

National Gallery of Art

Washington, D.C. 20565

August 29, 2002

Mr. Fred Dodge
706 Latham Drive
Crownsville, M.D. 21032

Dear Mr. Dodge:

By official notice, dated and received on July 15, 2002, Michael Giamber, Deputy Chief, Office of Facilities Management (AFM), proposed to remove you from your position as an Electrician, WG-2805-10, at the National Gallery of Art (NGA/Gallery), and from the federal service no sooner than thirty (30) calendar days from the date you received the proposal letter for the following reasons:

- Reason 1: UNAUTHORIZED TAKING OF AN NGA I.D. BADGE
- Reason 2: MAKING A FALSE STATEMENT
- Reason 3: CONCEALMENT OF MISAPPROPRIATED NGA PROPERTY
- Reason 4: TAMPERING WITH A GALLERY KEY RING

This is a letter of decision on that proposal.

I have given full and careful consideration to the proposal and the materials relied upon to make it. I also considered the written response from your attorney, Lee Boothby, which you submitted on August 6, 2002. I also interviewed Mr. Giamber; Brannock Reilly, Security Specialist; James Lucey, Chief, Office of Protection Services; and Brian Thomas, Electrical Engineering Technician. This was the only information available since you did not provide an oral response.

Upon review of this matter, I find that the reasons and specifications, as contained in the proposal, are fully supported by the evidence, and thus sustained. Moreover, I believe that removal is the only appropriate penalty, due to the seriousness of your misconduct, the intentional and repetitive nature of your offenses, and the loss of trust your misconduct has created. My analysis of the charges and the penalty determination follows below.

DEFENDANT'S
EXHIBIT

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Review of the Charges:

Specification A: Reasons 1 and 2:

According to the proposal, on March 1, 2002, you visited the Identification Office to replace your malfunctioning I.D. badge. However, when Mr. Reilly generated a new I.D. badge for you, a recurring problem with the printer ribbon caused your portrait to develop as a black silhouette. You were amused by the look of this unserviceable I.D. badge and asked Mr. Reilly if you could keep it.

The proposal stated that Mr. Reilly told you that he had to destroy such defective badges and could not let you have it. He then issued you a proper I.D. badge. To the best of his recollection, Mr. Reilly placed the defective badge on a counter along with other badges that needed to be destroyed. A few days later, Mr. Thomas, your supervisor at the time, observed you displaying the defective badge with the blacked out silhouette of your face. He contacted Mr. Reilly and inquired why you were issued a defective I.D. badge. Mr. Reilly explained what had occurred and concluded that you must have taken the defective badge, despite him telling you that you could not have it and that it needed to be destroyed. When Mr. Thomas questioned you about this matter on March 5, 2002, you admitted to having the badge, but told him that Mr. Reilly had said that you could have it.

Thus, you were charged with the unauthorized taking of an NGA I.D. badge for taking the defective Gallery I.D. badge, despite Mr. Reilly's instructions that you could not have it and that it needed to be destroyed. You were also charged with making a false statement for telling Mr. Thomas that Mr. Reilly had allowed you to take the defective I.D. badge.

In your written response, you denied that Mr. Reilly told you that you could not take the defective I.D. badge. You stated that these charges relate to stale complaints against you and that this matter was resolved within a week of March 1, 2002. You argued that these charges were brought against you because you had complained to Earl A. Powell III, Director, that the Gallery had violated your rights, as well as your son's rights under the Family Medical Leave Act (FMLA). Without being more specific, you also alleged that the charges against you arose only after you raised "certain union complaints directed against the administration" of the Gallery.¹ You also stated that this incident was, at best, a misunderstanding and did not compromise Gallery security.

¹ Given the unspecified nature of your allegation about union complaints against the Gallery, I have not addressed it in this decision. More importantly, you have not specifically alleged what union activities "caused embarrassment to [the Gallery's] administration for its failures." In fact, in response to my request, the Gallery's Personnel Office indicated that it has not received any adverse findings in any ULP or other labor relations matter you have been involved with to date.

