

December 14, 2005

## MEMORANDUM

TO: IRS Chapter Presidents

RE: **Arbitration Decision — Internal Revenue Service and NTEU Chapter 24 — Section 1203(b)(4) of the Revenue Restructuring Act**

**SUMMARY: An Arbitrator reversed the discharge of a Revenue Agent and awarded full back pay and benefits in a matter involving Section 1203(b)(4) of the “Ten Deadly Sins.”**

In a significant case where the Agency alleged violation of Section 1203(b)(4) of the Revenue Restructuring Act (RRA or “Ten Deadly Sins”) an arbitrator reversed the discharge of a Grade 12 Revenue Agent and awarded full back pay and benefits. The IRS accused the agent of violating Section 1203 (b) (4) by falsifying Revenue Agent Report/Form 4549 in order to conceal mistakes she made with respect to a matter involving a taxpayer.

The employee had recently been rated “Less than Fully Successful” in the critical element “Efficiency” because of the employee’s occasional failure to act on and/or close cases in a timely manner; resulting in a denial of their within-grade promotion. Consequently, the employee received a 60-day opportunity period to improve. During this time and as a part of completing an audit of a taxpayer, the employee prepared the 4549 and presented it to the taxpayer who agreed with the proposed \$515 adjustments and provided full payment of the tax due to the employee. The employee timely processed the payment but did not use the office date stamp to stamp the 4549 and did not process the 4549, along with the payment or close the case until two months later. The employee contended she misplaced the 4559 and forgot about the case. She claimed she then discovered the Form 4549 some two months later at which point the employee date- stamped the 4549 and closed the case to her manager.

The IRS took the position that the employee intentionally stamped the 4549 with the wrong date and used the incorrect date in an attempt to hide the fact that the case had not been closed to the manager within ten days of receipt of the 4549 with the full payment. The IRS charged the employee both under its traditional rules of conduct as well as in the alternative citing to Section 1203(b)(4) of the RRA of 1998.

After receiving the oral reply, the deciding official determined the facts of the case

constituted a violation of 1203(b)(4) and, thereafter the matter was processed through to the Commissioner's Review Board which rejected mitigation of the mandatory removal penalty consistent with agency policy for the processing of substantiated 1203 allegations. Consequently, the IRS failed to pursue the Rules of Conduct violation and gave no consideration to the so-called Douglas or mitigating factors Article 39 of our National Agreement requires a deciding official to consider when determining the appropriate level of discipline to be administered.

NTEU argued that the facts of the case did not rise to the level of seriousness or outrageousness contemplated by Congress in enacting the "Ten Deadly Sins." Furthermore, NTEU argued that by virtue of the taxpayer making full payment of the tax due, the processing of the 4549 was really an internal "process issue" matter that the IRS's own All Employee Guide specifically noted are not, in most instances, violations of Section 1203. We pointed out that the date stamped on the 4549 in no way negatively impacted the agency or the taxpayer and only had internal consequence to the employee to the extent she was supposed to close cases to her manager within a certain period.

The arbitrator embraced the critical part of NTEU's analysis and found that the actions involved did not rise to the level of egregious misconduct Congress intended to discourage by enacting Section 1203. He agreed that "there was no demonstrable impact on the taxpayer whatsoever" and that the record demonstrated the processing of the 4549 was "an internal matter." The arbitrator further found that the IRS's decision to narrowly pursue the matter as a 1203 violation and subsequent failure to prove that charge left him no choice but to sustain NTEU's grievance in its entirety. He directed the agency to reinstate the employee with full seniority and back pay within 30 days. The arbitrator's fees and expenses were divided 75% to the IRS and 25% by NTEU and retained jurisdiction to determine the entitlement of the union for attorney fees.

This case is significant because it firmly establishes that the IRS cannot simply bypass its obligations and your rights under the negotiated National Agreement. Congress intended mandatory removal under Section 1203 only in instances of egregious, outrageous conduct that affected taxpayer rights. The agency tried to apply 1203 when traditional disciplinary means that have always been available to them were more appropriate given the facts of the case.

Colleen M. Kelley  
National President