extend the Grievant's visa.

Although both Parties are correct to a point, the Agency ultimately prevails on this issue. A perusal of the relevant law that the Agency cites in its Post-hearing Brief as well as the Statute itself, the CFR, judicial opinions, and treatises reveal no *absolute statutory duty* for employers to extend H-1B visas. Instead, applicable law seems to require employers to extend H-1B visas, *if and only* if employers voluntarily decide to retain H-1B employees. Accordingly, *immigration law* required the Agency and not the Grievant to apply for an extension of the Grievant's visa *if and only if* the Agency elected to retain the Grievant as an H-1B employee. There was no standing, *automatic affirmative* duty, as Attorney Shihab suggested, to extend the Grievant's visa.[22]

D. Failure to Extend Visa–Whose Fault

The issue here is whether the Agency or the Grievant was primarily responsible for the failure to

---

[21] As noted above, however, preponderant evidence in the arbitral record does not demonstrate that immigration law requires the Agency to extend the Grievant's H-1B visa.

[22] Nor does the Union cite an immigration provision that either expresses or implies such a duty.

extend the Grievant's visa, the event that triggered his removal. The Union admits that the Grievant was "partly responsible for being out of status"[23] but insists that "It was [solely] the employer's fault that the H-1B visa was not timely extended."[24] Similarly, the Agency admits that it should have monitored the visa and the Grievant's job movements. A fair and proper assessment of fault in this instance requires an initial assessment of the Agency's and Grievant's respective duties

Although the arbitral record reveals no explicit statutory or contractual duty for the Agency to keep abreast of its personnel matters, one may reasonably expect such vigilance because the Agency controls its personnel matters. This *reasonable expectation* effectively creates an *implicit duty* for the Agency to monitor its own personnel matters. Furthermore, this duty to monitor personnel matters arguably assumes even greater significance where, as here, a non-immigrant H-1B alien is involved. Thus, although the Agency had no affirmative duty to extend the Grievant's visa, it had a duty to monitor the visa's expiration as well as the Grievant's job movements, both of which fall squarely within the realm of personnel operations. Ultimately, then, the Agency's failure to monitor the visa's expiration date–despite the Grievant's reminders in 2006 notification–as well as the Agency's failure to monitor the Grievant's job movements delayed the initiation of the visa extension process.[25]

Once the Agency initiated the extension process, the Grievant's conduct further confounded it, thereby contributing to the ultimate lapse of his visa. Specifically, the NST position and his *silence* about the transfer (failure to notify Attorney Shihab) frustrated the efforts of Mses. Harrison and Harris-Smith to extend the visa by diverting their efforts away from the extension process and to vainly attempting to redefine the NST as a "specialized position." But for the Grievant's decision to transfer to the NST in the first instance, Mses. Harrison and Harris-Smith could have poured their energy solely into extending the visa, perhaps with positive

---

[23] Union Post-hearing Brief at 18.

[24] Union Post-hearing Brief at 13 & 17.

[25] Although the Agency had no duty to extend the visa, where, as here, it elects to do so, then it must timely initiate the extension procedure. Of course the Agency's ignorance of the visa's expiration date is no excuse.

results.

Moreover, the Grievant's decision not to notify Attorney Shihab about the NST further aggravated efforts to extend the visa. A timely notification of that transfer very well could have triggered earlier efforts to rehabilitate the Grievant's status under the visa and averted last-minute scrambles to correct his out-of-status condition. Hence, the Grievant's decision not to notify Attorney Shihab also contributed to the visa's demise.

In summary, then, the following factors contributed to the untimely effort to extend the visa: (1) the Agency's failure to monitor the visa's expiration, leading to a belated attempt to extend the visa; (2) the Agency's failure to monitor the Grievant's job movements; (3) the Grievant's decision to transfer to the NST, stripped him of proper status; and (4) the Grievant's decision not to notify Attorney Shihab about the transfer to the NST. Ultimately, these four elements were *substantial factors* in the failure to extend the visa. ***Other matters equal***, there can be no "but for" or solely causal factor where *two or more* causes effect a single result. Under those circumstances, each cause becomes a substantial factor in that result. That is, each factor is said to have substantially caused the result.

