FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of Arbitration	)	
	)	
Between	)	
	)	
The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correction Institution - Tallahassee, Florida	)	
	)	
and	)	FMCS Case No. 071026-50576-3 Suspension Grievance of Dana Blanco
	)	
American Federation of Government Employees, AFL-CIO, Local No. 1570	)	

Before: Robert B. Hoffman, Arbitrator

Appearances:

For the Agency: Chung-Hi H. Yoder, Esq., U.S. Dept. of Justice

For the Union: E. Nicole Trail, Esq., Harris Shelton Hanover & Walsh

Places of Hearing: Tallahassee, Florida and Washington D.C.
Dates of Hearing: February 28-29; June 16-17, 2009 (Tallahassee, Florida); July 27, 2009 (Washington, D.C.)
Briefs Received/Hearing Closed: November 20, 2009[1]
Date of Award: January 10, 2010

DECISION AND AWARD

A. Introduction

The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correction Institution - Tallahassee, Florida ("the Agency)" suspended for 21 days Physician's Assistant Dana Blanco ("the grievant") in its July 20, 2006 final decision. It alleged that she failed to follow a recently changed illness call-in leave procedure, made by a supervisor in one of its departments, during ten instances and was AWOL for those ten absences from September 6,

2005 to December 4, 2005. Its investigation ended with a proposed suspension letter on March 28, 2006.

American Federation of Government Employees, AFL-CIO, Local No. 1570 ("the Union") on behalf of the grievant, maintains that the Agency's investigation and discipline were untimely and that the Agency failed to establish just cause, which includes issues concerning unilateral changing sick leave policy and fair and equitable treatment. The Agency contends that the Union's grievance lacks specificity and it failed to engage in informal resolution as required by the CBA.

At issue is whether given all of the due process issues, and if necessary, the merits, whether the Agency established just and sufficient cause under Article 30(a) for the suspension, and if not, what is the proper remedy?

B. Facts

The Federal Correctional Institution at Tallahassee, Florida consists of a low security female institution ("FCI"), with a population of approximately 1,300 inmates, and a male holdover facility, the Federal Detention Center ("FDC") with approximately 250 inmates. The grievant, hired in 1993, transferred to Tallahassee in 1995, as a Physician's Assistant. Her primary duties involved patient care. She was assigned a group of inmates as patients and would treat them daily according to their timed appointments. Four other employees also worked in this facility during those times, including physician's assistants, nurse practitioners, and unlicensed medical graduates. They are referred to as mid-level practitioners ("MLP"). The grievant had a medical degree from a foreign school and was unlicensed in the U.S. In addition to her patient duties she helped other MLPs as a backup for the morning pill line (administered by nurses) and the early morning triage if other MLPs were absent. Her hours

[1] On December 6, 2009 the parties agreed to extend the decision due date to January 20, 2010 per Art. 32(g).

were from 6:00 a.m. to 4:30 p.m., four days a week. On average, she had approximately 12-15 scheduled appointments a day in the Health Services Department. During the period in question the grievant was supervised by Health Services Administrator Cynthia West. Her shift started at 7:30 a.m. No other supervisors began their shift at 6:00 a.m.

The grievant's husband passed away in 2002. Thereafter she experienced attendance problems, especially tardiness. The grievant testified that she went on anti-depressant meds for about two years and then took them sporadically thereafter. She suffered a back injury in early 2003 and had back surgery. She also took pain meds thereafter. On March 11, 2004 supervisor West wrote her:

> Although we discussed this before, you continue to arrive late at work on repeated occasions. This can no longer be tolerated.
> Effective immediately, anytime that you are to be late for work or absent from work, you will be required to call and speak to your supervisor (either Lee Antunes or myself) prior to the scheduled start of your shift. If you call and cannot reach either of us at home, work, or by pager, you can leave a message, but you must leave a phone number where we can contact you.
> Failure to comply with this procedure can result in disciplinary action.

Then on September 30, 2004 West issued the grievant a proposed suspension for two days. She charged in three specifications during May 2004 that the grievant failed to follow leave requesting procedures, specifically her March 11, 2004 memo [above]. West also cited her for seven AWOL charges for the period April 13 through May 21, 2004. Warden Rivera reviewed the proposal and did not sustain four of the AWOL charges based on medical documentation. She stated that in the future medical documentation should be given to her supervisor upon the grievant's return to work. The Warden sustained the remaining charges in her February 4, 2005 letter, but reduced the discipline to a letter of reprimand in consideration of her recent personal tragedy, some medical issues, her first discipline and the grievant's acknowledging the seriousness of her behavior. No grievance was filed.

About seven months later, on August 14, 2005 West proposed a seven day suspension

for the grievant for a period from February 4, 2005 through June 7, 2005. This time West charged the grievant with failure to follow her March 11, 2004 instructions on call-ins and specified 15 instances of AWOL. On November 16, 2005 Warden Rivera sustained the proposal. No grievance was filed for this suspension.

