
IN THE MATTER OF THE ARBITRATION

Between

FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL COMPLEX,
FORREST CITY, ARKANSAS

And

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, LOCAL 0922,

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) FMCS Case No.12-00782
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) Grievant: Justin Killingsworth
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(Sick Leave
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BEFORE: Dineo Coleman Gary, Arbitrator

APPEARANCES:

For the Employer: Wesley A. Pummill
Labor Relations Specialist
LMR-South
U.S. Department of Justice

For the Grievant/Union: Jay Westbrook, Steward
B. J. May, Steward
AFGE Local 0922

Date of Hearing: August 22 and September 20, 2012

Location of Hearing: Federal Correctional Complex
Forest City, Arkansas

Date of Award: December 10, 2012

ARBITRATOR'S DISCUSSION, OPINION AND AWARD

Introduction

The above-captioned matter came to be heard on the twenty-second day of August and the twentieth day of September 2012, at the Federal Correctional Complex in Forest City, Arkansas. Official record of the hearing was the court reporter's transcript. Post-hearing briefs were timely submitted by the parties on or about November 5, 2012; the record was officially closed November 9, 2012.¹ The parties were afforded the opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to be heard in connection with any objection, and to argue orally. Upon a thorough review of the record, having thoroughly considered the evidence; careful observation of the witnesses, consideration of the arguments of the parties and the post-hearing briefs, the Arbitrator makes the following findings and renders the following Discussion, Opinion and Award.

Parties

Justin Killingsworth, hereinafter referred to as the Grievant, is a Senior Officer and an employee of the Federal Bureau of Prisons, at the Forrest City Federal Correctional Complex (FCC) hereinafter referred to as the Agency. The Grievant was represented by the American Federation of Government Employees (AFGE), Local 0922, hereinafter referred to as the Union. The Grievant and the Union contend that the Agency violated the terms of the Collective Bargaining Agreement with reference to the non-promotion of the Grievant.

Issue

The parties did not agree as to the issue in this matter. Therefore, the Arbitrator has formulated the issue as: Did the Agency violate the Master Agreement and relevant Sections of

¹ The Agency timely submitted its brief by electronic mail. According to certified mail documentation the Union also timely submitted its brief via U.S. Postal Service. The Union's brief was not received by the Arbitrator until November 9, 2012, at which time both e-mailed and certified mailed copies were retrieved. The record closed upon the receipt of these documents.

5 USC by not selecting Justin Killingsworth to a GL-08 Correctional Officer, and if so, what is the proper remedy?

Stipulations

The parties agreed to stipulate as to the following: All evidence and testimony presented during the arbitrability hearing of August 22, 2012, shall be used for the evaluation of and decision for the merits of this case. (9/20/12 Merits Transcript at 75-76)

Burden of Proof

Inasmuch as the issue as set forth above involves contract interpretation, the Union has the burden of establishing, by a preponderance of the evidence, that the Agency violated the terms of the Collective Bargaining Agreement. Preponderance of the evidence shall mean that evidence which is more persuasive when compared to all evidence, if any, in opposition therewith.

Statement of the Case

The Grievant is a GL-7 Senior Correctional Officer at the Low Institution, a low security Federal Correctional Institution located at the Forrest City Federal Correctional Complex (FCC) in Forrest City, Arkansas and operated by the Federal Bureau of Prisons which is an Agency of the U.S. Department of Justice. Approximately 600 employees work at the facility. The bargaining unit employees are represented by the American Federation of Government Employees, Local 0922. Sometime in 2010 and again in 2011 the Grievant was issued sick-leave abuse letters by the Deputy Captain. Both letters were rescinded or "pulled" after the Grievant and his Union representatives substantiated that he used the leave for personal medical and family medical purposes. (Threshold Transcript at 135-136,143)

In the spring or early summer of 2011, the Grievant applied for the position of Correctional Officer (Senior Officer Specialist) which represented a grade promotion to GL-

08.² (Threshold Transcript at 117) (Union Exhibit 3) The Grievant was later notified by the Human Resources Division in Grand Prairie Texas that he made Best Qualified (BQ) group meaning he was qualified to be considered for the GL-08 Senior Officer Specialist position and among those applicants to be considered by the selecting official at Forrest City. The Warden at FCC is the selecting official. The Grievant was subsequently notified that he did not receive the promotion and on or about September 12, 2011, he informed the Union Local of his belief that he had been discriminated against due to the amount of sick leave he used resulting in a low sick-leave balance. The sick-leave balance is determined by the number of hours of sick leave an employee has remaining.

The Grievant had also applied for the positions of Maintenance Worker Supervisor (Maintenance Worker Foreman) for which he received notification of non-selection on July 7, 2011; and Woodworking Machine Operator Supervisor (UNICOR) for which he received notification of non-selection on November 8, 2011. (Union Brief, Exhibits 8, 7) For both positions, referred to here as Facilities and UNICOR, the Grievant was notified that although not selected, he received consideration for selection as part of the "Best Qualified" (BQ) group.

