


To: Whom it may concern.  
Merit Systems Protection Office  
Washington Regional Office

October 11, 2002

From: Ralph L. Wright   
Representative  
AFGE Local 1831

Subject: Amendment of a initial appeal to the Merit System Protection Board.

On or about September 7, 2002 a initial appeal was sent to the Merit System Protection Board at the Washington Regional Office. Unfortunately an oversight was made when we did not include copies of the relevant documents, specifically a copy of the proposal and decision letters. We sincerely apologize for the oversight. In light of the oversight, please find included a copy of the initial appeal, a copy of the proposal letter and a copy of the decision letter.

If there is anything else I/We have overlooked, please do not hesitate to contact me at (202) 842-6140.

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# MERIT SYSTEMS PROTECTION BOARD

## APPEAL FORM INSTRUCTIONS

**GENERAL:** You do not have to use this form to file an appeal with the Board. However, if you do not, your appeal must still comply with the Board's regulations. See 5 C.F.R. Parts 1201, 1208, and 1209. Your agency's personnel office will give you access to the regulations, and the Board will expect you to be familiar with them. You also should become familiar with the Board's key case law and controlling court decisions as they may affect your case. Complete **Parts I, II, III and V** of this form regardless of the kind of action you are appealing. Complete **Part VI** only if you are appealing an action resulting from a reduction in force. You must tell the Board if you are raising an affirmative defense (see **Part IV**), and you are responsible for proving each defense you raise. If you believe the action you are appealing was threatened, proposed, taken, or not taken because of whistleblowing activities, you must complete **Part VII**. If you are requesting a stay, you must complete **Part VIII**. If you claim a violation of your rights under the **Uniformed Services Employment and Reemployment Rights Act (USERRA)** or the **Veterans Employment Opportunities Act (VEOA)**, you must provide the information required by the Board's regulations at 5 C.F.R. 1208.13 (for **USERRA** appeals) or 5 C.F.R. 1208.23 (for **VEOA** appeals). You may use a separate sheet of paper (please put your name and address at the top of each additional page) or you may include the information in block 31 of **Part IV**.

the effective date, or within 30 days after the date you receive the agency's decision, whichever is later. However, if you and the agency mutually agree in writing to try to resolve your dispute through an alternative dispute resolution process before you file an appeal, you have an additional 30 days--for a total of 60 days--to file your appeal. You may not file your appeal before the effective date of the action you are appealing. If your appeal is late, it may be dismissed as untimely. If you are filing a **USERRA** appeal, there is no time limit for filing. (see 5 CFR 1208.12). You may not file a **VEOA** appeal with the Board unless you first filed a complaint with the Secretary of Labor and allowed the Secretary at least 60 days to try to resolve the matter; any subsequent appeal to the Board must be filed within 15 days of the date you receive notice that the Secretary has been unable to resolve the matter (see 5 C.F.R. 1208.22). If you are filing a **whistleblower** appeal after first filing a complaint with the Office of Special Counsel (OSC), your appeal must be filed within 65 days of the date of the OSC notice advising you that the Special Counsel will not seek corrective action or within 60 days after the date you receive the OSC notice, whichever is later (see 5 C.F.R. 1209.5). The date of filing is the date your appeal is postmarked, the date of the facsimile transmission, the date it is delivered to a commercial overnight delivery service, or the date of receipt if you personally deliver it to the regional or field office.

**WHERE TO FILE AN APPEAL:** You must file your appeal with the Board's regional or field office which has responsibility for the geographic area where your duty station was located when the agency took the action or, if you are appealing a retirement or suitability decision, the geographic area where you live. See 5 C.F.R. Part 1201, Appendix II; and 5 C.F.R. 1201.4(d).

**HOW TO FILE AN APPEAL:** You may file your appeal by mail, by facsimile, by commercial overnight delivery, or by personal delivery. You must submit two copies of both your appeal and all attachments. You may supplement your response to any question on separate sheets of paper, but if you do, please put your name and address at the top of each additional page. All of your submissions must be legible and on 8 1/2" x 11" paper. Your appeal must contain your or your representative's signature in block 6. If it does not, your appeal will be rejected and returned to you. If your representative signs block 6, you must sign block 11 or submit a separate written designation of representative.

