101 FLRR 2-1059

American Federation of Government Employees, Local 501 and Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Miami, FL

FMCS 99-11523

December 13, 2000

Appeal Pending (0-AR-3389)

Related Index Numbers

37.130 Discipline, Suspension
109.005 Suspensions, Basis

Case Summary

THE ARBITRATOR FOUND THE AGENCY'S ACTIONS WERE RETALIATORY FOR THE GRIEVANT'S UNION ACTIVITIES AND HELD THE SUSPENSION WAS NOT FOR JUST CAUSE.

The grievant was a Physician's Assistant and employed by the Agency since 1995. In 1997 the grievant became a Union officer. On August 12, 1998, the grievant filed a grievance against the Assistant Health Services Administrator. Two days later, the assistant administrator complained to the grievant's supervisor that the grievant did not follow directions relating to a patient. On January 13, 1999, the grievant received a letter of proposed suspension for 10 days. The grievant was suspended for seven days. Two weeks after serving the suspension, the grievant received a letter of proposed suspension from the administrator for 14 days for events occurring February 16 and 17, 1998. Ten days after returning from the 14-day suspension, the grievant received a letter of proposed suspension for 30 days for events occurring November 14, 1998. On July 7, 1999, the grievant was suspended for 30 days. On October 29, 1999, the grievant received a letter of proposed termination for events occurring on January 26, 1999. The termination was effective December 17. The grievant filed a grievance against the 7-day suspension, which was scheduled for an arbitration hearing on March 2000. The Union elected to discontinue the case. The grievant filed a grievance against the 14-day suspension, which went to arbitration. The Agency argued that the grievant did not follow a doctor's orders in dispensing medication and that the grievant did not report a discrepancy in the inventory of controlled substances. The Union argued that the grievant had an unblemished record until the grievant filed charges against the assistant administrator. The Union pointed out that the Agency's actions were in retaliation for the grievant's Union activities. The Arbitrator found the evidence did not support the charges in the 14-day suspension. The Arbitrator noted he disbelieved the administrator's sincerity and recollections. The Arbitrator found that the Agency's actions strongly indicated that they were retaliatory against the grievant. The Arbitrator held that the Agency did not have just cause to suspend the grievant and ordered the Agency to pay the grievant back pay for the 14 days and to reinstate the grievant, without back pay.

Judge / Administrative Officer

Arbitrator: William D. Ferguson

Full Text

The hearing herein was held on September 20, 2000 at the Old Federal Courthouse, Miami Florida before William D. Ferguson, impartial arbitrator. The Agency was represented by Carol A. Hummel, Labor Management Relations Specialist, and the Union by Ron Hutchens, Supervisory National Representative. Exhibits were received in evidence and testimony was heard from June McAdams, Jose Martinez, Fernando Quintana and Robert M, Here on behalf of the Agency and Bruce Rusty Lang on behalf of the Union. Post hearing briefs were received on November 11 and 13, at which time the hearing was closed.

The Union stated the issues: "Were the seven day mid fourteen day suspensions for just cause? Whether the suspensions were in retaliation for Grievant's participation in Union activities? If so, what should be the remedy?" The Agency stated the issues: "Did management violate the Master Agreement - when they suspended the grievant, Bruce R. Lang, for failure to follow instructions of a supervisor and failure to follow policy? If so, what should the remedy be? Does the arbitrator have jurisdiction to rule on a previous grievance which was withdrawn prior to the hearing?" The arbitrator concludes the issues are: Does the arbitrator have jurisdiction of the seven day suspension grievance? If so, was there just cause for that suspension? Was there just cause for the fourteen day suspension? Was the suspension imposed as retaliation for union activities? If so as to any of these issues, what is the appropriate remedy?