On September 6, 2005, the grievant left a voice mail advising her supervisor that she would be late because of an issue with her dog. She reported at 8:30 a.m. West wrote the grievant a memo on this date notifying her that she was placed on AWOL. The memo stated that the grievant did not call West because she was unaware of her schedule. West reminded her of the numerous occasions the grievant had been told to speak to her supervisor and her continued failure to abide by this instruction and her absences "will not be tolerated."

This September 6, 2005 incident would ultimately be Specification 1 in a list of some ten AWOL specifications between this date and December 14, 2005. And they all involved the grievant's alleged failure to notify West per the March 11, 2004 memo. In charge 2, West referred to this memo in making the charge that the grievant did not follow leave procedures. In West's March 28, 2006 letter she proposed a 21 day suspension based on these two charges and the specifications for AWOL and referred to memos she wrote similar to the September 6 memo, supra, reminding her of the proper procedure to follow and to check with West if she needed clarification. West wrote memos after September 6 on September 8, October 26, December 1 and 6, 2005.

For this suspension the grievant maintained in an affidavit on January 24, 2006, her written response on April 24, 2006 to the proposal and her meeting with the Warden on May 10, 2006 that West's procedure on call-ins "is not in the Master Agreement." She specified that she notified West "in accordance with the Master Agreement, Article 20, sec. a." This provision states:

Article 20 – Sick Leave

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

1. sick leave may be used when an employee receives medical, dental, or optical examinations or treatment; is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement; is required to give care and attendance to a member of his/her immediate family who is afflicted with a contagious disease (as defined by applicable regulations); or would jeopardize the health of others by his/her presence at his/her post of duty because of exposure to a contagious disease;

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. If the supervisor is unavailable, the employee will contact the next available supervisor in the chain of command to request sick leave;* [emphasis added]

At the session with the Warden the grievant and her Union representative noted that the grievant had a "meltdown" in December when "most of the incidents happened [seven of the 10]." Her husband's birthday is in December. She is still grieving but she stopped all of her meds and seeing a counselor in December. She had migraines in September and October when she called in sick. In her written response the grievant stated:

> I have been more than honest about my condition up to this point, have not challenged any disciplinary action against me because I realize that it has been a difficult situation not only for me, but for the Bureau. I believe there has been significant improvement since the Christmas holidays and my job performance on the job has continued to reflect this.

Asked on cross examination if a beeper message or voice mail would suffice as a "personal request by the employee to the immediate supervisor" under Article 20(a)(3), West testified:

> . . . they wouldn't actually know whether if it was approved or not unless they actually speak . . . I still think a personal request is you actually speaking to a person so that you get a response back from that person.

The grievant testified that her messages to West were generally the same. She gave an example as follows:

> Cindy, this is Dana, it is" -- I would generally repeat the time. "It is about 5:00 a.m. I'm not feeling well. I had a rough night last night and I am not going to be in this morning. If I feel"

-- and this was my fault because I would sometimes say, "if I'm feeling better I'll try to come in later," instead of just put me on sick leave.

In her January 24, 2006 affidavit taken during the Agency's investigation, and her testimony at the hearing, as well as Agency documentation and West's testimony, the following is found regarding each of the ten specifications for AWOL:

(1) September 6, 2005 – Grievant Affidavit: She left a voice mail for West because of an issue with her dog. She would be in before the morning meeting at 7:45 a.m. She did not call West at home "because I did not know what her schedule was." She arrived at work at 8:30 a.m. Testimony and Documentation: West acknowledges voice mail in testimony and memo to grievant the same day.

(2) September 8, 2005 – Grievant Affidavit: arrived at work at 6:45 a.m. Scheduled to start at 6:00 a.m. "I did not contact my supervisor prior to the beginning of my shift to notify her that I would be late."[2] Testimony: Grievant related: "I was stuck in traffic on the way to the institution."

(3) October 26, 2005 - Grievant Affidavit: Called employee Pickens and told him she was on the way in and he should tell West. She arrived at 9:15 a.m. "I did not contact my supervisor prior to the beginning of my shift to tell her I would be late." Testimony and documentation: Grievant testified: "I attempted to contact my supervisor at home that morning; I got no answer. That is why I called Mr. Pickens." West memo of same day to grievant states that when she arrived at 7:45 Pickens told her he had a message that the grievant was on her way into the institution.

(4) December 1, 2005 - Grievant Affidavit: Voice mail for West that she would be late and was not feeling well. At 11:00 a.m. she pages West and leaves message that tried to call

[2] The grievant maintained at the hearing that what she really meant was that she did not "personally" contact her supervisor and that the affidavit was typed by HR without the word "personally" in these sentences.

institution but could not get through. States she is too ill to report and would be at work next day. Testimony and documentation: Grievant testified that "I Tried to contact her by voice mail." She paged her a second time and told West she would not be at work. West in testimony and memo to grievant same day – she received voice mail and page.

(5) December 6, 2005 - Grievant Affidavit: Voice mail that she was sick and would report next morning. Testimony: Grievant states she left voice mail.