**WHEN TO FILE AN APPEAL:** Unless your appeal is covered by a law that sets a different filing time limit, your appeal must be filed during the period beginning with the day after the effective date, if any, of the action you are appealing and ending on the 30th day after

### Part I Appellant Identification

1. Name (last, first, middle initial) <b>Dodge, Fred G.</b>	2. Social Security Number <b>216-60-2256</b>
3. Present address (number and street, city, state, and ZIP code) You must notify the Board of any change of address or telephone number while the appeal is pending with MSPB. <b>706 Latham Dr. Crownsville Md 21032</b>	4. Home phone (include area code) <b>410-923-2963</b> 5. Office phone (include area code) <b>202 812 6140</b>

6. I certify that all of the statements made in this appeal are true, complete, and correct to the best of my knowledge and belief.

Signature of appellant or designated representative Date signed

*[Signature]* **2007 OCT 27 9-7-02**

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## Part II Designation of Representative

7. You may represent yourself in this appeal or you may choose someone to represent you. Your representative does not have to be an attorney. You may change your designation of a representative at a later date, if you so desire, but you must notify the Board promptly of any change. Where circumstances require, a separate designation of representative may be submitted after the original filing. Include the information requested in blocks 7 through 11.

"I hereby designate Ralph Wright to serve as my representative during the course of this appeal. I understand that my representative is authorized to act on my behalf. In addition, I specifically delegate to my representative the authority to settle this appeal on my behalf. I understand that any limitation on this settlement authority must be filed in writing with the Board."

8. Representative's address (number and street, city, state, and ZIP code).

AFGE Local 1831  
National Gallery of Art  
6th & Constitution Ave. N.W.  
Washington DC. 20565

9. Representative's employer

National Gallery of Art

10.a) Representative's telephone number (include area code)

202-842-6140

10.b) Representative's facsimile number

202-289 6840

11. Appellant's signature

Date

Judith Doty

9-7-02

## Part III Appealed Action

12. Briefly describe the agency action you wish to appeal and attach the proposal letter and decision letter. If you are appealing a decision relating to the denial of retirement benefits, attach a copy of OPM's reconsideration decision. If the relevant SF-50 or its equivalent is available, send it now; however, do NOT delay filing your appeal because of it. You may submit the SF-50 when it becomes available. Later in the proceeding, you will be afforded an opportunity to submit detailed evidence in support of your appeal.

I wish to appeal any and all actions that the National Gallery of Art has used to remove me from my job.

13. Name and address of the agency that took the action you are appealing (including bureau or other divisions, as well as street address, city, state and ZIP code)

National Gallery of Art  
6th & Constitution Ave N.W Washington DC 20565

14. Your position title and duty station at the time of the action appealed

Electrician  
Washington D.C.

15. Grade at time of the action appealed

WG 10-5

16. Salary at the time of the action appealed

\$ 20.97 per hr.

17. Are you a Veteran and/or entitled to the employment rights of a veteran?

Yes  No

18. Employment status at the time of the action appealed

Temporary  Applicant  Retired  
 Permanent  Term  Seasonal

19. If retired, date of retirement (month, day, year)

20. Type of service

Competitive  SES  
 Excepted  Postal Service  
 Foreign Service

21. Length of government service

10 yrs.

22. Length of service with acting agency

10 yrs

23. Were you serving a probationary or trial period at the time of the action appealed?

Yes  No

24. Date you received written notice of the proposed action (month, day, year) (attach a copy)

July 15, 2002

25. Date you received the final decision notice (month, day, year) (attach a copy)

August 30, 2002

26. Effective date of the action appealed (month, day, year)

August 30, 2002

27. Explain briefly why you think the agency was wrong in taking this action. First I believe the Agency action is wrong because the Agency has not presented any evidence at all in support of its action. As of this date the only thing the Agency has presented in support of its actions are speculations, accusations, assumptions and hearsay. Continued on a separate sheet.

