

IN THE MATTER OF ARBITRATION  
BETWEEN

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Federal Bureau of Prisons, Federal Medical Center, Rochester Minnesota, Agency,	)	
	)	
And	)	FMCS No.: 10-04398
	)	
American Federation of Government Employees, Local 3947, Union.	)	
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<b>Before:</b>	<b>Vicki Peterson Cohen, Arbitrator</b>
<b>Appearances:</b>	<b>Ruby Navarro, Lead Labor Relations Specialist, Federal Bureau of Prisons Agency Representative, for the Agency,</b>
	<b>Daniel Bethea, AFGE/CPL33 National Representative, for the Union.</b>
<b>Dates of Hearing:</b>	<b>October 4, and October 5, 2011</b>
<b>Hearing Location:</b>	<b>Federal Medical Center, Rochester Minnesota</b>
<b>Briefs Filed:</b>	<b>February 27, 2012</b>

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The grievance is denied in part and sustained in part. The grievance is arbitrable to the extent discussed herein. The Agency's fourth quarter and overall yearly evaluation of the Grievant, dated April 26, 2010, was issued in violation of Article 6 and Article 14 of the Master Agreement. The Agency shall reevaluate the Grievant's Satisfactory ratings in two categories and adjust her 2010 overall rating accordingly.

Vicki Peterson Cohen

April 9, 2012

## I. CASE SUMMARY

The Grievant, Sandra Parr, is employed as a nurse by the Department of Justice, Federal Bureau of Prisons Federal Medical Center located in Rochester, Minnesota. The Grievant has been employed as an LPN for thirteen years on the Medical Surgery Unit. At the time the grievance arose, the Grievant held the Union positions of Regional Fair Practices Coordinator and Shop Steward.

The parties are subject to a Master Agreement with the effective dates of March 9, 1998 through March 8, 2001. The parties mutually agreed that the terms of Master Agreement remained in effect on the dates of the hearing.

On April 26, 2011, the Grievant received her fourth quarter evaluation and yearly evaluation. For her fourth quarter evaluation, the Grievant received two Exceeds ratings, two Satisfactory ratings and two Outstanding ratings. The Grievant received an overall rating of Exceeds for the year. The highest rating is Outstanding. In response to the Grievant's fourth quarter rating, and her 2010 yearly evaluation, a grievance was filed on June 4, 2010, with the Agency's Regional Office in Kansas. The grievance claimed the Grievant's evaluation resulted from continuing retaliation by her supervisors/managers based on her union activities.

The grievance was rejected by the North Central Regional Office on June 25, 2010. The Agency rejected the grievance due to the lack of specificity, timeliness and because it was not filed at the appropriate level.

## II. ISSUES

(As presented by the Agency)

Was the grievance filed on June 4, 2010 timely under Article 31, Section f (1) of the Master Agreement?

Was the grievance filed on June 4, 2010 filed at the proper level under Article 31, Section f (1) of the Master Agreement?

Did the grievance filed on June 4, 2010, provide specific information in block 5 to understand the alleged violations?

Did the Grievant's supervisors/managers retaliate against her for her union activities? If so, what shall be remedy?

## III. RELEVANT AGREEMENT LANGUAGE

### Article 6- Rights of the Employee

#### Section b.

The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

2. To be treated fairly and equitably in all aspects of personnel management.

### Article 14- Employee Performance and Ratings

#### Section a.

The Employer's performance evaluation program as applied to bargaining unit employees is intended to increase the efficiency of operations, foster good employee morale, strengthen employee-management relationships, and evaluate work performance based upon established elements and performance standards. These standards and elements will be developed and communicated to each employee, and as they are applied to an employee, will be fair and based upon objective criteria and job-relatedness. In the event that employees do not understand portions of

their performance requirements, it is the employees' responsibility to bring those specific areas to the attention of their supervisors.

**Article 31-Grievance Procedure.**

**Section d.**

Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of the alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the dated the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for longer filing period, then the statutory period would control.

**Section e.** If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

**Section f.**

Formal grievances must be filed on Bureau of Prisons " Formal Grievance" forms and must be signed by the grievant or the union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

**1.** When filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over . . .

**IV. BACKGROUND**

In regard to the arbitrability of the grievance, Dawn Hellickson, Human Resource Manager, testified that only the first paragraph of Block 6 was timely filed. The first paragraph of Block 6 refers to the Grievant's April 26, 2010 fourth quarter and yearly evaluations. Hellickson considered only this paragraph to be timely because the event fell within the 40-day

contractual filing period.