(6) December 7, 2005 - Grievant Affidavit: "On December 7, 8 and 9, 2005 I left a voice mail and I paged Ms. West with a message that I would be absent." Testimony: Grievant relates that she left voice mail and paged West.

(7) December 8, 2005 - Testimony: Grievant testified that she paged her supervisor. West testified she received either a page or a message on her office phone from the grievant.

(8) December 9, 2005 - Testimony: The grievant testified she left both a voice mail and page for West.

(9) December 13, 2005 - Grievant Affidavit: "I did not contact my supervisor to notify her that I would be absent."

(10) December 14, 2005 - Grievant Affidavit: Called acting Health Administrator Rankins at home prior to 6:00 a.m. and received no answer, "but got her answering machine. Called her at work at 5:50 a.m. and spoke with her." Advised her that she would be late. Arrived at 11:30 a.m.

The Warden issued her final decision on July 20, 2006. She sustained the two charges and the suspension of 21 days. At the hearing the Warden testified about the decision – it was the grievant's third discipline in two years, including two suspensions, all for the same conduct, and the adverse effect the grievant's continued absences had on the medical work. The Union grieved, *inter alia*, maintaining that the grievant followed established procedures

and negotiated leave procedures. The Agency denied the grievance.

C. Discussion and Decision

Absenteeism is always a concern when it becomes excessive. And rightfully so. Dependability is one of the core essentials any employee brings to an employer. If that somehow diminishes then the employee's value becomes such that his or her reliability is of concern. Productivity, whether in a manufacturing facility or in a service provider operation, is critical. In the latter the service needs to be provided and provided in a way that it can be depended upon.[3]

But before even reaching that issue here, whether the grievant's absences were such that the Agency had just cause to suspend her for 21 days, both parties raise a number of procedural issues. And these issues need to be closely examined and decided before the issue of the grievant's absences can be examined. Nonetheless, as will be seen, the discussion of the last issue calls for an examination of the absences themselves.

First, there are two issues raised by the Agency for its claim that the grievance is not arbitrable. It argues that the Master Agreement, Article 31(f), requires the Union to file its formal grievance on the Bureau of Prisons "Formal Grievance" form. According to the Agency, the Formal Grievance Form requires the Union to detail alleged violations with specificity. The grievance form filed by the Union, the Agency maintains, has been altered from the original, which specifically states the grievance is to be specific. It argues that this

[3] For example, in *City of Titusville, Florida and Police Benevolent Assoc.*, 101 LA 828 (Hoffman 1993) this arbitrator held: "There is no question that the City is entitled to have its employees attend work on a regular basis. Quite simply, for an employer to operate efficiently, and in this case, provide vital law enforcement services, it must be able to depend on employees working their full schedule. Occasional absences due to illness are to be expected. Still, when the excuses are proven to be abused, or even when the reasons are legitimate but the absences are too frequent, employers have a right to reasonably enforce defined attendance policies and discipline employees. It is also well documented that employers with serious attendance problems find that their operations are less efficient, have higher labor costs and the absences place a heavy burden on other employees to replace the absent ones."

grievance fails to state in what way(s) the agency violated 5 U.S.C. §§ 7101, 7106, 7114, 7117, 7116 (a), 1, 2, 5, 7 and 8, Title 7 and EEO rules, regulations and laws in relation to discrimination. It contends that blanket assertions and presuppositions fail to provide appropriate detail in the grievance to give the Agency fair opportunity to rebut the allegations. A matter can become non-arbitrable, the Agency argues, if there is a due process violation or a violation of a CBA.

It is true that by reference Article 31(f) incorporates the BOP Grievance Form. But there is no language in the contract itself requiring that the grievance be "specific." And in at least one publicly reported case an arbitrator concluded that there is no contractual requirement for specificity. *USP Florence and AFGE Local 1302*, 104 LRP 21037 (Henner 2004). Nonetheless it is sufficiently clear from the Union grievance that box 6, which asks how "each of the above," or the various contractual provisions and laws, were violated, need to "be specific." The intent is obviously to provide the Agency with sufficient information so it can reasonably understand what the Union is grieving.

This grievance is specific. It allows the Agency to know the various positions of the Union and connects them to contractual and/or regulations it maintains the Agency violated. In some 20 lines in box 6 the Union went into sufficient detail regarding each of the provisions it asserted as violations, such as management making its own procedures rather than following the contract; unfair treatment of the grievant; discrimination against the grievant; violating Article 20 and 5 CFER 630.403 by refusing to take in to consideration evidence to support sick leave -- and more. The upshot is that the evidence is more than sufficient to both inform the Agency and the arbitrator of what is being grieved.

Secondly, the Agency contends that the Union failed to attempt informal resolution prior to filing the grievance. Article 31(b) of the Master Agreement states:

> [t]he parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance.