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You stated that Mr. Giamber's claim that Gallery security may have been compromised is a pretext, since if that was the case, action should have been taken in March 2002, instead of waiting until July 2002, when the proposal to remove you was issued. You also argued that the fact that you displayed the badge freely to your co-workers and did not hide that you had it, shows that you thought you had permission to have the defective badge in your possession.

In terms of your claims that these charges are stale and that action should have been taken earlier than July if they truly compromised Gallery security, I have the following observations. Based on the evidence presented, I do not believe that these charges are stale, since if there was a delay, it was not prejudicial to your case and it was due to your own actions. For example, following Mr. Thomas' questioning of you on March 5, 2002, about the Gallery I.D. badge, you explored resigning from Gallery employment. On March 15, 2002, you initially submitted a resignation to be effective on March 29, 2002. You then rescinded it on March 29, 2002. Thus, because of your stated intent to resign, the Gallery did not address this matter in March 2002. Soon thereafter, the Gallery began investigating the key incident (described more fully under Specification B), which was triggered by your telephone call on or about April 11, 2002. The investigation was concluded in mid-June 2002. After reviewing the investigation, and determining the next course of action, Mr. Giamber issued your proposed removal on July 15th. Thus, I do not believe the proposal to remove you, issued on July 15, 2002, was unduly delayed or stale, given the facts in this case.

As to your allegation that the charges against you were in response to your complaint to Mr. Powell about violation of your FMLA rights, I note the following. Your letter to Mr. Powell was dated March 8, 2002. Mr. Powell's office received your letter on March 11, 2002. The Gallery responded to your complaint by letter dated March 20, 2002. Since Mr. Thomas questioned you about taking the defective Gallery I.D. badge on March 5, 2002, his questioning was unrelated to your complaint to Mr. Powell, dated March 8, 2002.

More importantly, in reviewing this specification, it is clear that the predominant matter at issue is whether Mr. Reilly authorized your taking of the defective I.D. badge as you claim, or whether you did so without his authorization, as described in the proposal. In order to resolve this credibility question, I spoke to Mr. Reilly to discuss his version of the events surrounding this matter. Mr. Reilly's version was similar to his written statement, included with the materials relied upon in this action. In essence, he observed that you were amused by the defective I.D. badge and said you asked him if you could keep it. Mr. Reilly noted that people often ask if they can keep their old I.D. badges and his reply to them is the same as the one he gave you. He told you that he could not let you have the defective I.D. badge.

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During our conversation, I found Mr. Reilly's demeanor to be professional, courteous and helpful. I did not get the impression that he was being deceptive. Moreover, it appears that he deals with similar requests from employees wanting to keep old or defective I.D. badges on a routine basis. If he had authorized such requests, he could have affected the integrity of the Gallery's I.D. program. Also, I doubt that Mr. Reilly would be at this job for long, as it is his primary responsibility to ensure the effectiveness of the I.D. system. Mr. Reilly added that he knows Mr. Thomas, Mr. Giamber, and you only as Gallery employees for whom he has prepared I.D.s. Thus, I do not believe that Mr. Reilly is biased in this matter against you.

Next, I reviewed your credibility. Since you did not provide an oral response, I relied on the record in this matter. As discussed in more detail under Specification B, the record shows that you lied when you claimed to be unaware of any information concerning any unauthorized tampering with key rings. Thus, your untruthful statements under Specification B, make me question your credibility under this specification, relating to whether Mr. Reilly authorized your taking of the defective I.D. badge.

Based on this analysis, I consider Mr. Reilly's version of events to be the true and accurate version of what occurred. Since Mr. Reilly did not authorize your taking of the defective I.D. badge, I have decided to uphold the charge of unauthorized taking of an NGA I.D. badge. Additionally, for telling Mr. Thomas that Mr. Reilly had allowed you to take the defective I.D. badge, when in fact Mr. Reilly had prohibited you from taking it, I have decided to uphold the charge of making a false statement.

Specification B: Reasons 2, 3 and 4:

According to the proposal, on April 15, 2002, Mr. Giamber questioned you about a report he had received from Mr. Thomas that sometime in January 2001, you had removed the Seventh Street (WP-4) elevator key from his engineer's key ring. You replied that you had not done so and added that you were completely unaware of any information concerning unauthorized tampering with key rings. Reportedly, you stated, "I have no information about anybody removing keys from key rings."