On behalf of the Grievant, the Union submitted a formal grievance citing provisions of the Master Agreement, United States Code and Human Resources Manual, specifically: Master Agreement, Preamble, Articles 1, 2, 3, 6, 14, 17, 20, 23, and 36; 5 USC 7116, 7114; P. S. 3420.09 Standards of Employee Conduct; Local Supplemental Agreement, Human Resources Manual 3000, 5 USC 5596 U.S. Back Pay Act and FLSA. The grievance dated September 28, 2011, stated in pertinent part:

Mr. Killingsworth has worked at this institution for over 8 years applying for numerous positions including Unicolor, Facilities and GL-8 Officer where he has been in the Best Qualified group.... When he inquired about why he has not been promoted, (Deputy) Captain Howard explained to him on two separate occasions that under this administration, the Warden would not promote anyone he feels to not have enough sick leave. This is a direct violation of the Master Agreement and will not be tolerated by the local. The entitlement of Sick Leave is the condition of employment. If exercising the condition of employment is used to delineate a subgroup of the employees in which the Agency gives less

² GS/GL 8, GS-8, GL-8 and GL-08 seem to be used interchangeably in documentation, during the hearing and in briefs. For the purposes of this decision it is hereinafter referred to as GL-08 unless quoted in another form.

consideration for promotion and upward mobility, the Agency has clearly committed a prohibited, unwanted personnel practice. (Joint Exhibit 2)

The grievance referred to the Union's failed attempts to informally resolve the issue with the Warden during the week of September 12, and on September 19, 2011. Among several other measures, the remedy requested included the Grievant's promotion to a GL-08 Correctional Officer with back pay and interest in accordance with applicable pay law, and that the Agency "cease and desist" violating terms of the Master Agreement.

The Warden issued a response denying the grievance on October 28, 2011, stating in pertinent part:

After reviewing your grievance I was unable to see what violation occurred. Deputy Captain Howard is not the selecting official at FCC Forrest City. I determine who is selected for the positions announced and do not use sick leave as a guide to promote or not promote anyone to any position.

Additionally, in accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while procedures used by an Agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. It is obvious from reading your grievance that the ranking and certification was not in issue and therefore, the selection was made from a properly ranked and certified group of employees. (Joint Exhibit 3)

On November 17, 2011, the Union invoked arbitration and through the Federal Mediation and Conciliation Services (FMCS) the parties selected the Arbitrator. (Joint Exhibit 4) The hearing date was set for August 22, 2012. August 13, 2012, the Agency submitted a Motion to Dismiss the grievance on the basis that the grievance was not properly before the Arbitrator. (Joint Exhibit 5) During the subsequent August 15, 2012, prehearing conference call, the parties presented argument regarding the Agency's request for a threshold ruling for the Motion to Dismiss. Due to the complexity of the issues involved, the August 22 hearing was bifurcated to address the threshold matter of arbitrability. The parties commenced presentation of evidence, testimony and argument addressing the merits of the case following the arbitrability portion of the hearing. Briefs were submitted by the parties on the threshold issue and September 14, 2012, the Arbitrator issued the decision determining that the grievance was arbitrable. The hearing of the merits of the case concluded on September 20, 2012.

Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 5 - RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this Section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

2. In accordance with applicable laws:

C. With respect to filling positions, to make selections for appointment from:

(1) among properly ranked and certified candidates for promotion;

Section c. The preferred practice whenever Bureau of Prisons positions are announced under Section a (2) (C), above is to select from within the Bureau of all qualified applicants. This shall not be construed as limiting the recruiting function or any other rights of the employer.

In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an Agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.

ARTICLE 19 - ANNUAL LEAVE

Section a. The employer and the Union agreed that annual leave is the right of the employee and not a privilege, and should be used by all employees. All employees will be allowed utilization of their annual leave at least to the extent that annual leave carry-over will not exceed the statutory limit for each individual.

ARTICLE 20 - SICK LEAVE

Section a. Employees will accrue and be granted sick leave in accordance with applicable regulations, including:

3. except in an emergency situation, any employee who will be or is absent due to illness or injury will notify the supervisor, prior to the start of the employee's shift or as soon as possible, of the inability to report for duty and the expected length of absence. The actual granting of sick leave, however will be pursuant to a personal request by the employee to the immediate supervisor unless the employee is too ill or injured to do so, for each day the employee is absent, up to three (3) days, provided the supervisor has not approved other

arrangements...

Section c. In those instances where an employee was on sick leave in excess of three (3) days and did not require medical attention, the employer may accept a written statement from the employee in lieu of a medical certificate.

Relevant United States Code

5 USC §2302 - PROHIBITED PERSONNEL PRACTICES

(a)

(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).

(2) For the purpose of this Section —

(A) “personnel action” means—

(ii) a promotion;

(b)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under Section 717 of the Civil Rights Act of 1964;

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment,·

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation...

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an Agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in Section 2301 of this title.

5 USC §5596 - US BACK PAY ACT:

(b) (1) an employee of an Agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay allowances or differentials of the employee - (A) is entitled, on correction of personnel action to receive for the period for which the personnel action was in effect - (i) an amount equal to or all of any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;

5 USC §7114 - REPRESENTATION RIGHTS AND DUTIES

(2) An exclusive representative of an appropriate unit in an Agency shall be given the opportunity to be represented at-

(A) any formal discussion between one or more representatives of the Agency

and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment or

(5) the rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from-

(B) exercising grievance or appellate rights established by law, rule, or regulation; except in the case of grievance or appeal procedures negotiated under this chapter.