Associate Warden Gregg stated that she met with the grievant and her Union Representative at their request after the issuance of the proposal but before the issuance of a decision. At that stage, there was no issue to resolve, formally or informally; no determination had been made on the grievant's misconduct. Thus, the issue was not yet ripe for resolution, the Agency contends, and the Union never made another effort after filing the grievance.

As seen, the intent of the parties in Article 31(b) is for an informal resolution – an intent that is expressed not only as one that "must" occur but one that "the parties strongly endorse. The Agency is correct that the parties did not seek any informal resolution once the Warden made her final decision and a grievance was filed shortly thereafter. On the other hand this record is replete with evidence as to the efforts made by the parties to resolve the dispute that ended in a formal grievance. In this instance, as with many others where the investigation occurs and a proposed suspension follows, the parties are keenly aware that a dispute exists; it is to the benefit of all to seek an informal resolution as early as possible.

That is what occurred here. Not only did Associate Warden Gregg became involved, but when the Warden met with the grievant and Union Representative Pickens just prior to her final decision, they extensively discussed the dispute; such discussion in this record clearly shows an effort by the Union to seek a resolution. Pickens testified that he spoke to West, the Clinical Director, Associate Warden Gregg and Warden Rivera in an attempt to resolve the issue prior to filing a grievance. But then he testified what happened when he spoke with the Warden:

> I talked with her right by the lieutenant's office. There is an opening that goes into Health Services, right across the hall. I caught her coming back from lunch and I talked to her about it. Well, she told me that, nope, that she wasn't interested in resolving it. We always were able to resolve most everything, up until the time Ms. West came, and then it became a problem.

In *AFGE Local 2001 and FCI Fort Dix*, FMCS No. 0140823-15274-7 (Nov. 22, 2003), the Agency argued that the Union failed to make a reasonable and concerted effort towards informal resolution after filing the grievance. The parties had been discussing the issue for more than one year. Because no amount of informal resolution would have changed the Agency's mind that a violation existed, the arbitrator concluded that the Union had fulfilled its informal resolution obligation.

It is most obvious here when considering the Warden's extensive testimony regarding her session with the grievant and the Union, as well as Gregg's detailed description of his meetings with the Union and grievant, these parties made a reasonable and concerted effort to resolve this dispute, albeit before the grievance was filed. But given this strong effort prior to the grievance, and the Warden's blunt response after all these efforts that the Agency was not interested in any resolution, it would have been fruitless to again raise the subject after the grievance was filed, much the same as in the above cited case. Inasmuch as the Agency was unwilling after these all-embracing discussions to engage in any more, it is clear that any further effort made after filing the grievance would be futile. And otherwise the parties fulfilled the intent expressed in 31(b) that they make a reasonable and concerted effort. They did so. The grievance is arbitrable.

Thirdly, the Union contends that the Agency failed to investigate and impose the discipline in a timely manner as is required by the Master Agreement and Agency policy. The first instance of AWOL occurred on September 6, 2005 and the last one on December 14, 2005. Sometime thereafter the matter was referred for an investigation. The grievant supplied an affidavit during the investigation on January 30, 2006. Supervisor West issued her proposed suspension on March 28, 2006, and the Warden, after meeting with the grievant in

June 2006, issued her final decision on July 20, 2006. It was some seven months from the last incident and the start of the investigation until the Warden issued her decision. It took West about three months after the investigation started for the proposed decision, which was about the length of the investigation. And the Warden's decision was made about four months from the proposed suspension. It is found for the reasons below that these time frames, in the circumstances of this matter, did not violate Article 30(d) below.

There is no question that Article 30(d) of the Master Agreement shows a clear intent by the parties to make sure the investigations conducted by the Agency and disciplinary actions made by it thereafter are done so in a way that produces a timely disposition. Those very words appear in the Article called "Disciplinary and Adverse Actions."

> Article 30 – Disciplinary and Adverse Actions
>
> Section d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

As this arbitrator has held in other cases, and most recently in one involving these very parties, timeliness is a critical function of procedural due process, a major component of what constitutes just cause. *FCI Miami and AFGE Local 3690*, FMCS 08-00539 (Hoffman 2009). And even absent any clear contractual intent by the parties to timely dispose of these matters, timeliness is inherently a part of just cause. See *Levy County, Florida*, 109 LA 1184 (1998) in defining just cause generally: "Factors such as . . . *promptness in imposing discipline, are some of the factors inherent in cause that are just.* [Emphasis added]

The Union maintains that as in *AFGE, Local 3239 and SSA,* 106 LRP 17458 (Grissom 2006) an

> employer is not at liberty to resurrect months old 'offenses' for which the employee was never disciplined. In other words, there can be no 'add ons' to other alleged improper occurrences in the future where the Employer 'reaches back' to undisciplined events that transpired long before, to capture what will become a multiple offenses for which the employee is then disciplined with a severe penalty.