In this case, however, other matters ***are not*** equal. The Grievant had a statutory duty to remain in status under his visa, and he failed to do so, thereby violating that duty. In contrast, the Agency's duty to keep abreast of the Grievant's job movement's was not merely operational rather than statutory and was derived from the Agency's responsibility for and control of its personnel operations. Given this distinction between the Agency's and the Grievant's ***duties***, the Grievant's contribution to the lapse of the visa looms larger than the Agency's. In the Arbitrator's view, the Agency's implied duty, though important, was not as obligatory as the Grievant's statutory duty. Furthermore, the Grievant failed to notify Attorney Shihab of the transfer to the NST. Ultimately, the Grievant's violation of a statutory duty together with his silence loom larger in the lapse of the visa than the Agency's violation of its implicit duties.[26] The foregoing analysis persuades the

---

[26] It is not certain that the visa would have been successfully extended even absent the Grievant's contributions to the failure of that effort, but this uncertainty hardly excuses those contributions.

Arbitrator to hold that although the Agency's and the Grievant's conduct were substantial factors in the visa's lapse, the Grievant's transfer and silence were more problematic than the Agency's.

E. Remedial Considerations

1. Reinstatement/Just Cause

The issue here is whether the Grievant is entitled to reinstatement or whether the Agency removed him for just cause. The Union contends that the removal was not for just cause, since the Agency's error *contributed to* the visa's expiration and, hence, to the Grievant's removal.[27] To support this position, the Union cites several arbitral opinions involving *comparative fault* where arbitrators modify discharges because employers somehow contributed to their employees' established misconduct. With these opinions as a backdrop, the Union contends that the Grievant in the instant case is less blameworthy than the grievants in the precedential cases. Although the Grievance filed in this dispute requests reinstatement of the Grievant,[28] neither Party raised that issue doing the arbitral hearing, and the Union's Post-hearing Brief falls silent at that point. In contrast, the Agency offers the following arguments against reinstating the Grievant: (1) The Grievant's visa had expired; (2) The NST did not meet the definition of a "specialized position" under immigration law; and (3) The Grievant was, in any event, unqualified for an IT position, even if that position qualified as a "specialized position" under immigration law.

The foregoing arguments together with the immigration law that the Agency sites in its arguments persuade the Arbitrator that reinstatement of the Grievant is ***not*** indicated in this dispute. Nevertheless, the Arbitrator wishes to stress that one should not view this refusal to reinstate the Grievant as any indication whatsoever that he somehow engaged in misconduct. Manifestly, he did not, at least not in any traditional meaning of that concept. Instead, the Grievant accepted another job, which happened to deprive him of proper status under his H-1B visa, which in turn precluded his continued employment with the Agency.

---

[27] The Arbitrator has already rejected the contention that the Agency had an absolute responsibility to and was wholly responsible for extending the visa.

[28] Joint Exhibit 2, at 1.

a. Application of Rule 28

Here the Arbitrator assesses whether preponderant evidence in the arbitral record establishes that the Grievant violated Rule 28, the relevant section of which broadly prohibits "malfeasance," "misfeasance," and "nonfeasance." Nowhere in the record does the Agency either directly or indirectly support its allegation that the Grievant violated Rule 28. In fact, it is unclear whether the Pre-disciplinary Hearing Officer even considered Rule 28, since his decision never mentions that Rule. Nevertheless, the removal letter cited Rule 28 as a basis for terminating the Grievant. In the Undersigned's view, unless a rule violation is self-evident, the employer must *affirmatively demonstrate* with reasonable clarity how an employee violated the rule. Otherwise, the violation remains unestablished and discipline for that alleged violation, unwarranted. Such is the case with respect to the Grievant's alleged violation of Rule 28. The Arbitrator holds that the Agency failed to establish that the Grievant violated Rule 28.