An administrative investigation of these allegations followed. As spelled out more fully in the proposal, the following information was discovered. After Mr. Thomas started working at the Gallery in October 2000, he began using the WP-4 elevator as a convenient way to access the basement level of the West Building where the Electrical Shop is located. Instead of picking up his engineer's key ring from the security office located on Fourth Street,² Mr. Thomas relied on you to access the WP-4 elevator.

² Gallery Circular No. 58, Key Policy, Section V.A., provides as follows:

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According to Mr. Thomas, you had a separate key to the WP-4 elevator, contrary to security regulations. This key was always in your possession; it was not attached to a key ring; and you did not return it to the security office each evening as required. Mr. Thomas explained that one morning, approximately in January 2001, you forgot your WP-4 elevator key at home and the two of you had to walk a greater distance in order to return to the Electrical Shop. Mr. Thomas stated that in order to prevent this from happening again, you detached the WP-4 elevator key from his engineer's key ring. You reportedly told him, "Don't worry about it. If anybody asks, tell them the key ring broke and bring it back to me. I'll have it put back on."

As described in the proposal, Mr. Thomas admitted that when he turned in his engineer's key ring in August 2001, and was upgraded to a supervisor's key ring, he kept the detached WP-4 elevator key from the engineer's key ring in his possession. He added that you knew this. According to Mr. Thomas, he believed you set out to get him in trouble for the detached WP-4 elevator key, in retaliation for his proposed disciplinary action against you in February 2002 for misconduct on an unrelated matter.

As noted in the proposal, Robert Lowry, Plumber, stated that in early March 2002, he overheard an individual he believed to be you, state that you were going to have Mr. Thomas' keys checked. Mr. Lowry further confirmed that he warned Mr. Thomas about this at the time.

Additionally, Robert Brown, Locksmith Leader, admitted that it was you who had informed him that Mr. Thomas had an elevator key detached from a key ring. He stated that this was the reason he had questioned Mr. Thomas about the missing WP-4 elevator key on April 11, 2002.

The proposal noted that you were interviewed on May 9, 2002, as part of this administrative investigation. In response to questions by Enis Pinar, Investigator, you stated that you were unaware of any Gallery issued keys, such as elevator keys, missing from key rings. You also denied ever taking Mr. Thomas' key ring and returning

All keys, including those for elevators, escalators, mechanical and maintenance rooms, etc., will be kept in a locked key vault located in the Protection Services Security Control Office. Keys will be placed onto a numbered key ring to correspond with the key vault hook number. Keys for persons who need several change keys to perform their job functions, or any form of controlled key, will be placed on a numbered key ring that will be checked out from the Security Office when needed, and returned to the Security Office before leaving the premises each day. A list of persons who are authorized to draw specific key rings will be maintained in the Security Control Office. This list will be the main determinant of whether a person is authorized to check out a particular key ring. Exceptions to the key-ring authorization list will be prohibited in all but emergency situations and then only through the authorization of the Chief of Protection Services.

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it back to him with the WP-4 elevator key removed from the ring. In terms of any knowledge on the subject, you stated that in April 2002, Daniel Smith, Electrician Leader, told you something about Mr. Thomas being set up with regard to some missing keys.

When Mr. Smith was questioned during the administrative investigation, he contradicted you and said that you, not he, had stated that you heard that someone took the elevator key off Mr. Thomas' key ring and re-welded the ring back.

Based on the above, Mr. Giamber concluded that you did have information and/or knowledge concerning unauthorized tampering with Gallery key rings, contrary to your statements to Mr. Pinar and to him. He cited Mr. Brown's admission that it was you who had alerted him about Mr. Thomas' detached elevator key as proof of this. As further proof that you knew more than you were willing to let on, Mr. Giamber cited Mr. Lowry's statement that he overheard you say that you were going to have Mr. Thomas' keys checked. Finally, Mr. Giamber gave greater weight to Mr. Thomas' statements in this matter, since parts of it are supported by Mr. Brown and Mr. Lowry, and because they were made against his own interest.