The Union points out that here, instead of promptly addressing the alleged offense in September of 2005, the Agency chose to wait until March 2006 and reach back to September 2005 to add on undisciplined events, which transpired long before March 2006 to "capture what will become multiple offenses for which the employee is then disciplined with a severe penalty." It is exactly what the Agency did with the grievant for her two previous disciplines – waiting for numerous violations to pile up. The Union cites this arbitrator's recent decision with the parties in Miami, referred to earlier, finding that delays involving some parts of the investigation and finally issuing discipline were unreasonable. As stated in *FCI Miami*, supra:

> to be clear about the meaning behind the principle the parties embedded in their CBA that "timely disposition" is critical, the notion of due process, which public employees derive from both the Constitution and developed principles of labor relations due process, includes a variety of protections meant to assure that the investigatory and disciplinary process is fair and reasonable.

Arbitrator Hoffman, the Union further noted, also recognized the significance of the Master Agreement's emphasis on timeliness. In Section 30 the parties "agree that when employees are disciplined progressively, the intent is 'to correct and improve employee behavior,' as opposed to severe misconduct that can lead immediately to termination," and thus the further due process need to assure promptness in correcting behavior. The Union argues that, as was recognized by Arbitrators Grissom and Hoffman in the above cited cases, timeliness of bringing charges and then investigating those charges is endorsed by the Master Agreement. Here, the Union contends, neither of those events occurred in a timely manner.

Unlike *FCI Miami*, supra, it is found that the delays here do not violate Article 30(d)'s timeliness provision for a number of reasons. First, as distinguished from *FCI Miami* the Agency there did not present any affirmative evidence to show that the delays were justified. It must be remembered that this section starts with a condition to "timely disposition" that "the circumstances and complexities of individual cases will vary. . . . " By prefacing the

timeliness requirement with this recognition, the parties clearly intended to not fix any rigid rule that every matter must be timely disposed of. They clearly intended, as seen in the testimony of those who negotiated this language, that in this environment, where investigations can involve serious criminal matters and other complex issues, timeliness cannot always happen. And although it could be argued, but was not here, that this language is meant to apply only to a grievant's investigation, the language is broad enough to show an intent from the word "circumstances" to include other investigations whose circumstances may contemporaneously affect the timing of another investigation. Thus, even though the case at hand is less complex, its "timely disposition" can be delayed or lengthened by such contemporaneous cases being handled that are more complex and serious.

And in *FCI Miami*, supra, the Agency had no such contemporaneous evidence to counter a prima facie case of untimeliness involving a one year delay from investigation to final decision. Here, there is sufficient contemporaneous evidence that suggests another more serious and complex matter took substantial time of those charged with investigating this grievance. More specifically, Special Investigative Agent Williams who handled the grievant's investigation, testified about a substantial criminal investigation that occurred about the same time:

> The allegations that may involve physical or sexual abuse of inmates, introduction of contraband cases. And also, at the same time frame, I had agents from Office of inspector general and FBI that were coming to the institution on a fairly regular basis on a large and complex case that did take up quite a bit of my time around that particular period.

More specifically, these allegations, which began in March 2005, involved six staff members charged with sexual abuse of inmates, introduction of contraband, conspiracy, and witness tampering. Williams was the institution liaison for to the FBI and the OIG. He related that he became highly involved with them at the same time as the grievant's AWOLs occurred from September through December 2005.

> . . . when FBI and OIG get involved it becomes a situation where I'm helping them more than they are helping me. It is their case. And any time that they come to the institution I'm there at their heels, getting them anything that they need, arranging interviews, and I had several at one time. So at the same time that I'm helping them on a fairly continuous basis, at that time I'm also doing other cases chronologically that I had open trying to get those cases done as well. . . . In this case most of the interviews I was sitting in on because I am familiar with the layout of the institution, the inmates and staff and so forth, so I'm inside to those investigators so.

The Chief of Internal Affairs, Dr. Dignam, whose office reviews and directs internal investigations, confirmed Williams' involvement. He added even more seriousness to the events that were occurring during the grievant's investigation:

> The [grievant's] investigation was delayed because of the tragic event that occurred in Tallahassee, where the OIG agents, with the assistance of Mr. Williams and others, attempted to arrest the employees, because they'd already been indicted. And, unfortunately, one of our former employees shot and killed one of the agents . . . . He was shot and killed during the arrest. And, of course, that incident led to even further investigation, which Mr. Williams had to -- had to assist on. So it was -- it was a very tragic event in our Agency's history.

As to the 120 day time frame for investigations referred to in Program Statement 1210.24, "Office of Internal Affairs" that covers procedures for reporting allegations of misconduct and how investigations are to be completed, Dr. Dignam testified that these type of circumstances and other complex and serious ones often delay less complex investigations. That is why, he related, the time frame is not held out as an absolute time in which the investigation must be completed. Dr. Dignam testified that investigators still are aware of the time frame and try to follow it even when confronted with a heavy caseload: "It's a standard, or guideline, or was a standard, that we offered for investigators to shoot for, to complete their investigations. It's in everybody's interest to complete the investigations in as timely a manner as possible." And here there is sufficient evidence that the grievant's investigation was delayed by factors the parties contractually recognized as sufficient to qualify the timely disposition provision.