Grievant was employed by the Miami facility as a Physician's Assistant (PA) in 1995 and become a Union officer In 1997. His duties as a PA included dispensing medications as prescribed by medical doctors to inmates in the institution and monitoring the Pyxis machine inventory of controlled substance medications. In 1997 he became a Union representative. He had a clean record until after August 12, 1998 at which time he filed a grievance against Mr. Orellana, Assistant Health Services Administrator (AHSA), Two days later, Orellana sent a memo to his supervisor regarding alleged failure to follow directions relating to changing a dressing for one of the patients. On January 13, 1999, Grievant received a letter proposing a ten day suspension relating to his performance. Thereafter, he was suspended for seven days, February 23 through March 1 based upon that proposal letter. The record does not reflect the incident(s) or dates thereof on which the suspension was based. Two weeks after he returned from serving that suspension he was given a proposal letter from Mr. Martinez, Health System Administrator, (HSA), for a fourteen day suspension, the subject of this dispute, based upon events which occurred February 16 and 17, 1998. On April 8, 1999, Warden Haro issued a decision letter imposing the fourteen day suspension to be served April 17 through 30. Ten days following his return from that suspension, he received a letter proposing a thirty day suspension for events occurring on November 14, 1998 and, on July 7, 1999, was suspended for thirty day. July 12 through August 10. On October 29, 1999 he received a letter proposing termination for events occurring on January 26, 1999 The termination was effective on December 17.

Grievant filed a grievance relating to the seven day suspension and an arbitration hearing was scheduled for March 30, 2000. On March 28, the Union informed the Agency representative that it had elected not to continue the case to arbitration (Ag. Ex. 3). A

grievance in the fourteen day suspension case was duly filed and the evidence on that suspension has been received and it is now properly before the arbitrator for resolution.

The Master Agreement contains the following provisions:

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

ARTICLE 32 - ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to the expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

AGENCY POSITION

Relating to the prior grievance, it is not properly before the arbitrator because the Union had withdrawn the grievance from arbitration. Further, there was no mutual agreement to modify that or this grievance, which is the only way to modify the issues under Article 32. The affidavit of Robert J. Will, attached to the post hearing brief, is evidence that there was no mutual agreement and that the grievance was withdrawn.

Turning to the merits, Dr. Barnett prescribed three percocet tablets twice a day, noon and evening pill line. Grievant's initials appear on the am and noon pill line on February 16 and 17, 1988, as having dispensed the medication. He had no authority to change the prescription and administering more than prescribed is a failure to follow the orders of his supervisor. On February 16, when he and Ms. Ramos, PA, inventoried the Pyxis machine, they found a discrepancy in the inventory of Phenobarbital and Percocet, both controlled substances. Grievant failed to document the discrepancy as required under the applicable policy. During the investigation of the charges, in March 1999, Grievant provided a memorandum dated February 16,1998 reporting the discrepancy. Them was no record that the document or a similar one was received on or about February 16, 1998. Mr. Haro upheld the charges and imposed the suspension in accord with the Table contained in the Standards of Employee Conduct. He did not adopt the maximum discipline permitted under the standards.

Grievant claimed the disciplinary action was taken against him because of his union activities. Mr. Haro testified that most of his dealings were with the Union president, Mr. Young, and denied the action was taken because of Grievant's union activities. The grievance should be denied.

UNION POSITION

The arbitrator has jurisdiction to hear the prior grievance because the Union withdrew it without prejudice and informed the Agency in its letter of March 28, 2000 that it was amending its grievance to include a claim for "constructive discharge." Under the Master Agreement, the issues in a grievance may be modified by mutual agreement of the parties The Agency was put on notice of the Union modification of the grievance by the letter of March 28 and through phone conversations in which the subject was raised but the Agency said it was not prepared to proceed in relation to that first grievance. At the arbitration hearing, the Agency again stated it was not prepared to try the first grievance. The responses of the Agency should be interpreted as acquiescence in the modification of the issues to include the seven day suspension. The Arbitrator should hold that he has jurisdiction of the seven day suspension grievance and he should hold a hearing to hear the merits of the dispute.

The record supports the Union claim that this and the other disciplinary actions were taken in retaliation for Grievant's Union activities. Prior to the grievance filed against AHSA Orellana, on August 12, 1998, Grievant had an unblemished record. Two days later, Orellana registered a charge of failure to follow instructions with Grievant's supervisor. At a meeting on the grievance against Orellana. Orellana was hostile toward Grievant and threatened his job. Four disciplinary actions occurred in rapid succession following that grievance against Orellana as a result of the hostility of Orellana and others in management. Part of the hostility towards Grievant may also be traced to the many memoranda, letters, complaints, etc. that Grievant generated relating to staffing, procedures, overtime, misuse of employees, scheduling, etc. He was considered a problem employee.