b. Application of Rule 33

For reasons discussed below, the Arbitrator holds that the Grievant did violate Rule 33 and, therefore, was removed for just cause. With the visa expired and the Grievant out of status in the NST, which did not qualify as a "specialized position," the Agency faced the strictures of immigration law as reflected in Rule 33, which required the Grievant to retain his licensure, i.e., to remain in status under his visa. Therefore, the Grievant undoubtedly violated Rule 33 for which removal is the sole penalty.[29] Thus, the Grievant's removal was mandated by immigration law as referenced in and fully supported under Rule 33 of the Collective-bargaining Agreement. In short, the Grievant was removed for just cause. Because the Grievant was out of status with an expired visa, the Arbitrator holds that the Grievant was not entitled to reinstatement.

F. Backpay–Propriety/Quantum

Having decided that the Grievant was removed for just cause, the Arbitrator now turns to the issue of whether the Grievant deserves a monetary award, and if so, what amount given the afore-mentioned

---

[29] Joint Exhibit 3, at 10.

comparative fault , which caused the pre-extension lapse of his visa. The Union contends that the Grievant is less blameworthy than the Agency and, therefore, is entitled to at least seventy-five (75) percent of any backpay award. And, of course, the Union also relies to some extent on its arbitral precedent that calls for exoneration of employees whose wrongful conduct is somehow joined by their employers. In response, the Agency rejects the Union's prayer for backpay, essentially contending that the exhaustion of the Grievant's visa and his resultant termination lies squarely at the Grievant's feet, since he intentionally accepted the NST with actual or constructive knowledge of his duties under immigration law and remained silent about the position. Second, and contrary to the Union's arbitral precedent, the Agency cites arbitral precedent in which arbitrators denied backpay where grievants failed to mitigate their damages by avoiding their employers' wrongful conduct in the first instance.

Neither Party's arguments are wholly persuasive here. First, the relevant facts of the Union's arbitral precedent are again readily distinguishable from the facts in the instant dispute. As discussed above, the grievants' faults in the Union's precedential opinions are slight relative to their employers'. In this dispute, the Grievant was primarily responsible for the lapse of his visa and, thus, for his removal. Consequently, the Union's argument that the Grievant is deserving of a larger award because he is less culpable than either the grievants' in the arbitral precedent or the Agency in this case is unpersuasive.

Nor does the Agency fair much better. Although less substantial than the Grievant's, the Agency's errors were hardly inconsequential in this dispute and cannot be ignored. The Agency's attempt to lay all blame on the Grievant is but a fig leaf. Nor is the Agency's arbitral precedent any more persuasive than the Union's. Equally unpersuasive is the Agency's argument that the Grievant is entitled to no monetary award. Such an outcome would unjustifiably discount the Agency's fault while unduly stressing the Grievant's. Ultimately, the Agency ***and*** the Grievant displayed poor judgment in this dispute, and neither Party's fault absolves the other, and one should not penalize the Grievant for the Agency's negligence.

VI. The Award

For all the foregoing reasons, the Arbitrator holds that the Grievance is sustained in part and denied in part. The Grievant is neither eligible for nor entitled to reinstatement. However, the Grievant is entitled to some measure of backpay given the comparative fault in this dispute. Based on the aforementioned degrees of fault, the Grievant is entitled to twenty-five (25) percent of the backpay spanning the date of his removal to the date of this opinion and award, less any income the Grievant did or, with *due diligence*, could have earned during this time frame. In addition, the Agency shall compensate the Grievant for twenty-five (25) percent of all medical costs he incurred *and* paid for out-of-pocket as a *direct* result of his removal in this case. Finally, to be entitled to compensation for these medical expenditures, the Grievant must clearly and convincingly establish them.

Robert Brookins

Professor of Law, Labor Arbitrator/Mediator, J.D., Ph.D.