28. Do you believe the penalty imposed by the agency was too harsh?

Yes  No

29. What action would you like the Board to take on this case (i.e., what remedy are you asking for)?

I would like for the Board to rescind the removal and reinstate me to my position with back pay

### Part IV Appellant's Defenses

30.a) Do you believe the agency committed harmful procedural error(s)?

Yes  No

30.b) If so, what is (are) the error(s)?

30.c) Explain how you were harmed by the error(s).

**Block 31 - Violations of Law: If you use this block to claim a violation of your rights under USERRA or VEOA, you must include the information required by the Board's regulations at 5 C.F.R. 1208.13 (for USERRA appeals) or 5 C.F.R. 1208.23 (for VEOA appeals). DO NOT use this block to claim a violation of the Whistleblower Protection Act; instead, complete Part VII and, if you are also requesting a stay, Part VIII.**

31.a) Do you believe that the action you are appealing violated the law?

Yes  No

31. b) If so, what law?

31. c) How was it violated?

32.a) If you believe you were discriminated against by the agency, in connection with the matter appealed, because of your race, color, religion, sex, national origin, marital status, political affiliation, disability, or age, indicate so and explain why you believe it to be true.

32.b) Have you filed a formal discrimination complaint with your agency or any other agency concerning the matter which you are seeking to appeal?

Yes (attach a copy)  No

32.c) If yes, place filed (agency, number and street, city, state, and ZIP code)

32.d) Date filed (month, day, year)

32.e) Has a decision been issued?

Yes (attach a copy)  No

CONTINUED ON ATTACHED PAGE.

THIS IS A CONTINUATION OF THE ANSWER TO QUESTION 27 ON PAGE 3.  
I also believe that the Agency action is wrong because the charge of tampering with a Gallery key ring is more than 1 1/2 years old, which makes it a stale offense that is based on nothing more than the word of a proven liar. In addition to the above I believe the Agency action is wrong because the Agency has conspired to remove me from my position every since I became a Union representative. Please see attached letter.

I further believe the Agency action is wrong because there is evidence that other employees have lost or misplaced entire key rings and no action disciplinary or otherwise was ever taken. Please see attached memo.

I strongly believe that the Agency action is wrong because all of the alleged offenses were intentionally created and are simply ~~fixes~~ based on false accusations.

Finally the Agency action is wrong because there is absolutely no evidence to support any of the accusations or alleged offenses.

33.a) Have you, or anyone in your behalf, filed a formal grievance with your agency concerning this matter, under a negotiated grievance procedure provided by a collective bargaining agreement?

Yes (attach a copy)  No

33.b) Date filed (month, day, year)

N/A

33.c) If yes, place filed (agency, number and street, city, state, and ZIP code)

[Empty box for filing information]

33.d) Has a decision been issued?

Yes (attach a copy)  No

33.e) If yes, date issued (month, day, year)

[Empty box for decision date]

### Part V Hearing

34. You may have a right to a hearing on this appeal. If you do not want a hearing, the Board will make its decision on the basis of the documents you and the agency submit, after providing you and the agency with an opportunity to submit additional documents.

Do you want a hearing?  
yes I want a hearing  Yes  No

If you choose to have a hearing, the Board will notify you where and when it is to be held.

### Part VI Reduction in Force

#### INSTRUCTIONS

Fill out this part only if you are appealing from a Reduction in Force. Your agency's personnel office can furnish you with most of the information requested below.

35. Retention group and sub-group [Empty box]	36. Service computation date [Empty box]	37. a) Has your agency offered you another position rather than separating you? <input type="checkbox"/> Yes <input type="checkbox"/> No
37.b) Title of position offered [Empty box]	37.c) Grade of position offered [Empty box]	37.d) Salary of position offered \$ [Empty box] per [Empty box]
37.e) Location of position offered [Empty box]		37.f) Did you accept this position? <input type="checkbox"/> Yes <input type="checkbox"/> No

38. Explain why you think you should not have been affected by the Reduction In Force. (Explanations could include: you were placed in the wrong retention group or sub-group; an error was made in the computation of your service computation date; competitive area was too narrow; improperly reached for separation from competitive level; an exception was made to the regular order of selection; the required number of days notice was not given; you believe you have assignment [bump or retreat] rights; or any other reasons. Please provide as much information as possible regarding each reason.)