5 USC § 7116 - UNFAIR LABOR PRACTICE

(a) For the purpose of this chapter, it shall be an unfair labor practice for an Agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

§ 335.103 Agency Promotion Programs

(a) *Merit promotion plans.* Except as otherwise specifically authorized by OPM, an Agency may make promotions under §335.102 of this part only to positions for which the Agency has adopted and is administering a program designed to insure a systematic means of selection for promotion according to merit. These programs shall conform to the requirements of this Section.

(b) *Merit promotion requirements.* (1) *Requirement 1.* Each Agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this Section. Actions under a promotion plan—whether identification, qualification, evaluation, or selection of candidates—shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical handicap, or age, and shall be based solely on job-related criteria.

(4) *Requirement 4.* Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates.

(d) *Grievances.* Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures... While the procedures used by an Agency to identify and

rank qualified candidates may be proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal of OPM, but OPM may conduct investigations of substantial violations of OPM requirements.

Relevant Provisions of the Human Resources Manual

335.1 MERIT PROMOTION PLAN

1. **PURPOSE AND SCOPE.** This Section prescribes the procedures to be used to implement federal merit promotion policy.

15. **DETERMINING THE BEST QUALIFIED GROUP.** Promotion board members will determine which candidates will be included among the best qualified group. The best qualified applicants are those eligible candidates who rank at the top when compared to the other eligible candidates for promotion.

16. SELECTION PROCEDURES

d. **Action by the selecting official.** The selecting official may:

- Select any best qualified applicant;
- fill the position through some other type of placement action; or
- decide not to fill the position.

18. QUESTIONS, COMPLAINTS AND GRIEVANCES

C. **Matters not appropriate for consideration as a grievance.** Formal grievances may not be based on;

- failure to be selected for promotion when proper promotion procedures are used, that is, non-selection from a group of properly rated, ranked, and certified applicants...

Position of the Grievant and Union

On behalf of the Grievant, the Union advances the following arguments and contentions to assert that the Agency violated the Master Agreement and relevant Sections of 5 USC by not

selecting the Grievant to a GL-08 Senior Officer Specialist, UNICOR Foreman or Facilities Maintenance Supervisor position. The Grievant applied for and was placed on the Best Qualified list for all three job vacancies. He was not selected for any position for which he applied and made the Best Qualified group due to his sick leave usage. The Agency used criteria other than knowledge, skills and abilities, and performance as established in the guidelines listed on the announcements for the three positions for which the Grievant applied and was rated among the Best Qualified. The Agency improperly used the additional decisive factor of sick-leave balance to select candidates from the Best Qualified list and discriminated against the Grievant because of the amount of sick leave he used for personal and family medical reasons.

The un-rebutted testimony of the Union witnesses and the submission of an affidavit serve to corroborate the Union's premise that as an ongoing practice the Warden has used sick leave in the selection process. Unable to refute the evidence regarding the Warden's use of sick leave, the Agency has argued that use of sick leave to determine staff reliability is an acceptable personnel practice, thereby denying the use of the sick leave criterion while arguing its permissibility as an indicator of staff reliability. As it affects promotional opportunities, employees are not afforded the opportunity to address their sick-leave balances with the Warden. The Agency provides no means to address the usage of sick leave nor did the Agency provide any evidence that such an option was available to the Grievant. The unauthenticated documents pertaining to successful candidate sick-leave balances presented by the Agency have no proven direct connection to the job vacancies being grieved and do not warrant consideration.

The Agency committed a 5 USC § 7116 Unfair Labor Practice by instituting a unilateral change in negotiated agreement when it redefined the best qualified group of applicants. Sick leave has been used to delineate a subgroup of employees in which the Agency gives less consideration as candidates for promotion. Un-rebutted testimony definitively proves that as an ongoing practice sick leave usage was used by the Agency contrary to negotiated agreements and law. The Union requests that the Arbitrator upholds the grievance, make the Grievant whole, award one of the three positions being grieved and award back pay as allowed by statute.

Position of the Agency

The Agency advances the following arguments and contentions to establish that the provisions of the Master Agreement and of 5 USC § 7114 and 7116, Federal Labor Relations Statute, Program Statement 3420.09 - Standards of Employee Conduct, and the local Supplemental Agreement, were not violated when the Grievant was not selected for the position of GL-08 Senior Officer Specialist and therefore the grievance should be dismissed. Consideration of the UNICOR and Facilities positions would be outside the four corners of the grievance and should not be at issue here.

The GL-08 Merit Promotion Board was properly rated and certified having been centrally processed in the Human Resources Division in Grand Prairie, Texas. The Warden properly selected candidates for promotion from the Merit Promotion Board of Best Qualified candidates. The Warden's decision to select from this Board was without regard to political, religious, or labor organization affiliation or non-affiliation, marital status, race, color, sex, sexual orientation, national origin, non-disqualifying physical disability, or age as prescribed by controlling US Code. The Warden is on record stating that he did not use sick leave as a standard for the selection or non-selection of candidates. As the deciding official, the Warden has broad discretion and made his decision using all information available to him while ensuring not to violate US Code. Consideration of an employee's use of sick leave would fall under the classification of "staff reliability" which is not listed in the US Code and reasonably falls under job-related criteria.