Thus, you were charged with making a false statement for your untruthful statement on April 15, 2002, when you stated to Mr. Giamber that you were completely unaware of any information concerning any unauthorized tampering with key rings.

You were also charged with making a false statement for your untruthful statement on May 9, 2002, during an official investigation, when you told Mr. Pinar that you were unaware of any Gallery issued keys missing from key rings.

You were charged with concealment of misappropriated NGA property for having had in your possession, a WP-4 elevator key, apparently detached from a key ring, and not returned to security in the evening.

Finally, you were charged with tampering with a Gallery key ring, for taking Mr. Thomas' engineer's key ring and returning it with the WP-4 elevator key detached from it.

In responding to this specification, you again argued that the charges were stale. You further stated that the Gallery investigated these allegations about keys presumably in retaliation for having received letters of inquiry from Senators Paul Sarbanes, dated March 13, 2002, and Barbara Mikulski, dated May 7, 2002. Their inquiries concerned your allegations that the Gallery had violated your rights, as well as your son's rights under the FMLA. The Gallery responded to your allegations by letter, dated March 20, 2002. The Gallery began its inquiry into the allegations about keys as soon as the

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matter was reported to Mr. Giamber on April 15, 2002. I do not find either letter from your senators to be relevant in this matter, as the Gallery's inquiry into the allegations about keys had its genesis in a telephone call in early April that you initiated to Mr. Brown, alerting him to possible misconduct by Mr. Thomas. Additionally, for the reasons previously stated under Specification A, I do not believe that these charges are stale.

In your response, you also argued that the proposal misrepresented your knowledge about Gallery issued keys, such as elevator keys, missing from key rings. Additionally, you alleged that no explanation was given as to why Mr. Brown's statements were believed instead of yours and why his allegations constituted clear proof that you had information and/or knowledge concerning unauthorized tampering with Gallery key rings, contrary to your statements to Mr. Giamber and Investigator Pinar that you knew nothing about this subject matter.

My review of the evidence presented under this specification leads me to the following conclusions. Mr. Lowry stated that sometime in early March 2002, he overheard you say that you were going to have Mr. Thomas' keys checked and Mr. Lowry warned Mr. Thomas about it. I agree with Mr. Giamber, that although Mr. Lowry only heard you say it and did not actually see who made this statement, he has worked with you long enough to be able to recognize your voice.

I next considered the important fact that Mr. Brown admitted that it was you who had contacted him and informed him that Mr. Thomas had an elevator key detached from a key ring. I also found it important that Mr. Brown noted that this was the reason he had questioned Mr. Thomas on April 11, 2002. Here was the true genesis of this key investigation, starting with your telephone call. I believe Mr. Brown's statement for the following reasons. First, this statement is consistent with what Mr. Lowry overheard you say, that you would have Mr. Thomas' keys checked out. Additionally, I found the statement that Mr. Brown provided to Investigator Pinar to be honest, and it contained elements of statements against his own interest. For example he admits to failing to file incident reports on at least two occasions contrary to AOP procedures. Thus, I found his statement very credible.

I next considered the timing and possible reasons motivating your call to Mr. Brown. According to the evidence you presented, you were upset that Mr. Thomas had questioned and rejected your use of FMLA leave. Additionally, Mr. Thomas had also just questioned you about your taking of the defective Gallery I.D. badge and you were concerned that he would be taking disciplinary action against you for this incident. Indeed, you had even considered resigning as a result of the badge incident.

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As further evidence that you knew more than you were willing to admit, I also considered Mr. Smith's statement that it was you, not him, who mentioned having heard that someone took the elevator key off of Mr. Thomas' key ring and re-welded the ring back together.

Finally, I have also considered Mr. Thomas' statements against his own interest, which alone might be enough to establish that you were not forthcoming with information in this matter. However, in light of the statements from Mr. Lowry, Mr. Brown and Mr. Smith, reliance on only Mr. Thomas' statement is not necessary. I agree with Mr. Giamber's conclusion that compared to your denials, these additional statements support and give greater weight to Mr. Thomas' credibility in this case.