Moreover, unlike *FCI Miami*, supra, where the investigation involved a series of unrelated allegations, here the incidents concerned a pattern whereby the grievant would go

for weeks and months without a problem and then in short bursts have problems with reporting to work. So, as it did in the prior investigation, the Agency examined her behavior over a number of months to determine whether discipline would be appropriate and if the pattern continued. As in any attendance investigation, a major concern is if the employee's absences show a pattern or whether the absences are isolated. With this grievant, as seen, the pattern showed periods of continued absences. So, too, the notion that the investigation should have been made for each incident and this prejudiced the grievant is unconvincing, given that the grievant had several warnings and counselings from September thorough December 2005.

As noted, the investigation from the last event in December to proposed finding encompassed some three and one half months. And from the start of the incidents, September 2005, it could be said that the investigation lasted seven months. But as seen, taking the entire period into account, and finding that the investigation started after the last December 2005 occasion, with the grievant providing an affidavit in late January to the investigator, a three and one-half month investigation would then not be outside the guideline of 120 days, even considering the delays caused by the other investigation noted earlier.

Taking some four months from the proposal and the end of the investigation to final decision is *prima facie* untimely. The Warden was not directly involved in the criminal investigation. But she met with the grievant about 60-70 days after the proposal and promised her, after a lengthy meeting that she would closely examine all of the facts and make her decision. It must be remembered that previously when the Warden did this the first time, she decided to revoke the suspension and issue a written reprimand. Weighing on her again were some considerable issues involving this grievant's mental capacity and possible issues involving disability. It was not unreasonable then for her to take another 30 days or so and finally decide the issue. When broken down in this way, both the "circumstances and

complexities" of this case suggest strongly that the timing, while long, did not violate 30(d), unlike *FCI Miami,* supra, where the delay was over one year and the issues were not complex, with no prior discipline to consider and no serious other cases interfering with the investigation.[4]

The final due process issue concerns supervisor West's call-in procedure and whether it amounted to the Agency in effect changing a working condition practice and/or changing the contract. And for this issue it is also necessary to examine the merits of each absence occasion relied on by the Agency. The issue is not over whether the grievant had to provide documentation for her tardiness or absences, but whether there was some practice an/or Agency rule that existed before supervisor West's March 11, 2004 memo, and if West, as an Agency supervisor, could unilaterally change procedures for how an employee is to call-in when ill.

To be clear – Supervisor West's March 11, 2004 memo advised only the grievant that she must notify the Agency of an absence for illness by directly calling and speaking to either West or her assistant, Antunes, prior to the start of her scheduled shift; if she could not reach either of them to page or leave a message. Previously, as is so found, the long standing practice, which still existed for others in the Department after March 11, 2004, allowed them to notify supervision by leaving messages with no delineation that it must be before the start of the shift. And even messages left with employees to pass on to supervision in this small department were acceptable by supervision. It is undisputed that this practice existed for a

[4] "The burden rested with the Agency to show 'circumstances' or 'complexities' that would make a one year or more wait reasonable. It has not done so. And even if had evidence showing that more time was needed for these other two investigations, and thus some reasonable circumstances existed during the fact gathering process, there is no explanation why the Warden then needed some seven more months to decide discipline." *FCI Miami*, supra at 15.

long period of years, at least as long as the grievant's 13 years in this health services department and it continued to exist, except for the grievant.

The Union maintains that the Agency changed this practice, which was a condition of employment, and it otherwise failed to abide by the terms of Article 20(a)(3). And while the grievant may have been allowed to simply leave a message in the past without directly speaking to her supervisor, the CBA provides the contractual basis for what employees must do when they are sick and need to notify supervision that they will not be at work and claim sick leave. And in most of the ten cited instances the cause for the grievant's lateness or absences related to an absence due to illness. Her testimony concerning the lingering mental strain of her husband's death and the medications she took for this trauma, as well as a recent back surgery, were well known to the department and her supervision. Article 20(a)(3) in relevant part provides:

> 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. . . . If the supervisor is unavailable, the employee will contact the next available supervisor in the chain of command to request sick leave;* [emphasis added]

No regulation had been cited that changes or modifies the contractual call-in process to conform to West's March 11, 2004 memo. It is clear on the face of this contract that the parties agreed that employees must notify the supervisor "prior to the start of the shift *or as soon as possible*" and if the supervisor is unavailable the employee is to contact the next available supervisor. There are three major changes made in the West memo: First, it is clear that in the contractual procedure, by adding the phrase "or as soon as possible" the parties have modified the "prior to the start of the shift" language at the start of the sentence. And that modification or qualification in effect would allow an employee to call in after the start of the shift. The West call-in memo relied on for this suspension excludes the right of this one

employee to call in after the start of the shift "as soon as possible." West's March 11 memo limits the phase "or as soon as possible." It would thus be a violation of her policy to call in "as soon as possible" if the call occurs after the shift starts. This is not what the parties negotiated and agreed to in their CBA. They were most specific that the line would not be strictly drawn at the start of the shift. And the reasons are obvious. For anyone who has ever faced illness problems prior to work, there can always be circumstances that make it difficult to call exactly to the start of the shift. And without identifying them, it is clearly the intent of the parties that they allowed employees this leeway if done "as soon as possible."