The Union presented no evidence or testimony to indicate that any special preference or advantage was given to any of the five staff members selected from the Board. Testimony given by Union officials provided no credible evidence to prove that the selection criterion was not in accordance with applicable law, rule or regulation. Review of the Merit Promotion Certificate sick-leave balances reveals that half of the selected employees had sick-leave balances below the one hundred hours minimum the Union attributes to the Warden. The Warden's selection from the GL-08 Board was appropriate and not arbitrarily determined according to a staff member's sick leave usage.

The Union and the Grievant failed to show that he would have been selected for the GL-08 position but for the violations alleged by the Union; therefore no remedy of retroactive promotion

or back pay can be granted. The Union has not argued that the enforcement of a contractual arrangement between the parties provides specific remedy for adversely affected employees. The selection process was fair, equitable and within policy, and no violations of law, rule or regulation have been shown by the Union. The Agency requests that the Arbitrator find the grievance to be meritless and dismiss the grievance.

Discussion and Opinion

The topic of workplace promotion is a complex issue that requires an analytical review that considers management rights to make decisions, as well as the opportunities for deserving employees to achieve upward mobility. To be determined here is whether the Grievant was improperly denied a promotion or the opportunity for promotion due to a sick-leave balance that failed to meet an unwritten standard set by the Warden. The body of evidence presented in this matter indicates that an employee's sick-leave balance was systemically used as a barometer for promotion and therefore was detrimental to the selection of the Grievant who could have been promoted to a GL-08 Correctional Officer.

Statement of the Issue

The parties disagreed as to the statement of the issue. The Agency expresses the issue as: did the Agency violate the Master Agreement and relevant Sections of 5 USC, by not selecting the Grievant as a GL-08 Officer? The Union believes the issue is: Did the Agency violate the Master Agreement and relevant Sections of 5 USC, by not selecting the Grievant to a GL-08 Officer, UNICOR, or Facilities position? The UNICOR and Facilities positions were introduced by the Union in the grievance dated September 28, 2011. (Joint Exhibit 2) During both the arbitrability in merit hearings, the Union resolutely sought to include the UNICOR and Facilities positions as non-promotions additionally being grieved, citing the original grievance and initial discussions. (Threshold Transcript at 137-140) (9/20/12 Merits Transcript at 6-9) The Agency held that the Union must remain within the four corners of the grievance, as written, characterizing the attempt to enter documents relating to the UNICOR and Facilities positions, as an attempt by the Union to expand the grievance. (Threshold Transcript at 137-138) The framing of the issue remained

unresolved and therefore, as occurs in such cases, the issue was determined in the Arbitrator's Decision as stated above. (9/20/12 Merits Transcript at 24)

I am in agreement with the Agency that inclusion of the UNICOR and Facilities positions would expand the scope of the grievance, beyond its original purpose. The Union refers to the positions applied for by the Grievant in both the Formal Grievance Form and the Memorandum Invoking Arbitration dated November 17, 2011, in a historical context. Specifically, "Mr. Killingsworth has worked at this institution for over 8 years applying for numerous positions including UNICOR, Facilities and GL-08 Officer where he has been in the Best Qualified group." A historical and descriptive context is continued by the next sentence: "Mr. Killingsworth has received a number of awards, including on the spot, time off, 3 officer of the month and QSI awards." (Joint Exhibits 2, 4) Moreover, there is a timing incongruity regarding the two positions. Although the Grievant received non-selection notification of the Facilities position on July 7, 2011, before the grievance was filed, the UNICOR position non-selection notification of November 8, 2011, was received significantly after the grievance filing date of September 28, 2011. (Union Brief, Exhibits 8, 7) Perhaps the Grievant applied for an earlier vacant UNICOR position for which he was not selected but documentation to that effect was not presented.

However the most persuasive factor was that the requested remedy was: "The employee, Justin Killingsworth, be promoted to a GL/GS 8 Correctional Officer with back pay and interest..." (Joint Exhibits 2, 4) There was no remedy requested regarding the UNICOR and Facilities positions. Hence the singled out the GL-08 position was understandably the focal point. Given the context in which the UNICOR and Facilities positions were originally presented and that the GL-08 Correctional Officer promotion was the remedy requested, it was reasonable for the agency to deduce that the grievance pertained to that job alone. It would seem had the requested remedy included UNICOR or Facilities promotions at the time arbitration was invoked, they would have been components of an issue for which the Agency was prepared to argue.

Promotion Selection Process and Sick Leave

During the arbitrability hearing the vacant job selection process was described in great detail. In summary, the process which begins at the facility with the Warden and Human Resources Manager moves to the centralized Human Resources Division at Grand Prairie, Texas which creates

an announcement to post on the USA Jobs website satisfying the rule that everyone has equal access to apply for the position. Once the position closes, typically after fifteen working days, the information is processed in Grand Prairie where they rate, rank and certify the potential candidates by certificate which is then returned to the facility. Asked what the Human Resources Division takes into consideration the Human Resources Manager, Ricky Galloway testified:

...your knowledge, skills, and abilities, your awards, and evaluations, and they come up with a scored list. And then they go by how many people, the vacancies we requested, the number, and then they generate a BQ list based on the number.