Human Resource Manager Hellickson further testified that the grievance should have been filed at the institutional level with the Associate Warden, or Warden. According to Hellickson both the Associate Warden and the Warden had disciplinary authority over the Grievant and her supervisors as required by the parties' grievance procedure.

Finally, Human Resource Manager Hellickson stated that the grievance did not make it clear how the Agency violated 5 USC 7106 or Master Agreement Articles 6, 14, 16 or 17. According to Hellickson, the Union did not definitively explain how the Agency violated the cited the Master Agreement or the Federal Statute. However, Hellickson believed that the Grievant was appealing the two satisfactory ratings on her fourth quarter log entries for 2010 which she thought should be rated higher. However, Hellickson pointed out that the Grievant did receive an Exceeds rating for her overall yearly performance evaluation in 2010.

Human Resource Manager Hellickson identified a formal grievance filed on February 9, 2010, ( Agency Exhibit 4) in which the Grievant had grieved her January 7, 2010 third quarter evaluation. This grievance specifically addressed an incident that occurred on December 29, 2009 resulting in a performance log entry. According to Hellickson, after the Agency answered the grievance, it was never pursued to arbitration by the Union.

Dwight Porter, Union President of Local 3947 and correction officer, filed the grievance in this case. Porter recalled that the Grievant had reported an incident of alleged supervisor misconduct that allegedly occurred on December 29, 2009. Porter subsequently attempted to informally resolve the issue with the Grievant's Department Head, Labor Management Relations Chair/Assistant Warden, and then the Warden of the institution. When Porter did not receive a

promised response from the Assistant Warden, he went to the Warden. As requested by the Warden, Porter subsequently sent him a packet on information. The packet contained allegations of supervisor misconduct and retaliation by a supervisor. According to Porter, the Warden did not subsequently address the supervisor misconduct issue with him, but he did address the evaluations. Because the Warden did not address the supervisor misconduct issue, Porter decided to file the present grievance at the Regional level, and report the alleged supervisor misconduct to Internal Affairs.

Marian O'Donnell, became a Supervisor in 2009 and supervised the Grievant. O'Donnell evaluated and rated the Grievant for four quarters from April 2009 through March of 2010. On February 4, 2010, Supervisor O'Donnell entered a log entry under Performs Technical Procedures and rated the Grievant as minimally satisfactory. O'Donnell based this rating on the Grievant's failure to timely return emergency suction equipment checked out from central supply. The Grievant contended that she passed the unreturned equipment to the next shift, and it was common practice to sometimes not get the equipment returned immediately if the floor is busy.

Supervisor O'Donnell also gave the Grievant no rating under the category of Communication for her third quarter evaluation. The Grievant contended that after she temporarily assumed responsibility for an inmate assigned to another nurse, O'Donnell purposely tried to start an argument between her and the other nurse. Based upon this one rating, the Grievant believed that she could not be rated Outstanding for the year. The Grievant agreed that the Warden had investigated the incident almost one year later.

Amy Ford, registered nurse, explained that on December 29, 2009, the Grievant agreed to watch her primary patient while she finished passing out medication. After the Grievant brought the patient to the area by the nurses' station, Supervisor O'Donnell told Ford that Grievant was complaining about watching her patient. According to Ford, O'Donnell then instructed her to go take over her patient while she observed the Grievant's reaction should she become mad.

Supervisor O'Donnell testified on December 29, 2009, that she did instruct RN Ford to go relieve the Grievant who was watching her patient. According to O'Donnell, only after Ford indicated that the Grievant may be upset, did she say she would watch down the hall to make sure there was no problem. O'Donnell received no discipline for the incident and the supervisor misconduct complaint was not sustained. O'Donnell did give the Grievant a satisfactory rating for the fourth quarter in "Communications" because the Grievant had raised her voice when in a private meeting between the two on December 29, 2009, regarding this incident.