Thus, given the above discussion, I have concluded that you did have more information and/or knowledge concerning unauthorized tampering with Gallery key rings than you admitted and the fact that Mr. Thomas' key was taken off his key ring. Specifically, I find that you were untruthful when on April 15, 2002, you stated to Mr. Giamber that you were completely unaware of any information concerning any unauthorized tampering with key rings. Thus, I have upheld the charge of making a false statement.

I also find that you were untruthful on May 9, 2002, when during an official investigation, you told Mr. Pinar that you were unaware of any Gallery issued keys being missing from key rings. As a result, I have upheld the charge of making a false statement under these facts.

I also credit Mr. Thomas' report that you had in your possession a WP-4 elevator key, apparently detached from a key ring, and not returned to security in the evening. Thus, I have decided to uphold the charge of concealment of misappropriated NGA property.

Finally, I have upheld the charge of tampering with a Gallery key ring. I base this finding on the fact that Mr. Thomas' statements on this charge are supported by the independent information provided by three other Gallery employees. Mr. Lowry overheard you say that you were going to have Mr. Thomas' key ring checked. Mr. Brown stated that you alerted him to the missing key from Mr. Thomas' key ring. Additionally, Mr. Smith said that you mentioned that someone took the elevator key off of Mr. Thomas' key ring and re-welded the ring back together. Thus, considering all of the information provided on this particular charge, I am convinced that it was you who took Mr. Thomas' engineer's key ring and returned it with the WP-4 elevator key detached, as stated in the proposal.

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Based on the above charges and specifications, I have decided to remove you from your position to promote the efficiency of the federal service and Gallery operations. **Your removal will be effective on Friday, August 30, 2002.**

Review of the Penalty:

In upholding your removal, I have reviewed the relevant aggravating and mitigating factors, as well as your defenses (described in more detail in the next section, below). First, I have considered the nature and seriousness of your offenses as a Gallery employee. The Gallery has a right to expect its staff to be honest, trustworthy and candid. Your misconduct raises serious doubts about your trustworthiness, integrity, and continued fitness for employment at the Gallery. I have also considered that your misconduct included not only making false statements to supervisors and an investigator, but that you made them in relation to both keys and credentials. Moreover, your disturbing pattern of false statements and deception shows that you lack the potential for rehabilitation and that no lesser alternative penalty applies.

I also considered your unauthorized taking of the Gallery I.D. badge and your subsequent lie about how you acquired it, in light of the Gallery's mission to protect priceless and irreplaceable works of art. Given this mission and the heightened scrutiny following the incidents of September 11, 2001, I agree that your unauthorized taking of the I.D. badge, as well as your tampering with key rings that allow access to many non-public areas of the Gallery, are serious offenses that have destroyed the Gallery's confidence and trust that you possess the necessary judgment and veracity to be retained as a Gallery employee. Although the badge was not activated, I believe that credentials are a critical element of our Gallery security program and there was still a potential for its unlawful use. Additionally, your tampering with controlled Gallery key rings is further evidence of your complete disregard for the Gallery's critical security precautions. Thus, your lack of integrity and poor judgment are contrary to the standards of conduct expected of Gallery and federal employees.

Your misconduct is not only egregious by its very nature, but also in relation to your duties and responsibilities. As an Electrician at the Gallery, your work impacts on the Gallery's ability to provide functional, pleasing, and safe space for research, education, exhibition, production, storage, operations, and staff functions throughout our landmark buildings. As such, the degree of dependability and vigilance required of someone in your position is at the highest level. Due to your misconduct, which was intentional and repeated, I do not believe that you possess the ability to perform your duties as an Electrician effectively without constant supervision.