There is no evidence to support the first charge, failure to follow instructions, in relation to the medications dispensed on February 16 and 17,1998. The Agency produced no witness who was present at the time of the alleged misconduct. The only witness to testify was Grievant, who denied the charge. The only Agency witness to testify to the dispensation issue, interpreted Agency Exhibit 1, the patients medical record. Ms. McAdams, nurse, testified the patient received the prescribed dosage on February 14, 15, 16 and 17. There was a failure of proof of this charge.

It also failed to prove the second charge, failure to file DEA Form 106 and failure to follow policy in relation to the inventory of the Pyxis machine on February 16. PA's are not responsible for filing the DEA Form 106, that is the responsibility of the Warden. Grievant did follow the policy that a PA who finds a discrepancy will prepare a notice or memorandum for the Chief Pharmacist of the HSA. He did give notice to LCDR Parilla in the form of a memorandum to her dated February 16, 1999. Because February 14 - 17 was a holiday weekend, neither Parilla nor the HSA were on the premises and Grievant followed the established practice and slid the memo under the pharmacy door which was locked. That exhibit was provided to management at the time of his oral response to the proposed suspension. The Agency was on notice that the charge was unfounded but proceeded to rely thereon.

The charges against Grievant were made long after the occurrence of the alleged misconduct and the deciding official improperly considered prior discipline in assessing the penalty even though it has been determined by the United States Court of Appeals for the Federal District that it is improper to rely upon prior discipline which was being disputed. The Grievant has been denied due process in the fourteen day suspension, the thirty day

suspension, and the termination because the prior discipline was being disputed at the time the subsequent discipline was imposed.

The agency was engaged in a strategy to get rid of the Grievant and applied so-called progressive discipline in an improper manner without room for correction and without due process. The grievance should be sustained and the Grievant be reinstated with full back pay and benefits. Severe action should be taken against the Human Resources Manager for her misrepresentations and misconduct.

OPINION

The first issue to be addressed is the seven day suspension grievance which the Union seeks to have the arbitrator hear in conjunction with the fourteen day suspension. The party seeking to establish the arbitrator's jurisdiction bears the burden of proving that jurisdiction. The Union relies upon Jt. Ex. 3, the letter of March 28,2000 from Mr. Walker to Mr. Will, an Employee Relations Specialist with the Agency relating to "FMCS Case Number 990520-115233. The Agency has responded by attaching an affidavit purportedly made by Robert J. Will on September 22, 2000, two days after the arbitration hawing in this matter. There was no request to keep the record open or to permit either party to submit additional evidence. Both parties stated at the close of the hearing on September 20 that they had no further evidence to offer. A party cannot add to the record after the taking of evidence is closed and the other party has no opportunity to address that evidence. It would be a denial of due proms for the arbitrator to consider what the Agency has attached to its post hearing brief as Ag. Ex. 6. It will not be considered.

The letter, Jt. Ex. 3, contains the following paragraphs on which the Union relies:

The American Federation of Government Employees (AFGE) Local 501, hereby notifies you that we have elected not to continue the above referenced case to arbitration. In making our decision we, in no way, agree to any alleged violations the Bureau has made with regard to the case of Dr. Bruce Rusty Lang, Local 501 Vice President.

Inasmuch as Dr. Lang has been charged with multiple offenses. we will continue the Fourteen (14) day suspension case which is scheduled for May 16, 2000. That case is FMCS Case # 999708-13712-8. Further, be advised that this and future case(s) are hereby amended to include a defense of constructive discharge. Arbitrator William D. Ferguson set May 16th as the first day of the arbitration hearing of our Grievance.

The first paragraph clearly gates that the case would not continue to arbitration and them is no language therein limiting that language. Nor was there any testimony from Mr. Walker that them were any oral agreements to hear the case at a later date.