[Large empty box for explanation]

**Part VII Whistleblowing Activity**

**INSTRUCTIONS**

Complete Parts VII and VIII of this form only if you believe the action you are appealing is based on whistleblowing activities. If you filed a complaint with the Office of Special Counsel (OSC) using Form OSC-11 (8/00) before filing this appeal, you may attach a copy of Part 2, Reprisal for Whistleblowing, of the OSC form together with any continuation sheet or supplement filed with OSC. This will give the Board the information requested in blocks 39(a) through (c) below. Please complete the other blocks in this part even if you attach Form OSC-11.

39.a) Have you disclosed information that evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety?

Yes (attach a copy or summary of disclosure)  No

39.b) If yes, provide the name, title, and office address of the person to whom the disclosure was made.

39.c) Date the disclosure was made (month, day, year)

40. If you believe the action you are appealing was... (please check appropriate box)

Threatened  Proposed  Taken  Not Taken

... because of a disclosure evidencing a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, provide:

a) a chronology of facts concerning the action appealed; and

b) explain why you believe the action was based on whistleblowing activity and attach a copy of any documentary evidence

41.a) Have you sought corrective action from the Office of Special Counsel concerning the action which you are appealing?

Yes (attach a copy of your request to the Office of Special Counsel for corrective action)  No

41.b) If yes, date(s) filed (month, day, year)

41.c) Place filed (location, number and street, city, state, and ZIP code)

42. Have you received a written notice of your right to file this appeal from the Office of Special Counsel?

Yes (attach a copy)  No

43.a) Have you already requested a stay from the Board of the action you are seeking to appeal?

Yes (attach a copy)  No

43.b) If yes, date requested (month, day, year)

43.c) Place filed (location, number and street, city, state, and ZIP code)

43.d) Has there been a decision?

Yes (attach a copy)  No

### Part VIII Stay Request

#### INSTRUCTIONS

You may request a stay of a personnel action allegedly based on whistleblowing at anytime after you become eligible to file an appeal with the Board under 5 C.F.R. 1209.5, but no later than the time limit set for the close of discovery in the appeal. The stay request may be filed prior to, simultaneous with, or after the filing of an appeal. When you file a stay request with the Board, you must simultaneously serve it upon the agency's

local servicing personnel office or the agency's designated representative. 5 C.F.R. 1209.8.

If your stay request is being filed prior to filing an appeal with the Board, you must complete Parts I and II and items 41 through 43 above.

44. On separate sheets of paper, please provide the following. Please put your name and address at the top of each page.

a. A chronology of facts, including a description of the disclosure and the action taken by the agency (unless you have already supplied this information in Part VII above).

c. Evidence and/or argument demonstrating that there is a substantial likelihood that you will prevail on the merits of your appeal of the personnel action.

b. Evidence and/or argument demonstrating that the:

d. Documentary evidence that supports your stay request.

(1) action threatened, proposed, taken, or not taken is a personnel action, as defined in 5 C.F.R. 1209.4(a); and

e. Evidence and/or argument addressing how long the stay should remain in effect.

(2) action complained of was based on whistleblowing, as defined in 5 C.F.R. 1209.4(b) (unless you have already supplied this information in Part VII above).

f. Certificate of service specifying how and when the stay request was served on the agency.

g. You may provide evidence and/or argument concerning whether a stay would impose extreme hardship on the agency.