It is understandable that West was frustrated with the grievant's tardiness and wanted a stricter rule to apply to her. And having the grievant's notification prior to the start of the shift would allow West to better plan who would substitute for her. But, as seen, the parties already agreed how it was to be done. And that could not then be changed unilaterally by a supervisor to make it any stricter than what is set forth in the Master Agreement There were other ways to get the grievant to abide by the call-in policy without changing the contract.

So, too West changed and made more strict what happens after the call is made. Under 20(a)(3) the employee calling in is "to *notify* the supervisor." But under West's memo the grievant was required to actually speak with West or another named supervisor (". . . you will be required to call and *speak*. . . "). 20(a)(3) does not require that there be anything more than notification; it does not limit such notification to actual speaking only. And the words "to notify" from 20(a)(3), commonly mean "to inform or to point out." *Webster's Third New International Dictionary* (2002). The communication itself, as understood by the word "notify" is also the subject of a common meaning – "To inform a person *by . . . any method that is understood.*" *Black's Law Dictionary* (6th Ed. 1991). In short, it is clearly the intent of the parties that the words "to notify" allowed the employee to do so by any means that

informs supervision the employee would be absent. It is irrelevant to the contractual procedure that the employee must only speak to the supervisor and that any other form of notification is unacceptable.

Finally, the requirement in the West memo that the grievant speak specifically with either West or Antunes is contrary to 20(a)(3), which allows the employee to notify the next available supervisor in the chain of command of her absence and request sick leave. The limitation imposed by West goes well beyond the Master Agreement procedure. The important objective West sought was information from the grievant that she would be absent or late. She needed it before the start of the shift to make new assignments. But limiting who the grievant could contact in the event she could not contact West or Antuines defeats the purpose of trying to have the grievant provide more timely information and have it directed to supervision. 20(a)(3) if enforced would accomplish those objectives, as the parties intended.

There is little doubt that this procedure is a significant condition of employment. Any unilateral change made to it can affect the employee's contractual right to claim sick leave or an illness absence, and at the same time if not followed correctly could result in the employee incurring AWOL charges and thus discipline. Article 3 of the Master Agreement requires the parties to "meet and negotiate any and all policies, practices, and procedures which impact conditions of employment." And when that condition of employment is plainly set forth in the Master Agreement, any change in these terms of how an absence for an illness is notified can be deemed improper under the Federal Labor Relations Act. In *U.S. Dept. of Veterans Affairs and Natl. Assoc. of Govt. Employees, Local R5-66*, 42 FLRA 712 (1991) the Authority stated:

> Section 7116(a)(5) of the Statute makes it an unfair labor practice for an agency to refuse to bargain in good faith with an exclusive representative of its employees. As a result, an agency must provide the exclusive representative with notice of proposed changes in conditions of

employment affecting unit employees and an opportunity to bargain over those aspects of the changes that are negotiable.

Moreover, as seen, a practice existed prior to West's March 11, 2004 memo that permitted notification that did not require actual conversation with the supervisor. Messages would be left and this health services department even accepted messages left with co-workers, a practice that exceeded 20(a)(3). And the testimony is undisputed that prior to March 11, 2004 there was no practice, policy or rule in this department that supervisors had to be called at home. The further undisputed testimony is that only upon the arrival of supervisor West to this department did this practice change. Also, the change made as seen in the March 11 memo was not a change for all department employees, but only for the grievant. By conditioning this supervisor's unilateral change in both the practice and the Master Agreement notification procedure, the Agency instituted a condition of employment that applied only to the grievant and one that changed, just for her, a term and condition of the Master Agreement. By so doing the discipline for violating this improper changed procedure does not support just cause.

The discipline for all ten incidents was based on the grievant violating the March 11 memo each time. Again, this is the memo containing a standard or procedure that the Agency in effect improperly relied upon – it violated both the Article 20(a)(3) and the Article 3 condition of a practice long maintained in this department on reporting absences. Thus any such reliance cannot be utilized to justify just cause for suspending the grievant. At the same time in examining each of the ten incidents, it is found that the grievant complied with either the 20(a)(3) contractual procedure or practice on eight of the ten occasions. They are as follows:

-Sept. 6. 2005 she left a voice mail message for West prior to her late arrival at 7:45 a.m. West acknowledged in her memo to the grievant on that day that she received the voice mail when she arrived at work at 7:30 a.m. And although this was not an illness issue, it complied with the past practice unilaterally changed by West to provide a message to supervision or an employee and she did so within one and one-half hours from the start of her shift, if not earlier.

-October 26, 2005 she called another employee and asked that employee to give a message to West. West admits that this employee gave her the message shortly after her arrival. By receiving notification in this way the grievant satisfied the practice improperly changed by West.