The claim that the present grievance was amended to include the prior one is not supported by the language of the letter. The only reference to amending it grievance in the quoted paragraphs is in the second paragraph and clearly relates to amending "this and future case(s) to include a claim for constructive discharge. That does not constitute an amendment to combine the seven day suspension grievance with the present one for arbitration before this arbitrator. The only other reference to amendment is in the unquoted third paragraph of the letter and relates to the decision letter language and was offered "for the purpose of compliance with the Master Agreement" which requires just cause for

removal, not just efficiency of the service.

It is concluded that the Union has failed to prove this arbitrator has jurisdiction of the grievance relating to the seven day suspension and the hearing will not be re-opened or continued to hear evidence concerning that matter.

As noted, the Union letter refers to amending the grievance to include a defense of constructive discharge. This issue was not addressed at the hearing or in the post hearing briefs. No authority for such a defense or claim was presented. It will not be further addressed herein.

Turning to the present grievance, the proposal letter, dated March 15, 1999, contained two charges:

Charge 1: Failure to Follow Instructions of Your Supervisor

Specifically, on February 16 and 17, 1998, you dispensed a morning dosage of Oxycodone/Acetaminophen against doctor's orders. The doctor's orders specified the dosage to be dispensed at noon and at the evening pill line. Your duties require you to follow the doctor's orders as written or as instructed.

Charge 2: Failure to Follow Policy

Specifically, on February 16, 1999, you discovered a discrepancy in the inventory of Phenobarbital and Percocet which are both controlled substances. You failed to document this incident on DEA Form 106. You also failed to immediately contact the Health Service Administrator or the Pharmacist to report the discrepancy. Program Statement 6000.05, page 8, requires specific documentation and proper notification when controlled substances are missing.

The decision letter by Warden Haro, dated April 8, 1999, states: "After careful consideration, I find the charges fully supported by the evidence in the disciplinary file. Your suspension is wan-anted and in the interest of the efficiency of the service."

Mr. Martinez testified that he was not at the Center when the events involved in this case occurred. When asked what evidence he had to support the charges in the proposal letter, he said he relied on the information that had been provided him but could not recall what that information was. Nor did he reveal from whom he received the information or what documents he may have received and from whom. He admitted that he did not inquire into the matter. He was able to offer no support for either of the charges. He could not recall whether he saw Ag. Ex. 1 with the report from Ms. McAdams though he thought he had seen something. When asked on cross examination about McAdam's conclusion that the correct dosage was administered on February 16 and 17, he said it didn't say when it was dispensed but merely that it was administered. An examination of page 65 of 106 of the patients record clearly reflects initials on the noon and evening lines, hence it could not have been correctly administered if the patient received three doses. His weak attempt to excuse his failure to perform his duties in connection with the proposal letter is clearly transparent

In an arbitration proceeding, it is necessary for the Agency and the deciding official. to

reveal the evidence on which the decision was based. A statement that a charge is supported by the disciplinary file which was not introduced into evidence does not meet the burden which the Agency must bear. The only testimony of Haro relating to the first charge was that Grievant's statement at the oral response on March 23, 1999 that he followed orders was contrary to a statement contained in an affidavit which was an admission that he made a mistake in dispensing the medication in question. It is noteworthy that Haro did not question Grievant about the affidavit at Grievant's oral response meeting. Had he seen Ag. Ex. 1 with the statement by McAdams that the patient received the prescribed dosages, he certainly would have questioned Grievant about the affidavit if his goal was to ascertain the truth.