*Privacy Act Statement: This form requests personal information which is relevant and necessary to reach a decision in your appeal. The Merit Systems Protection Board collects this information in order to process appeals under its statutory and regulatory authority. Since your appeal is a voluntary action you are not required to provide any personal information in connection with it. However, failure to supply the Merit Systems Board with all the information essential to reach a decision in your case could result in the rejection of your appeal.*

*You should know that the decisions of the Merit Systems Protection Board on appeals are final administrative decisions and, as such, are available to the public under the provisions of the Freedom of Information Act. Additionally, it is possible that information contained in your appeal file may be released as required by the Freedom of Information Act. Some information about your appeal will also be used in depersonalized form as a database for program statistics.*

*The Merit Systems Protection Board is authorized under provisions of Executive Order 9397, dated November 22, 1943, to request your Social Security number, but providing your Social Security number is voluntary and failure to provide it will not result in the rejection of your appeal. Your Social Security number will only be used for identification purposes in the processing of your appeal.*

*Public Reporting Burden: The public reporting burden for this collection of information is estimated to vary from 20 minutes to 1 hour, with an average of 30 minutes per response, including time for reviewing the form, searching existing data sources, gathering the data necessary, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of the collection of information, including suggestions for reducing this burden, to Financial and Administrative Management, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419.*



AUGUST 2, 2002

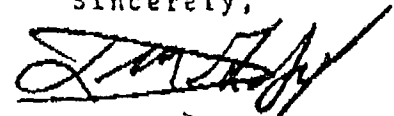
TO WHOM IT MAY CONCERN:

On or about May 15, 2002, I came to the AFM office, located in the National Gallery of Art, in Washington, D.C. to conduct a second interview for the Electrical Supervisor position. The following officials were present: Kurt Sisson, Mike Giamber, and John Bixler. After asking me a variety of questions, Mike Giamber opened and revealed what appeared to be a employee roster. He then began to give his personal opinion about each of my future employees in great detail. When Mr. Fred Dodge's name came to turn, Mr. Giamber stated that Mr. Dodge is our Union Steward in the Electrical Shop and that he is our "problem child", but you don't really have to concern yourself with him, because he will not be around much longer. Mr. Giamber also stated, "we already have something in the works for Mr. Dodge. Mr. Kurt Sisson also agreed with the very disturbing comments.

During my brief stay at the Gallery, it is definitely my belief that Mr. Dodge is being targeted for his affiliation with the Union and his positive attitude with the black employees of the shop. This type of behavior from selecting officials is not desirable or warranted. It very seriously questions the honesty, integrity and fitness of the Gallery's officials.

Please feel free to contact me at (410)674-6414 for additional information, or for any questions you might have regarding this very disturbing issue.

Sincerely,



LLOYD G. SELF  
Electrical Sup.

Acknowledged receipt: J.

Date: 7-15-02

July 15, 2002

Mr. Fred Dodge  
Office of Facilities Management  
National Gallery of Art  
Washington, D.C. 20565

Dear Mr. Dodge:

This letter is to inform you that I propose to remove you from pay and duty status 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 receive this 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

Specification A, Reasons 1 and 2:

On March 1, 2002, you went to the Identifications Office to obtain a replacement I.D. badge, as yours was malfunctioning. According to Brannock Reilly, Security Specialist, he confirmed that your I.D. badge was indeed malfunctioning and proceeded to make a replacement.

In generating a new I.D. badge for you, Mr. Reilly experienced a recurring problem with the printer ribbon, which caused your portrait to develop as a black silhouette. This made the first badge unserviceable. According to Mr. Reilly, you were amused by this error and asked to see the badge. Mr. Reilly allowed you to inspect it. You then asked if you could keep it.

Mr. Reilly explained to you that he had a duty to destroy such defective badges and thus could not let you have it. He then proceeded to issue 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, Brian Thomas, your supervisor at the time, observed you displaying this badge with a blacked out silhouette of your face. On March 5, 2002, Mr. Thomas checked with 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 his telling you that you could not have it and that it needed to be destroyed.

When Mr. Thomas questioned you about this matter, you admitted to having the badge, but told him that Mr. Reilly had told you that you could have it.