Then when they send it to the institution, the numerical system is taken off. The Warden has no idea who scored what. All you get is an alphabetical listing of staff that made BQ list. And that is forwarded to the institution. (Threshold Transcript at 18-19)

The Warden makes the final decision regarding the selection for promotion and although subpoenaed to appear, the Warden at the time of concern here did not testify at the hearing. The Warden is on record stating in his grievance response of October 28, 2011, "I determine who is selected for the positions announced and do not use sick leave as a guide to promote or not promote anyone to any position" (Joint Exhibit 3) To examine the promotion selection process we rely on the testimony given by the Human Resources Manager and Captain Lawrence Howard who was Duty Captain at the time of the grievance.³ (8/22/12 Merits Transcript at 84) The Captain confirmed that since he worked more directly with the staff, he gave input and opinion to the Warden, testifying, "If I was asked what I thought about a correctional officer, I would give any Warden what I thought about that officer what kind of performer he was at work, yeah." (8/22/12 Merits Transcript at 53). Questioned in more depth regarding sick leave as a job-related criterion during the Union's direct examination:

A. I think I explained what my opinion of a good correctional officer is. To come to work, do their job, follow instructions. They keep themselves safe, do they handle equipment properly, do they do good key control, are they security minded, to me that is job related criteria.

Q. Coming to work--which you say the uses of sick leave would fall into job-related criteria?

³ Captain Howard was on both the Agency's and the Union's witness lists.

A. I am not going to say sick leave is one way or the other. I am thinking sick leave is there for staff to use if they need it is. It is not a green light to be abused, but if staff needs their sick leave, that is their leave to use.

Q. So, it is an entitlement?

A. You are entitled to your sick leave, absolutely.

Q Okay. So, in your opinion, if a correctional officer or any of the bargaining unit staff use sick leave in accordance to what it was determined to be used for, no abuse, no reason to delve in and look at it, would that be a part of job-related criteria?

A. Their use of sick leave, would that be job-related criteria?

Q. Right. If they are using it appropriately and it has been determined that there is no abuse, would that be job-related criteria?

A. No. Your sick leave is not a job-related criteria. I said coming to work and doing what you are paid to do is job-related criteria. (8/22/12 Merits Transcript at 56-58).

Representing the management viewpoint, the Captain was careful to establish a distinction between the abuse of sick leave and its intended use. His initial and convincingly sincere observation that sick leave is an entitlement was short-lived as it was retracted under the Agency's guided cross examination. (8/22/12 Merits Transcript at 72) Referring specifically to the Grievant the Captain recalled having multiple conversations with him when he managed the facility. The conversation he recalled pertaining to the Grievant's sick leave usage resulted from the Captain's issuance of a sick-leave letter due to "a pattern of sick leave use" that was subsequently pulled after their discussion concerning the Grievant's heart-related medical issues. (8/22/12 Merits Transcript at 40-41)

Q. Now, these sick-leave letters, how do you determine that he (Grievant) had established a pattern?

A. Biannually, unless I was asked otherwise to run one, I ran an audit of sick-leave use for my entire department. I'd look for patterns of sick-leave usage, days off, three- or four-day weekends, things that seem to be a pattern for me. And those officers that had established a pattern of sick leave were candidates for a sick-leave-abuse letters. (8/22/12 Merits Transcript at 42)

Reflecting upon the administration of sick leave while he was Deputy Captain and Acting Captain of the facility, he portrayed a very "hands-on" manager with knowledge of the staff's medical conditions, childbirths and divorces, stating, "So, I was very in tune with what was going on with my correction officers." (8/22/12 Merits Transcript at 46) The Captain firmly establishes

that he was the management official charged with the responsibility of ensuring the facility was reliably staffed and addressed sick leave usage and issues.

Conflicting Testimony

When analyzing testimony Arbitrators called upon to evaluate interlocking characteristics that either give credence to or undermines the veracity of elicited versions an incident or account. In many instances Captain Howard provided testimony that was instructive and elucidated several matters of concern here. However, I would characterize the Captain's testimony pertaining to the Warden's sick leave comments as guarded and eloquently evasive. When asked directly if he repeated the Warden's statements regarding low balance sick leave, the Captain redirected the query and the answer to the characteristics of a good correctional officer. (8/22/12 Merits Transcript at 50-51) Asked about his inquiry into the Grievant's seventy-eight hour sick-leave balance, the Captain expanded the topic to a general scenario of sick-leave balance inquiry. (8/22/12 Merits Transcript at 61-62)

Nonetheless, the Captain's testimony regarding the comments alleged to have been made by the Warden is generally refuted by the testimony of the other witnesses. It is certainly plausible that the Captain was not present at the particular Annual Refresher Training (ART)⁴ sessions in which the Warden purportedly made public the hundred hour sick-leave standard. Testifying that, "If the Warden was there, I was with him," the Captain acknowledged that he may have missed the training between January 2011 and May 2011. (8/22/12 Merits Transcript at 81, 83) It is possible that the Captain had knowledge of the Warden's sick-leave balance requirement without discussing it with him directly. However, it is less plausible that the Captain did not convey this information to the Grievant and other witnesses in view of the consistent testimony that he did.