The affidavit, Ag. Ex. 5, was the result of an interrogation by a Special Investigative Agent of the Agency on December 3, 1998, nine and a half months after the event. The attached warning notice indicates it was the part of an official administrative inquiry and it appears that was the first time that Grievant became aware of any investigation or question concerning February 16 and 17. Grievant testified he was shown a copy of Ag. Ex. 1. copies of a portion of the patients medical records. He testified that he looked at the entries, the same ones later examined by Ms. McAdams, and told the investigator "according to this It looks like I made a mistake." The affidavit records the statement as "I made a mistake according to the way it was prescribed." The investigating agent did not testify. The fact that this interview occurred nine and a half months after the date of the alleged misconduct casts doubt upon the accuracy of the affidavit as in admission. It appears the statement was made based upon a very poor photo copy of the patient's medical record. To the untutored eye of the arbitrator, the entries am extremely confusing. It is not clear that Grievant recalled the event or that he correctly read the copies presented to him. The originals were never produced. McAdams, a nurse with no motive to bead the truth, testified on behalf of the Agency. She examined these same records, Ag. Ex. 1, in January 1999 and wrote a report of her findings on January 22, 1999, She described the prescriptions written during February and early March, covering the period in question. Based upon her examination of the records, she reported, "According to the medication sheets, it appears that he (the patient) received only one doe [sic] of percocet on 2-13-98. It appears that he received the prescribed dosages on the other days in question." In her direct testimony, she stated the patient received the percocet at noon and evening as needed on February 16 and 17. On cross examination she repeated her conclusion that the prescribed dosages were received on the days other than February 13. In an attempt to further clarify her testimony, she was asked if the patient received the correct dosages on February 14, 15, 16 and 17, to which she answered. "Yes".

Haro offered no reasons for rejecting the report and testimony of a nurse selected by the Agency to examine the records and who spent considerable time and energy closely examining those records. The arbitrator finds Nurse McAdams testimony credible and concludes the evidence does not support Charge 1: Failure to Follow Instructions of Your Supervisor.

As stated above, Haro stated in the decision letter that the two charges were 'fully supported" by the evidence. The second sentence of Charge 2 stated: "You failed to document this incident on DEA Form 106." On direct examination, he was asked whether Grievant was required to complete the DEA Form and he said the policy required him to do so. Later, on cross examination, he agreed that PA's am not responsible for that form. When asked who was responsible for the DEA Form, lie thought it was the Chief

Pharmacist or the HSA. Upon looking at Ag. Ex. 2, he became aware that the responsibility is placed upon the Warden. Lack of knowledge of his own duties may have been the basis of Ns failure to note that Charge 2 was not fully supported by the evidence. He then claimed that he had informed Grievant at the oral response that he was not including that element of the charge. The minutes of the oral response meeting taken by the Human Resources Manager (HRM) who did not testify though she was present at the hearing, reflects no such statement and Grievant denies that Haro made any statement about not including that charge Haro's excuse for the "fully supported" statement in the decision Letter was that the letter was written by HR and he just signed it. That is not his responsibility. He is responsible for making the decision and to consider all appropriate evidence in doing so. If the letter was not correct, he should not have signed it. He was obligated to get it right, He cannot pass the buck.

Dr. Qunitana demonstrated and explained the Pyxis machine and the policies relating to it. It is the responsibility of PA's to inventory the machine at the beginning of the shift. The outgoing and incoming PA's together conduct the inventory. If there is a discrepancy, the outgoing PA is to report it to the HSA or Pharmacist. On a weekend or holiday, neither of those two am on the premises. The policy is to put the memo under the door of the pharmacy or put it in the mailbox if neither of the two officials are present. Not only are the PA's responsible to inventory the Pyxis, the Pharmacist is required to conduct his or her own inventory at the beginning of their shift. The HSA or the Pharmacist is than to report the matter to the Warden who reports it via the DEA Form 106.

According to Grievant, he and Ms. Ramos made the inventory when she arrived on the day shift to relieve him on February 16,1998, a holiday. They discovered the discrepancy and he prepared a memo reporting it. He gave a copy of it to Ramos so she would not have to write one since she was very busy and he was about to get off. He also gave one to his supervisor and placed one under the door of the pharmacy. Band upon the record in this case, that was the last he heard of the matter until he received the proposal letter dated March 15, 1999, over a year later.