David Schott, Deputy Chief of Technical Services, Office of Protection Services, and the Gallery official in charge of the Identifications Office, wrote concerning this matter. He noted that Gallery Circular No. 59, on Personnel Identification Credential Policy, speaks to the importance of a credentials program that is appropriate, accountable, and of high integrity. He explained that the Circular also speaks to the responsibilities of employees. He stressed that taking a non-authorized Gallery I.D. without permission for personal purposes, as happened here, is wrong. He noted that even though the electronic access portion of the card had not yet been activated, the card still resembled closely enough an actual Gallery I.D. Thus, it could have been misused to gain unauthorized access to the Gallery. He requested that appropriate action be taken concerning this matter.

For having taken the defective Gallery I.D. badge, despite Mr. Reilly's clear instructions that you could not have it and that it needed to be destroyed, I am charging you with the unauthorized taking of an NGA I.D. badge.

For having told Mr. Thomas that Mr. Reilly had allowed you to take the defective I.D. badge, when in fact Mr. Reilly had prohibited such taking and specifically told you that the defective badge needed to be destroyed, I am charging you with making a false statement.

Specification B; Reasons 2, 3 and 4:

On April 15, 2002, I questioned you about a report I 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. Indeed, you stated, "I have no information about anybody removing keys from key rings."

An administrative investigation of these allegations ensued. My review of the evidence developed leads me to conclude that your statements to me on April 15, 2002, were untrue.

According to Mr. Thomas, sometime after he started working at the Gallery in October 2000, he realized that the WP-4 elevator was a convenient way to access the basement level of the West Building where the Electrical Shop is located. One drawback was that in order to access the WP-4 elevator, he first needed to pick up his engineer's key ring from the security office located on Fourth Street.<sup>1</sup> Mr. Thomas noted that picking up the key ring was not always the most practicable thing to do first thing in the morning. Instead, he relied on you to access the WP-4 elevator. According to Mr. Thomas, and contrary to security regulations, you had a key to the WP-4 elevator. 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.

Mr. Thomas added that one morning, approximately in January 2001, you forgot your WP-4 elevator key at home. As a result, the two of you had to walk a greater distance in order to return to the Electrical Shop, since you could not access the WP-4 elevator. Later that same morning, you asked Mr. Thomas for his engineer's key ring without giving a reason and walked away with it. You returned a few minutes later with the WP-4 elevator key detached from Mr. Thomas' engineer's key ring. The ring itself had been re-welded shut. When he asked you about it, you replied, "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." According to Mr. Thomas, you told him that you had been doing this for years and that nobody had caught on or questioned you about it. You added that other people had done it too.

Mr. Thomas then stated that in August 2001, he turned in his engineer's key ring when he was upgraded to a supervisor's key ring. However, he kept the detached WP-4 elevator key from the engineer's key ring in his possession and you knew this. Apparently, as a result of Mr. Thomas proposing disciplinary action in February 2002, for your misconduct concerning a separate matter, the two of you had a falling out.

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<sup>1</sup> Gallery Circular No. 58, Key Policy, Section V.A., provides as follows:

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.

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 disciplinary action against you.

*WHEN did LOWRY START AT NGA?*

Indeed, according to Robert Lowry, Plumber, sometime 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.

In the course of this administrative investigation, 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.

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 having taken Mr. Thomas' key ring and returning 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 having heard that someone took the elevator key off of Mr. Thomas' key ring and re-welded the ring back.

Based on the above, I have made the following conclusions: Contrary to your statements to me and to Mr. Pinar, you did have information and/or knowledge concerning unauthorized tampering with Gallery key rings. Mr. Brown's admission that it was you who alerted him about Mr. Thomas' detached elevator key is clear proof of this. Moreover, Mr. Lowry's statement that he overheard you state that you were going to have Mr. Thomas' keys checked, is further proof that you knew more than you were willing to let on to me and to Mr. Pinar. Although Mr. Lowry did not see you and only overheard you, he has worked long enough with you to recognize your voice. Finally, compared to your self-serving denials, I have given greater weight to Mr. Thomas' statements in this matter, since parts of it are supported by Mr. Brown and Mr. Lowry, and because they are made against his own interest.

*ON ONE HAND FRED IS ACCUSED OF SETTING UP THOMAS AND ON THE OTHER HAND HE IS ACCUSED OF WITH HOLDING INFORMATION*

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

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, I am charging you with concealment of misappropriated NGA property. ?