The presentation of the Union's case relies greatly on the veracity and credibility of witness testimony. The Agency characterizes the statements as "...self-serving testimony from various Union officials..." (Agency Brief at 4) Granted most witnesses were affiliated in an official capacity with the Local, however their testimony was consistent with a witness who "had no dog in

⁴ Annual Refresher Training (ART) is a week long course presented with the purpose of refreshing staff in a variety of matters including inmate diversity, self-defense techniques; inmate religious and health issues. The Warden routinely instructed a training session. (Threshold Transcript at 94, 95)

this fight,” specifically, the Time and Attendance (T & A) Clerk. Melissa Hallmark authenticated a sworn and notarized affidavit in which she stated, "I advised Officer Killingsworth that Deputy Captain Howard called me in to inquire about his (Killingsworth) leave balances during the summer of 2011. I believe it was in June or July of 2011." When asked, "Is there any reason that Deputy Captain Howard would call you in reference to sick-leave abuse letters?" The response was "No, that information is available on the roster program and not maintained by me." (Union Exhibit 2)⁵ (9/20/12 Merits Transcript at 68) The inference is that the Captain requested the sick-leave balance in relation to the Grievant’s promotion application and not the sick-leave abuse letter.

Sometime in 2011 and prior to the GL-08 application Complex Vice President for the Local Jody Cook met with the Captain to clarify a conversation the Captain had with the Grievant. Mr. Cook testified he was told by the Captain that according to the Warden's rule without a hundred hours of sick-leave on the books the Grievant would not be considered for the Facilities job for which he applied. (Threshold Transcript at 164-165)

The Grievant also recounted events when asked if Deputy Captain Howard talked to him about sick leave in reference to the GL-08 promotion. "Yes, he did. I asked him, because I knew I made the best-qualified list, if this had anything to do with me not getting the job. And he told me from the Warden, straight out of the Deputy Captain Howard's mouth, that I had nothing coming because I did not carry a hundred hours of sick leave." (Threshold Transcript at 118-119).

The Union President provided testimony regarding his meeting with the Warden in which they discussed the Grievant’s promotion. "... he (the Warden) indicated to me that as long as Killingsworth do not maintain a balance a hundred hours of sick leave, these are his words, he had nothing coming.... It was clear based on what the Warden was saying directly to me in his office that the standard was absolutely being applied." (Threshold Transcript at 77-78)

Statements attributed to the Warden at the Annual Refresher Trainings according during 2010, 2011 most directly reflected a systemic bias against those who failed to meet the hundred hours sick leave criterion. Senior Officer and Union Steward Jay Westbrook testified that during a 2010 ART, "He (the Warden) told us as a class that unless we have one hundred hours of sick leave that we had nothing coming. We were not going to be promoted. We were not changing jobs. He

⁵ Ms. Hallmark was not available for August 22, 2012, hearing but did appear on September 20, 2012, to authenticate her affidavit. The Agency was given the opportunity for cross-examination.

said we have to be at work and unless we had one hundred hours established that we weren't getting a promotion." (Threshold Transcript at 94)

Union Local Complex Vice President Cook testified to hearing the Warden state at the ART in March or April, 2011, "If you had been here for a while working at Forrest City and did not have any sick leave and annual leave on the book, if you could not come to work, you did not have anything coming from him." (Threshold Transcript at 166) Bobby "B. J." May a GS-08 Senior Officer Specialist testified, "It was stated in 2010, 2011 during the employee conduct part that the Warden does, that if you do not maintain a hundred hours of sick leave you will not be promoted." (Threshold Transcript at 112) He further disclosed that he was told by the Warden that his low sick leave prevented a promotion to Assistant Health Services Administrator. (Threshold Transcript at 113-114)

A most persuasive and definitive recounting of the Warden's pronouncements comes in the form of the written affidavit where the Time and Attendance Clerk was queried:

Q. Do you have any direct knowledge that Warden TC Outlaw used sick leave as a factor in promotions?

A. Yes, Warden Outlaw said in Annual Refresher Training, "If you do not have a hundred hours of sick leave on the books, you do not have anything coming. If you cannot come to work on the job you have, why would I promote you." (Union Exhibit 2)

Spoken in public, the pronouncements attributed to the Warden during ART are certainly verifiable. To determine the union witnesses were not credible I would have to presume that the Union has craftily orchestrated a wide ranging conspiracy which would involve many other attendees of the Annual Refresher Training over a two-year span. It is more plausible to conclude that the Warden, in an effort to ensure the reliability of this staff, expressed unequivocal expectations regarding sick-leave usage. Asked to weigh the Warden's single written general denial of the standard against the veracity of numerous witnesses under oath and a sworn affidavit, the scale tips decisively.

Sick Leave Abuse and Staff Reliability

The Union presents an excerpt of testimony from FMCS Case No. 09 – 04082 (USP Atwater) and references the 2010 decision of Arbitrator Richard D. Fincher.⁶ (Union Brief at 27, Exhibit 15). As in the instant case, the Agency initially challenged the arbitrability of the grievance for which the Arbitrator wrote, "On this record, I find the grievance to be properly before the Arbitrator... This grievance involves an issue of promotional criteria, not of non-selection." Discussing the case on its merits Arbitrator Fincher determined, "On this record, I find that 'staff reliability' is a valid job-related criteria for use in promotional decisions.... I find Warden Rios was not persuasive that staff reliability (including sick leave balance) is one of the last considerations in his mental checklist. The overwhelming evidence suggests it was in fact an up-front (gateway) determining criterion. He used it improperly."