Haro obviously rejected Grievant's version of events. He referred to the nature of federal service and how employees always write memos when things happen, they do it right away, and provide notice to whom appropriate. Of course, that is what Grievant says he did and his memo is dated that day. Apparently Haro considered that Grievant should have given him or the agency a copy earlier then March 23, 1999. He failed to explain his position. The evidence establishes that Grievant had no notice or knowledge that this matter was an issue until he received the proposal letter. Therefore, he had no reason to comb through his records to find a copy of that memo until he received the proposal letter. He then delivered it, or a copy of it, to the Agency at the time of his oral response. That delay does not support any claim that the document was not genuine or that Grievant did not follow the course he described.

Was this memo received by Parilla, the pharmacist? There is no evidence in this record that it was not. Was it in the records of the Agency? There is no evidence that it was not. Did Grievant's supervisor have a copy? There is additional evidence to indicate that she did have a copy of it and produced that copy for OIA. Did Haro conduct a search of the records seeking the document? There is no evidence that he did. He did make a reference to a purported affidavit by Parilla relating to the records. That supposed affidavit was not produced at the hearing and is not in the record in this case. There is no evidence in the

case that would have permitted any such affidavit to be admitted into evidence. There is no evidence that she made a search of the records and was unable to find the document. Conclusions of a deciding official have only that weight to which the evidence shows them to be entitled. In this case, there is no such evidence.

Grievant testified that he learned Hero requested 01A to investigate the document, claiming that it had been falsified. He was interrogated by an agent who showed him a copy of the document bearing a date stamp indicating it had been received in his supervisor's office. Un. Ex. 1 was received in evidence. It was a reply to Warden Haro in OIA cue No. 99-1850 sent to, inform him that based on investigation conducted by the Office of Internal Affairs, the charge of Falsification of a Document was riot sustained." Haro testified that he thought that related to a document in another caw but did not name any case or any other document which he sent to the OIA charging falsification. The document itself reflects that it concerned the Grievant bemuse it shows a copy to him. Grievant testified that he was interrogated by an agent and that he was shown a copy of the Ag. Ex. 4 in connection with that investigation. The copy bore a date stamp from his supervisor's office. No evidence was offered to rebut the testimony of the Grievant. The arbitrator determines that Haro's testimony was not credible.

Them we many unanswered questions presented by the Agency charge relating to the Pyxis discrepancy. The established policy was that the Pharmacist was responsible for taking an inventory when she came on duty. Had she performed her duties as required, she would have discovered the discrepancy according to Martinez and Quintana. Had she performed her duty, them would have been a report, based on that inventory, to Haro and he would have completed a DEA Form 196, if he were performing his duties. Had Parilla conducted the inventory as required, she reasonably would have questioned Grievant that day to find out why the discrepancy had not been reported. The reasonable conclusion is, if she conducted the inventory and discovered the document, she would have no reason to question him. Why did she not question Ms. Ramos, the other PA? She would have no reason to if she either neglected her own duties and did not conduct the inventory or she conducted it, found the discrepancy and gm report from Grievant. Had she found a discrepancy and no report from Grievant, she would not know on what day or shift the discrepancy occurred and would reasonably have questioned all of the PA's and the supervisors. Why was Ms. Ramos not present to testify, or her absence noted with some indication of what she could testify about concerning the event. She could either verify that Grievant gave her a copy of his memo or did he did not. There is no explanation of, how or -when management leaned of the discrepancy or why it was not brought to the attention of Grievant or others at the time of the events.

It is concluded that the Agency has failed to produce any evidence to support Charge 2: Failure to Follow Policy.

The Union has also charged the Agency action was taken in retaliation for his union activities and that it was precipitated by the grievance he filed against Orellana. Orellana did not testify, nor did the others who were in the room with Orellana and the Grievant in August 1999. According to Grievant, Orellana was upset and said, "I know you don't like me and I sure as hell do not like you." He then threatened Grievant's job. At about the same time Orellana sent a memo to Grievant's supervisor accusing him of failing to follow instructions regarding changing a dressing on a patient. The speculation by the Union and the Grievant is that Orellano initiated an investigation to see if it were possible to create

charges against Grievant to remove him from the Agency. Though the record is not clear as to the seven day suspension, them is reason to believe that was based upon events which occurred prior to February 1998. Within two weeks of his return from that suspension, he was given the proposal letter in this case based upon events which occurred over a year prior to the date of the proposal letter and almost six months before the grievance was filed against Orellana. Within ten days of his return from that suspension, he was given a proposal letter for a thirty day suspension based upon events which occurred almost eighteen months before the date of that letter and two months before the letter proposing the first suspension and four months before the second suspension, both of which were in the grievance process and disputed at the time of the third letter. On October 29, 1999 he received a letter proposing his termination based upon an incident which occurred nine months before the date of the letter and two weeks after the proposal letter for the first suspension.