For having taken Mr. Thomas' engineer's key ring and returned with the WP-4 elevator key detached from it, I am charging you with tampering with a Gallery key ring. P

Based on the above charges and specifications, I am proposing to remove you to promote the efficiency of the service and Gallery/AFM operations.

#### Penalty Determination

In proposing your removal, I have considered the nature and seriousness of your offenses and how they relate to your duties and responsibilities. I also considered that your misconduct was intentional and repeated. As an Electrician at the Gallery, you are responsible for the testing, repairing, and maintaining of all electrical equipment, including all power, lighting, signal and alarm equipment circuits. As such, your work directly impacts on the National Gallery of Art's ability to provide functional, pleasing, and safe space for research, education, exhibition, production, storage, operations, and staff functions throughout the landmark buildings of the National Gallery of Art. Your work requires you to strictly adhere to all safety rules to prevent injury to yourself or others, or possible damage to the valuable works of art, as well as equipment. As a result, the degree of dependability and vigilance required of someone in your position is at the highest level. Your misconduct has destroyed my trust and confidence in your ability to perform your duties as an Electrician effectively without constant supervision.

Moreover, the Gallery has a right to expect staff to be honest, trustworthy and candid. Your knowingly false statements to supervisors and an investigator strike at the very heart of the employer - employee relationship. ? Your repeated dishonesty in relation to both keys and credentials raises serious doubts about your trustworthiness, integrity, and continued fitness for employment at the Gallery. Your repeated lying to your first level supervisor, Brian Thomas, about the I.D. badge; to me, your second level supervisor, about the key; and to Investigator Pinar in a formal administrative investigation; shows a pattern of intent, lack of integrity, and lack of remorse. In light of your disturbing pattern of false statements and deception, I believe you lack the potential for rehabilitation and that no lesser alternative penalty applies.

I am also greatly disturbed by your unauthorized taking of the Gallery I.D. badge. As you know, in light of the Gallery's mission to protect priceless and irreplaceable works of art, the Gallery considers any unauthorized taking of property to be a serious matter for which removal may be warranted. Given the high level of security required at the Gallery to fulfill this mission, I find that your unauthorized taking of the I.D. badge and your subsequent lie about how you acquired it, and your tampering with key rings that allow access to many non-public areas of the Gallery, further substantiate my loss of confidence and trust that you possess the necessary level of integrity and judgment to be retained as a Gallery employee.

Your unauthorized taking of the Gallery I.D. badge, your tampering with Gallery key rings, and your repeated lying when confronted with your misconduct, are also detrimental to the Gallery's ability to maintain the security of the works of art and to ensure the welfare and safety of visitors and staff. As you are well aware, following the incidents of September 11, 2001, the Gallery, as well as other federal institutions, has been forced to operate with an increased vigilance as it pertains to matters of security. As Deputy Chief Schott noted, the Gallery I.D. badge that you took without authorization needed to be destroyed so as to prevent any unlawful use and to maintain the integrity of the Gallery's credentials program. Although the badge was not activated, credentials are a critical element of our Gallery security program and there was still a potential for its unlawful use. Moreover, 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.

I have also considered the clarity with which you were on notice of your conduct. Following Mr. Thomas' questioning of you on March 5, 2002, about the Gallery I.D. badge you took, you went to the Personnel Office and told Luis Baquedano, Gallery Representative, that you were thinking of resigning because you were concerned that you would be fired for "stealing" the Gallery I.D. badge. On March 15, 2002, you submitted a resignation and subsequently rescinded it on March 29, 2002, the day it was to become effective. Your actions relating to your resignation are a clear indication that you knew the seriousness with which the Gallery would consider an unauthorized taking of Gallery property.

You were also clearly on notice that the Gallery would consider a false statement as a serious incident of misconduct. Indeed, although that particular charge was not ultimately upheld against you, on March 4, 2002, you received notice of a proposal to suspend you for among other things, making a false statement. Finally, 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 were clearly on notice that your incidents of misconduct would be taken seriously and addressed by the Gallery.