I have also considered the clarity with which you were on notice of your conduct. In this regard, I believe that your actions relating to your resignation, which you

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subsequently rescinded on March 29, 2002, clearly indicate that you knew the seriousness with which the Gallery would consider an unauthorized taking of Gallery property.³ You were also clearly on notice that the Gallery would consider a false statement as a serious incident of misconduct, since although the charge was not ultimately upheld against you, you had previously received notice of a proposal to suspend you for making a false statement, among other charges. Finally, I agree that your apparent attempt to use the information concerning the tampered key rings to get Mr. Thomas into trouble, shows that you knew the seriousness of such an accusation, yet engaged in the conduct of tampering with key rings yourself. Thus, you clearly knew that the Gallery would consider your offenses serious and would likely take action to address them.

Additionally, I considered your past disciplinary history. On May 5, 1997, you were issued a letter of warning for failure to carry out specific written instructions and for failure to carry out regularly assigned duties. In your response, you argued that reference to this previous disciplinary action against you was gratuitous and designed to prejudice you, since the penalty must be considered a first offense. While it is true that this action is considered a first offense⁴, its inclusion is not gratuitous or prejudicial. The Gallery's Standard Table of Offenses and Penalties ("Standard Table") defines the aggravating period as the length of time that a prior disciplinary action will be considered as an aggravating factor in determining the appropriate penalty from the range of available penalties within an offense column in the Standard Table. The aggravating period is six years. Thus, like Mr. Giamber, I have not relied on your May 1997 letter of warning in determining which offense column from the Standard Table to use. However, I have considered it an aggravating factor, further justifying the more serious penalties under the first offense column.

³ Despite the arguments raised in your response, you admit that you went to Mr. Baquedano out of fear that your unauthorized taking of the Gallery ID would be used to remove you from the Gallery. Thus, you knew the potential penalty for such an offense could be your removal. This appears to be why you contemplated resigning from the Gallery and it appears to be the only reason why it was included in the proposal.

⁴ The instant action is considered a first offense under the Gallery's Standard Table of Offenses and Penalties' (Standard Table) "reckoning period" for all charges and specifications. The "reckoning period" is the length of time that a prior disciplinary action will be considered in determining whether the penalty for a subsequent offense should be selected from the first, second, or third offense column under this table. The subsequent offense need not be similar to any previous offense within the reckoning period in order to move from a first to a second or even a third offense in the table. Your letter of warning in May 1997 carries a reckoning period of six months from the date of issuance. Thus, it cannot be considered to make your current misconduct a second offense under the reckoning period. Additionally, the proposal to suspend you which was issued in March 2002, and was referenced earlier in this letter to establish clarity of notice, cannot be considered under the reckoning period, as a decision to suspend you was not issued until April 25, 2002; and was therefore not concluded before your current misconduct. Thus, I am treating the charges against you as your first offenses under the Standard Table.

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I also reviewed the Gallery's Standard Table to decide upon the appropriate penalty. Unauthorized taking of an NGA I.D. badge is similar to the charge of unauthorized taking of property controlled by the NGA, which is included under section J.2. of the Standard Table. The recommended penalty for a first offense is a ten day suspension to removal. Based on this charge alone, as well as in combination with the other charges, I find that the penalty of removal is supported.

Under section D.2 of the Standard Table, making a false statement, the recommended penalty for a first offense is a five to ten day suspension. I agree that your offenses should be considered much more egregious, given that your false statements occurred during inquiries into potentially serious security matters and that they occurred during a short period of time. Thus, considering that this charge consists of three separate incidents, I believe that removal is supported on this charge alone, in light of the serious nature of your false statements during official inquiries. I also believe that removal is supported by this charge in combination with the other charges.

Under section I.1.b. of the Standard Table, concealment of misappropriated NGA property where the action was deliberate, the recommended penalty is a ten day suspension to removal. As to this charge, I agree that removal is supported by this charge in combination with the other charges.

Tampering with a Gallery key ring is similar to the charge of unauthorized diversion of property controlled by the NGA, which is included under section J.2. of the Standard Table. The recommended penalty for a first offense is a ten day suspension to removal. As to this charge, I believe that this charge alone, as well as in combination with the other charges, supports the penalty of removal.

I agree with Mr. Giamber that your misconduct was egregious; intentional and repetitive. Given the nature of your offenses; and the subsequent loss of trust it has generated in your continued ability to carry out your duties; I find that your removal is the only appropriate penalty based on your present misconduct under the Standard Table.