While the final determination is analogous, several factors distinguish USP Atwater from the instant case. The USP Atwater Warden met with and subsequently promoted one candidate who explained her low sick leave balance; he did not meet with the other candidates thereby violating the Agency's procedures which prescribed if one is interviewed, all must be interviewed. The Warden also failed to deduct Family Medical Leave Act (FMLA) time from the sick-leave balances of candidates during the selection process. Additionally, as the Union highlights, the Warden denied imposing a particular number of sick-leave balance hours as a minimum. (Union Brief at 27, Exhibit 15).

While these factors distinguish USP Atwater from the case before us here there exists the nexus of "staff reliability" as a criterion in the promotion selection process. In both facilities the need to curb sick leave abuse led the respective Wardens to improperly impose sick-leave balances as a major decisive factor for promotional personnel actions. The evidence and testimony in the instant case supports the Union's contention that the Warden verbalized his hundred hour sick-leave balance minimum requirement which represented the unilateral imposition of an undocumented procedure. 5 USC § 2302 Section (B) (2) provides for the Agency to rely on particular nondiscriminatory information when making its merit-based personnel decisions, specifically, "... the recommendation or statement... based on the personal knowledge or records of the person

⁶ American Federation of Government Employees, Local 1242 and Federal Bureau of Prisons, U. S. Penitentiary Atwater, California. Federal Arbitration: 09-04082 (September 3, 2010) (Richard D. Fincher)

furnishing it and consists of-- (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or (B) an evaluation of the character, loyalty or suitability of such individual." (Union Brief, Exhibit 3) Certainly given the twenty-four hour, seven days a week schedule and critical responsibilities of Correctional Officers, the necessity of the Agency to rely on its employees to show up for work as a marker of staff reliability is reasonable.

The Agency makes reference to Federal Labor Relations Authority case 106 FLRR-II05 U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary (Administrative Maximum), Florence, Colorado and American Federation of Government Employees, Local 1302, in which sick leave abuse was tangential to non-selection of an employee involved in protected Union activities. The more relevant comment stems from the Arbitrator's footnote (9) in his decision, which states:

It might be argued that sick leave usage is not a legitimate factor under federal merit system principles, since employees are entitled to use the sick leave given them by law. While the full implications of such an argument would be best addressed in a Merit Systems Protection Board proceeding, I am addressing it only to determine whether the Warden's use of this criterion was a pretext for discriminating against Nicholls' protected activities. In this context, I note the Warden's testimony that his Administrative Lieutenant reviewed sick leave usage to determine whether applicants were using sick leave at times and in ways that suggested abuse or on the other hand suggested praiseworthy restraint (Tr. 255-57). While this evidence might not support disciplinary action against the former group of employees, I consider it a legitimate criterion for a selecting official with broad discretion to use in order to distinguish among qualified applicants. (Agency Brief at 14, Exhibit B)

I believe here the Arbitrator makes several observations worth noting and that are relevant here. First, employees are entitled by law to the use of sick leave. Second, sick leave should not be used as a pretext for discriminating against an employee. Third, as it also occurs at FCC, sick leave usage was reviewed to identify patterns of abuse. And fourth, sick leave abuse is a legitimate criteria for consideration by a selecting official.

The Forrest City Federal Correctional Complex appears to have a well tooled mechanism for identifying and addressing, abuse. Captain Howard detailed procedures and standards for the issuance of sick-leave abuse letters and as was in the case of the Grievant; an employee has the opportunity to protest the letter. After meeting with the Captain to explain his health and family related challenges the Grievant's sick-abuse letter was pulled. The Captain testified that he was

aware of circumstances that required his employees to make extensive use of leave. It would seem that such knowledge would serve to reduce the possible misinterpretation of an employee's absenteeism. While Captain Howard is no longer at the facility there was no indication that policies and procedures regarding sick leave abuse have changed.

The Agency promotes the argument that attendance as an indicator of "staff reliability" is permissible. I agree and management's system for identifying the abuse of the sick-leave policy contributes to the determination of reliability. Employee attendance is closely monitored to ascertain which employees are deserving of sick-leave abuse letters. The Captain testified he looks for a patterns of abuse such as three or four day weekends. An employee's low sick-leave balance should not be categorically equated with sick-leave abuse. It logically follows that a low sick-leave balance unaccompanied by a sick-leave abuse letter is not so much the barometer of loyalty and commitment to the job as it is the result of an employee accessing a benefit of employment to tend to health and family. Such was the case of the Grievant. Upon appeal, sick-leave abuse letters issued to him were rescinded and therefore should have no bearing on his promotional opportunities. The Grievant's sick-leave balance was low as he made use of an employment benefit for the prescribed purposes and in accordance with, Article 20, Section a. of the Master Agreement.