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.

Next, I reviewed the Gallery's Standard Table of Offenses and Penalties ("Standard Table") to determine the appropriate penalty to propose. 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<sup>2</sup> is a ten day suspension to removal. Thus, based on this charge alone, as well as in combination with the other charges, the proposed 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. Due to the fact that your false statements occurred during inquiries into potentially serious security matters and the fact that you they occurred during a short period of time, I consider your offenses much more egregious. 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 believe 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

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<sup>2</sup> The instant action is considered a first offense under the Standard Table's "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.



with the other charges, supports the proposed penalty of removal

Based on the egregiousness of your misconduct; the intentional and repetitive nature of your offenses; and my loss of trust in you to continue to carry out your duties; I believe your removal is the only appropriate penalty to propose based on your present misconduct under the Standard Table. Additionally, although I have not relied on your May 1997 letter of warning in determining which offense column from the Standard Table to use, I do consider it an aggravating factor, further justifying the more serious penalties under the first offense column. Under the Standard Table, the aggravating period is 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.

Despite the clear notice in your past disciplinary actions, 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. Thus, based upon the above, I believe that this proposed removal is consistent and warranted under the Standard Table and will promote the efficiency of the federal service and Gallery operations.

The Gallery has an Employee Assistance Program (EAP) which is intended to help employees with any problems that may be affecting their performance or conduct. If you would like to find out more about this confidential program, you may contact one of the EAP counselors by calling 1-800-222-0364.

### Response Rights

You may respond to this proposal, orally and/or in writing, to Kurt Sisson, Chief of Facilities Management, who is the deciding official on this action. You will be allowed fifteen (15) calendar days from your receipt of this letter to submit your response. Consideration will be given to extending this time if you submit a request in writing to Mr. Sisson stating the reason for requiring more time. You may submit affidavits in support of your answer. Full consideration will be given to any answer you submit. Additionally, if there are medical or other conditions that may have affected your conduct outlined above, you may provide medical or other information as part of your response.

Please note that during the notice period of this proposal, you will be carried in a paid, nonduty status (i.e., on paid administrative leave). Normally, you would be allowed official time to prepare your reply if you submitted a written request to Mr. Sisson explaining the amount of time needed. However, since you will be carried on paid administrative leave status, this request is not applicable. You have the right to be

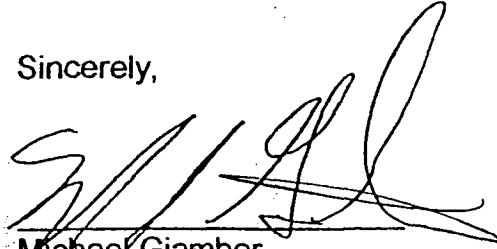
Mr. Fred Dodge  
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represented by an attorney or other representative at your own expense.

You may contact Luis Baquedano, Gallery Representative, in the Personnel Office at ext. 6296 to review any written materials relied upon in making this proposal.

A written decision will be issued to you as soon as possible after your response is received or if you have not responded, after the expiration of the fifteen (15) calendar day limit.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Giamber', written over a horizontal line.

Michael Giamber  
Deputy Chief  
Facilities Management

# National Gallery of Art

Washington, D.C. 20565

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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.

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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.<sup>1</sup> You also stated that this incident was, at best, a misunderstanding and did not compromise Gallery security.

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<sup>1</sup> 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 15<sup>th</sup>. 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,<sup>2</sup> Mr. Thomas relied on you to access the WP-4 elevator.

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<sup>2</sup> 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

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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



Mr. Fred Dodge  
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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. Giambér'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. Giambér 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.<sup>3</sup> 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 offense<sup>4</sup>, 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.

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<sup>3</sup> 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.

<sup>4</sup> 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."<sup>5</sup> 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.

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<sup>5</sup> 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.**

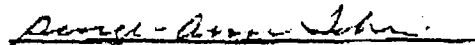
If you wish to file a grievance claiming discrimination, the procedures are described above.

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 42<sup>nd</sup> 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