-Dec. 1, 2005 she left a voice mail message for West and had her paged twice after the start of her shift. West acknowledged in her December 1 memo to the grievant that she received both the voice mail and page. By receiving notification in this way the grievant satisfied 20(a)(3) and the practice improperly changed by West.

-Dec. 6, 2005 she left a voice mail for West and West did not deny receiving it. By receiving notification in this way the grievant satisfied 20(a)(3) and the practice improperly changed by West.

-Dec. 7, 2005 she left both a voice mail and page for West and West did not deny receiving them. By receiving notification in this way the grievant satisfied 20(a)(3) and the practice improperly changed by West..

-Dec. 8, 2005 she left a page for West and West did not deny receiving it. By receiving notification in this way the grievant satisfied 20(a)(3) and the practice improperly changed by West.

-Dec. 14, 2005 she called the Acting Administrator at home prior to the start of her shift and got his voice mail; she then called the institution ten minutes before her shift started and spoke to the administrator. By receiving notification in this way the grievant satisfied 20(a)(3) and the practice improperly changed by West.

These eight occasions are sufficient and proper notification to the department. It is found that they complied with the contractual procedure and in two instances complied with past practice. And as such, the AWOL specifications are unsubstantiated, as will also be discussed infra. In all, the discipline imposed, a suspension of 21 days, is for this grouping of ten incidents and not for the remaining two incidents of the ten cited.

As to the AWOL charges, inasmuch as the grievant failed to violate any procedure for notifying the Agency of her absences, it would not follow that she remain AWOL. In *U.S. Department of the Air Force Robins Air Force Base and AFGE Local 987*, the FLRA held that under 5 C.F.R. 630.401, an "agency is required to grant sick leave to an employee when any of the events listed in (a) - (d) occur." 41 FLRA 635, 637 (1991). The grievant there was charged with AWOL and suspended for ten days based solely on the grievant's failure to follow established sick leave procedures. The Authority held that "the use of the phrase 'shall grant'" emphasizes that an agency must grant sick leave when requested to do so by an employee as set forth in 630.401.

The grievant here was never absent for more than three workdays. As such she was not required, per the Master Agreement and federal law, to provide medical certification. An employee's certification of their illness can suffice where the leave is not in excess of three days. There is no testimony from any witness that they doubted she was ill during the absences. Thus, it is evident that the AWOL absences are based solely on the first charge regarding notification. As such the AWOL charges are without merit.

As seen then, there are a number of factors suggesting that the grievant was treated unfairly. Article 6(b)(2) provides that employees must "be treated fairly and equitably." To summarize they include: the unilateral changed past practice and procedure; the unilateral change of the Master Agreement; the charge of AWOL based solely on a failure to follow leave procedures. And there is more.

Even assuming the propriety of a unilateral change, it is undisputed that on virtually every occasion cited by the Agency the grievant made an effort to notify the Agency and even comply with West's new rule for her. With the two exceptions noted above, including one day when she was stuck in traffic, she contacted either West or the acting administrator. And she also contacted employee Pickens to make sure he knew she was going to be late or absent and for him to inform West. As seen, in most instances West readily admitted she received these messages from voice mail, pages and Pickens.

The evidence is in conflict that the grievant's absences on the days in question resulted in burdens on others in the health services department. Much was made by the Warden and West that the grievant's absence would sometimes result in problems with the pill line or triage. Supposedly her absence created a back up or a failure to even have these services. The grievant testified that she was never assigned these duties. At most she was a back up for those absent, which she never had to fulfill during the four month period in 2005. And her testimony is found more credible given its corroboration by the Time and Attendance records for this period, which show she was not assigned to such duties.

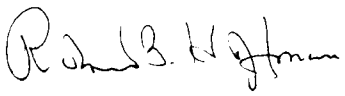
And even if discipline should be imposed, which by this decision it is not, the Agency never made it clear why it went from a seven day suspension to a 21 day suspension. Neither the Warden nor West could explain it, cite any precedent for it or in anyway justify its obvious harshness. Such failure suggests an unfairness in reasonably and progressively

assessing penalties on employees per the Agency's obligation in Art. 30(c) to progressively discipline.

All in all, it is hereby concluded that the Agency violated various provisions of the Master Agreement, as discussed and found above. Accordingly, it is determined that "just and sufficient cause" has not been shown to warrant a 21 day suspension for the two charges.

Award

Based on the above and the entire record, the grievance is sustained. The Agency's personnel action against the grievant was unwarranted for the reasons found above. But for these unwarranted actions described above, the grievant would have been entitled to compensation and benefits. The 21 day suspension is therefore rescinded, all records of this suspension shall be expunged and the grievant shall be made whole pursuant to the Back Pay Act. The arbitrator shall retain jurisdiction for a period of 90 days from this award, or from any appeal found to uphold all or any portion of this award, for the sole purpose of resolving any dispute regarding the administration of the remedy.



Robert B. Hoffman
Arbitrator