Referring to documents presented it at the hearing the Agency asserts: "It was very clear in the review of the sick-leave balances of the four individuals selected off the Merit Promotion certificate that half of them had sick-leave balances below the supposed one hundred hour floor. Therefore, the Union's assertion fails and the statement by the Warden and his response must be viewed as accurate and credible." (Agency Brief at 5-6) I believe it would be speculative to reach that conclusion without analyzing the Merit Promotion certificate in context with the sick-leave balances of the non-selected candidates; and without definitive information regarding the abbreviations used. (9/20/12 Merits Transcript at 83-84) Assuming *arguendo* the Warden chose to promote at least four candidates and therefore selected those with the sequentially next highest sick-leave balances albeit less than a hundred hours. Or a successful candidate with a low sick-leave balance was given special consideration due to an on-the-job injury. Absent more information the Merit Promotion certificate is not persuasive evidence.

Retroactive Promotion and Back Pay

The Union requests that the Grievant be made whole and awarded one of the three positions for which he made the Best Qualified list, that is, UNICOR, Facilities or GL-08 Corrections Officer and be awarded back pay as allowed by 5 USC §5596 - US Back Pay Act. In response the Agency looks to 91 FLRR 1-1421 Department of Health and Human Services, Family Support Administration, Washington, DC and NTEU, Local 250, in which the Federal Labor Relations Authority finds that an Arbitrator's determination that a Grievant "could" have been selected is not a sufficient basis upon which to order retroactive promotion. The authority requires the Arbitrator to properly establish a direct connection between the Agency's improper discrimination against a Grievant and his non-selection (Agency Brief at 7-8, Exhibit A) Therefore finding that a Grievant possibly would have been selected does not present a sufficient basis upon which to order retroactive promotion. The Authority additionally advises, "... in order to award back pay, the Arbitrator must find that (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action directly resulted in the withdrawal or reduction of the Grievant's pay allowances or differentials; and (3) *but for* such action the Grievant otherwise would have not suffered the withdrawal or reduction." (Emphasis added) (Agency Brief Exhibit A)

The FCC promotion selection process was tainted by the hundred hour sick-leave balance requirement and the unjustified personnel action adversely affected the Grievant. The evidence supports the premise that the Warden's requirement was in all probability a barrier to the Grievant's promotion. However no evidence was presented to prove that the Grievant was more qualified than the successful candidates. Nor was testimony presented to support the concept that "but for" the Agency's violation the Grievant categorically, would be promoted. Moreover, statements by Captain Howard and the Grievant fundamentally contradict that presumption.

Asked if he recalled the candidates selected for the GS-08 position the former Deputy Captain testified that the individuals selected were as qualified or better qualified than the Grievant. "They were all equally qualified. They all received outstanding evaluations for the year. They were all solid officers. If you have ten candidates and have five slots then somebody is not going to get promoted." (8/22/12 Merits Transcript at 74) Clarifying the Grievant's GL-08 application at issue here and the application submitted as an exhibit the Grievant confirmed it was his most current application revealing, "I actually applied again for the same position this year, and I did not make

the BQ list." (Threshold Transcript at 136) (Union Exhibit 3) Once an employee was determined to apply for promotion undeterred by the sick-leave balance requirement, the centrally processed Best Qualified (BQ) list represents the most objective portion of the selection process. The Grievant is to be applauded for remaining resolute; however his current failure to be among the Best Qualified indicates that his selection at the time of concern here while encumbered, was also indeterminate.

In Conclusion

Defining "promotion" as a covered "personnel action", 5 USC §2302-Prohibited Personnel Practices prescribes: "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority... (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment."

At the Forrest City Federal Correctional Complex the sick-leave balance minimum represented a criterion that injured the prospects of employees with balances less than one hundred hours. Fortunately the Warden's standard did not discourage the Grievant from pursuing promotional opportunities although it may have severely impeded his chances for success. Therefore, if this unilaterally imposed requirement injured the Grievant's prospects for advancement, it represented an unjust standard improperly imposed and seemingly discriminatorily applied. Through the evidence presented the Union has met its burden of proof that the Agency violated the Master Agreement and relevant Sections of § 5 USC by not selecting the Grievant for promotion. Accordingly, it has been determined that the Warden's hundred hour standard could have, and in all probability did adversely affect the Grievant as he pursued the GL-08 Correctional Officer promotion.

Award:

Based on the foregoing evidence, findings, reasoning, conclusions, rulings and determinations, the Arbitrator rules the appeal of the Grievant is SUSTAINED in part and DENIED in part. The Agency is hereby ordered to give the Grievant priority consideration for a GL-08

Correctional Officer promotion. The Agency is ordered not to compute, evaluate or otherwise consider the Grievant's sick-leave balance in the selection process. The remedy is limited to those actions specified herein; any other remedy requested is hereby denied.

Jurisdiction is Retained

The Arbitrator retains jurisdiction of this matter for six (6) months after the issuance of this decision in order to clarify or assist in the implementation of the Award, if either party requests in writing prior to that date to do so. Any such request if not made jointly should be forwarded to the other party so that an opportunity is afforded to all parties for the full expression of their positions and arguments on the questions or issues raised.

Issued at Dallas, Texas, the 10th day of December 2012

Dineo Coleman Gary

Dineo Coleman Gary, Arbitrator