In response to the proposal, you argued that the penalty of removal is inappropriate, as its true intent is to punish you and get rid of you because of your activities which embarrassed management by pointing out its failures. As discussed in more detail below, I have found no evidence to support that you are being removed for any reason other than your misconduct, as outlined in the proposal. Indeed, despite clear notice, your conduct demonstrates that you do not possess the necessary level of responsibility, integrity and judgment to carry out the duties expected of you at the National Gallery of Art. Based on the above, I believe that your removal is consistent

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and warranted under the Standard Table and will promote the efficiency of the federal service and Gallery operations.

Review of General Defenses:

In your response, you argued that your proposed removal is in retaliation for statements you made and violates your constitutional right to free speech. You also presented evidence from Lloyd Self, your supervisor at the time, alleging that your removal was based on your union activities. You additionally argued that your privacy was violated when a security alert barring you from non-public Gallery areas was posted in the Gallery. Finally, you alleged disparate treatment in the manner in which Mr. Thomas was disciplined compared to your proposed removal.

Retaliation Claim

You argue that the timing of your proposed removal shows that it is in retaliation for your union activities; as well as for the letters you wrote to your Senators, and to Mr. Powell, the Gallery's Director. You argue that this also represented a violation of your First Amendment right to seek redress of your grievances and your right to speak freely.

In reviewing your retaliation claim, I note that you did not specify exactly what union activities "cause[d] embarrassment to [the Gallery's] administration for its failures."⁵ Thus, I have not considered your allegation relating to your union activities any further. I did review your correspondence with your Senators and Mr. Powell. Based on this review, I do not believe that any of these activities or communications constituted protected activity. Turning to your constitutional claim, I find no evidence to support that your proposed removal was motivated by your exercise of free speech. Indeed, none of the charges in the two specifications relate to any constitutionally protected speech or statement. My review of this case convinces me that the serious charges cited against you stand on their own, separate and apart from your allegations of retaliation, which appear to be an attempt to divert attention from your misconduct. Accordingly, I find no connection between your claims of retaliation and your misconduct other than through the coincidence that they occurred at about the same time.

⁵ The only allegation you have made which relates to your union involvement appears to be that you were identified to Mr. Self as a union steward. (Discussed more fully under Mr. Self's Allegations.) However, this by itself does not establish how your being a union steward caused embarrassment to Gallery management for its alleged failures, nor does it establish that your removal was due to your union activities.

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Mr. Self's Allegations

You submitted a statement from Mr. Self, in which he relayed information he said he heard when he was interviewed for his job on or about May 15, 2002. He said he was told that you are a union steward; that you were described as a problem employee; that you would not be around much longer; and that there was "something already in the works" for you. You argued that this is proof that your proposed removal is designed to get rid of you for your union activities.

I have reviewed these allegations, to assess whether the charges against you could be false or fabricated with the purpose of removing you from the Gallery, as you allege. For purposes of this analysis only, I have assumed that Mr. Self's allegations are true. I have also considered that by the time these alleged statements were made, the badge investigation had been concluded. Additionally, Facilities Management was aware of the ongoing key investigation and you had already been interviewed about possible tampering with key rings. Thus, given this timing and the seriousness of the charges you were facing and the possible penalties involved, I do not construe the statements allegedly made to Mr. Self as indicating some type of conspiracy against you. Instead, these statements appear to reflect an accurate assessment of the seriousness of your misconduct and the likelihood that your removal would be proposed based on these offenses.

Privacy Violation

You also alleged that the Gallery violated your privacy when it posted a security alert with your name, date of birth, social security number, and photo, on a bulletin board easily seen by Gallery employees.

Although you have raised an issue concerning allegedly improper disclosure of information about yourself, you have not shown that the release of the information contributed to the Gallery proposing your removal. Thus, your alleged invasion of privacy is unrelated to your proposed removal. Moreover, based on my discussion with Chief Lucey, the security alert posted by the Gallery is the same one used whenever an employee is barred from non-public areas of the Gallery, pending a decision on a proposed removal.