The evidence presents a strong case for upholding the charge that the action in this case was taken in retaliation for the union activities of Grievant. In addition to the above, it is undisputed that Grievant papered the Agency and OIA and OIG with memoranda, claims, charges and complaints about working conditions at the center and made numerous charges against a number of the members of management. His testimony that Grievant was labeled a problem employee has not been refuted. The only attempt to refute the evidence offered by the Union was the conclusion of Haro that he did not act in retaliation and that he dealt mostly with the Union president, Mr. Young, and dealt with Grievant as a Union officer only once that he recalled. That does not meet the burden of the Agency to produce evidence meeting its burden of going forward with the evidence to rebut the Union evidence which suffices as a prima facie case of retaliation. It is concluded the Union has proved retaliatory conduct regarding the suspension in this case.

In addition to the above grounds for sustaining the grievance is this case, it is also noted that the fourteen days suspension specifically referred to the prior discipline and that prior discipline was a factor in the penalty decision. Under Gregory v. U.S. Postal Service, 212 F. 3rd 1296 (Fed. Cir. 2000) it is clear that disciplinary action cannot be supported by an earlier disciplinary action which has been reversed. That court held, "as a matter of law, consideration my not be given to prior disciplinary actions that we the subject of ongoing proceedings challenging the merits." The decision letter and the testimony of Haro, reveal that the seven day suspension was a factor in the penalty determination, hence the penalty was improper regardless of the decision on the just cause issue.

Having determined the Agency did not have just cause to suspend Grievant, it is necessary to turn to the remedy issue. Naturally, the suspension cannot be sustained. It must be removed from his personnel record and he must be paid for the time lost as a result of the improper suspension. The real issue at this point is whether this arbitrator has jurisdiction to reinstate the Grievant who was terminated in December 1999. Had the thirty day suspension and the termination bean grieved, and appealed, the arbitrator could leave the issue of reinstatement to the arbitrator hearing those claims. Inasmuch as no grievance was filed and no arbitration is pending, that alternative is not available.

Both the thirty day suspension and the termination referred to the prior

discipline in determining the penalty. Under the Grego case, that was improper. Logically, those actions could not stand under the Gregory case. At the very least, under the

progressive discipline "am and the reliance on prior discipline, those actions should be backed off one step. Because those actions were not grieved, the arbitrator declines to order such a remedy. In each of those actions, Martinez signed the proposal letter and Haro the decision letter. In light of the decision in this case, in which those two played the same roles, that the fourteen day suspension was in retaliation for Grievant's union activities, the arbitrator must provide a remedy that denies to the Agency the fruits of its illegal retaliatory conduct. Even though his jurisdiction is limited to the case before him, his jurisdiction includes the authority to fashion a remedy for the wrongs committed. Based thereon, he finds that Grievant is entitled to be reinstated to his position as a PA at the Federal Detention Center in Miami, Florida. Inasmuch as Grievant did not file a grievance relating to that discipline and discharge, the arbitrator concludes that he cannot direct the reinstatement be with back pay. He understands Grievant elected to pursue an EEOC claim relating to that discipline and considers that to be the proper forum

for determination of issues of damages or back pay.

The Union requested sanctions against members of management. Obviously, the arbitrator has no jurisdiction to consider such a request and the request is denied.

AWARD

The grievance is sustained. The Agency did not have just cause to suspend Grievant for fourteen days and the suspension was a retaliatory action. The suspension shall be removed from Grievant's personnel file and he is to be paid for the days missed as a result of the suspension. He is also to be reinstated to his PA position, without back pay.

William D. Ferguson

Arbitrator

December 13, 2000

Atlanta, Georgia