

Federal Mediation and Conciliation Service

In the Matter of Arbitration Between

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AFGE Local #148 (Lewisburg)

Against

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U.S. DOJ/Federal Bureau of Prisons USP Lewisburg PA

Discipline (Richard Fry)

05-0809-58122-7

Final Decision

Before: Dr. Mark D. Karper

Hearing dates: 6/14/06

Briefs due: 8/10/06

Decision date: 8/25/06

For the Union:

Tony J. Liesenfeld

AFGE Local 148

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For the Government:

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DOJ/Fed Bur. Prisons

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## Introduction

This a case between A.F.G.E Local #148 (hereafter called the union) and the U.S. Department of Justice/Federal Bureau of Prisons/ U.S. Penitentiary/Lewisburg Pennsylvania (hereafter called the employer). It concerned the discipline of Richard Fry (hereafter called the grievant) for allegedly being absent without leave, failure to follow leave procedures , and failing to follow the Standards of Employee Conduct by not reporting to work on November 29, 2004. The parties followed the grievance procedure which resulted in an arbitration hearing on June 14, 2006. The matter was closed when the parties submitted briefs on August 10, 2006. The parties were unable to agree on the exact issue with the primary difference being whether the issue should state the exact violation of the C.F.R. (Code of Federal Regulations) and the collective bargaining agreement or a more general statement of misconduct. I have chosen the more general statement and framed the issue broadly as follows: Did the agency have just and sufficient cause to take actions against Richard Fry for being absent without leave and failing to follow leave procedures regarding his absence from work on November 29, 2004 in light of appropriate sections of the C.F.R. and the collective bargaining agreement. If not, what should the remedy be?

## Facts

The parties were not in disagreement about the facts of the case. The grievant initially requested November 29 & 30, 2004 to be scheduled off as part of Annual Accrued Leave (vacation) on September 15, 2004. The grievant testified that he asked for the time off to go hunting. This request was initially denied. There was some discussion by union representatives with appropriate prison officials about this leave

denial. The discussion ended on October 29, 2004 when Mr. Harmon, the grievant's supervisor decided to stand by his original decision to deny the leave because it was high use leave period. On November 9, 2004, the grievant then submitted a sick leave request form for the purpose of a medical/dental/optical exam for November 29, 2004. (A-9) Mr. Harmon sent back the form (A-9) in which he denied the sick leave request and told the grievant to reschedule his medical appointment. Both Mr. Harmon and the grievant agreed that there was no other communication other than the sick leave request form.

The next action occurred on November 27, 2004 when the grievant called the on-duty foreman, Troy Ellis, to report that he would not be reporting to work on November 29, 2004 to give notice that someone needed to be called in to fill the shift on November 29, 2004 from 6:00AM to 2:00PM. Mr. Ellis noted this time off as Family Friendly leave in the log book, although there is no agreement that the grievant made any statement about what type of leave he was requesting other than the fact that he would not be reporting to work. The grievant did not report to work on November 29, 2004, instead he went to Lewisburg Hospital for a full body scan to check to see whether his prior cancer had returned. This scan was requested by his oncologist to be completed one week prior to his scheduled visit. With limited scanning equipment available, the grievant simply reported to the hospital and went through the procedure as soon as the equipment became free. The grievant testified that given the life threatening nature of his disease he considers dealing with his cancer treatment his number one priority. He completed his body scan on that day and made his doctor's appointment the following week with the necessary tests having been completed.



The employer upon learning about his absence charged the grievant with being AWOL and docked him for that day and added a one day suspension without pay as a penalty. This action was appealed through the grievance process. During the subsequent investigation about the appeal, the employer verified the grievant's statement that he reported to the hospital for tests on November 29, 2004 by checking hospital records. The decision was made to stay with the original penalty because it was felt that the grievant should have repeated his written request for sick leave with the provision of additional information rather than calling in sick during the weekend before his shift was to begin when he knew his supervisors were not on duty. The warden who reviewed this case before the decision was made to go to arbitration concluded that the grievant was determined not to report to work on November 29, 2004 no matter what the consequences. While he understood there was a valid reason for requesting sick leave, he agreed with the conclusion that the grievant should have pursued his sick leave request with more information rather than calling in during the weekend before his shift.

## Decision

Although both parties have made complex legal arguments, this case is about the administration of the sick policy not the sick policy itself, the CFR, or the collective bargaining agreement. It revolves around the single question of whether Mr. Harmon, the grievant's supervisor, appropriately denied his request for sick leave (A-9) on November 9, 2004. It is an uncontested fact established by the contract and past practice that it is a valid use of sick leave to complete medical testing/examination that needs to be done during regular business hours. The SF71 sick leave form reflects that by having it listed as purpose #2, which the grievant validly checked. The supervisor had no valid reason to

deny his request. If the supervisor was going to reject the request he would have needed to verify whether his medical appointment could or should be rescheduled. There is no doubt in the arbitrator's mind had the supervisor asked for and received the reason for the grievant's request, he would have been required to grant the sick leave due to the serious nature of the grievant's illness and the need for timely testing on that day. It is not the grievant's responsibility to correct mistakes made by his supervisor especially when the supervisor does not indicate in his leave denial any desire for additional information. I also must conclude that grievant had no other realistic option other than calling in if he was to complete his medical tests in a timely fashion so he did not abuse the sick leave policy by calling in for sick leave on November 27, 2004. For the above reasons, I rule as follows:

#### Award

The grievant appropriately requested sick leave on November 9, 2004, this request was improperly denied by his supervisor. As a result he did not violate the sick leave policy, when the grievant called on November 27, 2004 for time off on November 29, 2004 to complete timely medical tests for a serious illness. Accordingly, the disciplinary sanction should be expunged from his record and he should be made whole for any financial loss due this action.



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Mark Karper