Disparate Treatment

In addition, you allege that your removal is an act of disparate treatment. To make out a claim of disparate treatment, the charges and the circumstances surrounding the charged behavior must be substantially similar. The Gallery may refute

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a charge of disparate treatment by showing that the offenses in question were not really equivalent.

You have identified Mr. Thomas as an individual who has been treated more favorably than you. I have reviewed his case and find that he does not satisfy the requirement of substantial similarity with your case in terms of position, misconduct, or the seriousness of the charges. Thus, you have failed to establish that you have been treated disparately.

Grievance/Appeal/Complaint Rights:

Please read the following paragraphs carefully, and note that you must make choices about which avenue to pursue. While you have several choices, ultimately, you may only select ONE avenue of review from the three presented below.

You may grieve this decision under the Negotiated Grievance Procedure, Circular No. 23A, OR you may appeal this action to the Merit Systems Protection Board (MSPB), but not both.

A grievance must be in writing and should be submitted to Charles Schneider, Deputy Administrator, within twenty-one (21) calendar days after your removal has been effected. Consideration will be given to extending this time, if you submit a request in writing to Mr. Schneider, stating the reason for needing more time. Full consideration will be given to any material you submit. You have the right to be represented by your Union representative or to represent yourself. If you choose the Negotiated Grievance Procedure, you will waive your immediate MSPB appeal rights. However, later on in the grievance process, there is an exception to this waiver if you have alleged prohibited discrimination. In that case, you may be eligible for MSPB review of the Arbitration decision at the end of the grievance process. Please see the enclosed revised MSPB regulations for further information on this exception.

If you elect an appeal to the MSPB, it must be filed within thirty (30) calendar days after the effective date of your removal. If you are also alleging discrimination, you should include a description of those allegations in your appeal. Enclosed are a copy of the appeal form and a copy of the Federal Register, Part IV, MSPB, 5 C.F.R. Parts 1201-1206 and 1209. An appeal with allegations of discrimination is considered a mixed case appeal, which is covered under 5 C.F.R. Part 1201.151 and 29 C.F.R. 1614.302(a)(2). Your appeal to the MSPB should inform the Board that records of your case may be obtained by writing to: Personnel Office, National Gallery of Art, 2000B South Club Drive, Landover, MD 20785. This information will assist the Board in processing your appeal. If you appeal to the MSPB, you have the right to be

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represented by an attorney or other representative at your own expense. Your appeal should be submitted to:

Merit Systems Protection Board
Washington Regional Office
1800 Diagonal Road, Suite 205
Alexandria, VA 22314-2840

If you wish to file a discrimination complaint regarding your removal, you may do so under the Gallery's Negotiated Grievance Procedure, Circular No. 23A, OR the Discrimination Complaint Process, Circular No. 39, but not both.

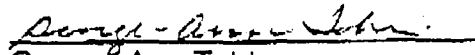
If you wish to file a grievance claiming discrimination, the procedures are described above.

If you wish to file a discrimination complaint under the Discrimination Complaint Process, Circular No. 39, as amended, you must contact an EEO counselor within 45 days of the personnel action that you believe was discriminatory and file a timely complaint. Your complaint will be considered a mixed case complaint, which is processed under 29 CFR 1614.302(a)(1).

Please note that under 29 CFR 1614.302(b), you may file a mixed case APPEAL to the MSPB OR a mixed case COMPLAINT under the Gallery's discrimination complaint procedures, BUT NOT BOTH.

If you have any questions concerning the grievance procedure or your MSPB appeal rights, you may contact Luis Baquedano, Gallery Representative, in the Personnel Office at (202) 842-6296. If you have any questions about the discrimination complaint process, you may contact Lindsay Patterson, EEO Officer, at (202) 842-6070.

Sincerely,


George-Ann Tobin
Deputy Treasurer

cc: Lee Boothby, Esq.
4545 42nd Street, NW
Suite 201
Washington, DC 20016

Docket No. DC-0752-03-0011-I-1

Party: Agency's Representative

Personnel Officer

National Gallery Of Art

6th & Constitution Ave., NW.

Washington, DC 20565