Supervisor O'Donnell did not realize until May 26, 2010, that the February 4, 2010-memo she had written to the Grievant's file regarding her failure to return the emergency suction equipment was missing. O'Donnell first realized that the memo was missing when she was asked by the Agency to produce a copy of the Grievant's fourth quarter and yearly evaluations. O'Donnell was able to obtain a copy of the missing memo from Employee Services and placed it back in the Grievant's file.

Supervisor O'Donnell agreed that after she became a Supervisor, as the Union Steward, the Grievant had reported many employee complaints to Labor Management Relations regarding changes on the floor. O'Donnell also agreed that the floor schedule would sometimes have to be adjusted to accommodate the Grievant's Union schedule. Lastly, O'Donnell agreed that the

Grievant was credited with performing life saving technical procedures on her April 26, 2010 performance evaluation under the category of Performs Technical Procedures.

## V. ARGUMENTS OF THE PARTIES

### Union

#### Timeliness, Specificity and Improper Filing of the Grievance

The grievance was filed because of a pattern of events that had taken place since the Grievant started working with the National Negotiation Team and became active as a shop steward. The Union was trying to informally attempt a resolution with the Acting Warden and Warden regarding union animus and staff misconduct related to the Grievant's evaluations being lowered by her current supervisor. The Union had to provide the Warden with the opportunity to respond before filing a grievance. When the Union President realized that the Warden had not questioned any staff member regarding the issue of supervisor misconduct, he reported it to the Office of Internal Affairs and filed a grievance. Cases cited.

The Agency, more than likely understood the nature of the grievance. *How Arbitration Works*, Elkouri and Elkouri, pages 297-298. In its response on June 25, 2010, the Agency declined to respond to the merits of the grievance stating the issue was rejected, which indicates it understood the issue. The Grievant had pointed out clearly and precisely what was being claimed. The parties' Master Agreement contains no specificity requirement. The grievance form only states in Box 6 to "be specific", yet no further guidance or instructions are provided. The Arbitrator does not have the authority to impose a specificity requirement on the parties. Cases cited.



The Agency contends that the grievance should have been filed the Warden instead of the Regional Director. In the case of the third quarter evaluation, the Union did file a grievance with the Warden which was denied in March of 2010. The present grievance is not about an improper evaluation or log entry, but rather about all of the transpired activities of staff harassment for Union activities and staff misconduct. The Union President filed the grievance with the Regional Director only after he discovered that the Warden failed to take appropriate action.

#### Merits

The Grievant is an outstanding employee who had continually received outstanding evaluations prior to being placed under the supervision of Supervisor O'Donnell. In 2008, the Grievant became active with the Union, which took time away from the facility on the nursing floor. On two occasions the Grievant reported misconduct to the Office of Inspector General and to PHS Medical Liaison Head in the Central office, which triggered investigations from outside Departments.

On December 29, 2009, Supervisor O'Donnell pitted the two bargaining unit members against each other. On the same day, O'Donnell placed a negative log entry into the performance log of the Grievant and was used to lower her yearly evaluation. Supervisor O'Donnell further placed a memo in the Grievant's file on May 26, 2010 regarding a counseling that supposedly took place on February 4, 2010 regarding her failure to return emergency suction equipment on January 20, 2010. The Grievant was not aware of this memo which was used to lower her fourth quarter performance evaluation. Cases cited.

Based upon the testimony of the witnesses and the facts, there is no doubt that the

Grievant was being treated differently because of her Union activities. Since the grievance was filed, Supervisor O'Donnell has been removed from her supervisory duties, the PIP letter was removed from the Grievant's file, and the Grievant's evaluations are back to Outstanding. As the result of the lowered evaluations, the Grievant was not considered for a SSP Award as other outstanding employees were for the year.

**Agency**

**Timeliness, Specificity and Improper Filing of the Grievance**

The majority of the events in the grievance are untimely filed and should be procedurally rejected. The grievance denotes events which occurred in July of 2008, August 2008, July 2009, January 2010, March 2010 and April 2010. The last cited incident occurred on April 26, 2010 for which the forty (40) calendar days would end on June 5, 2010. Since the grievance was filed on June 4, 2010, only the last event is timely.

This is not a continuing violation grievance. The events are too far apart and not recurring types of action. At the hearing, the Union focused on the only timely filed event, the fourth quarter evaluation, not the events cited in the grievance. The Union filed a similar grievance on February 9, 2010, but then did not pursue it to arbitration. Therefore, only events which occurred after February 9, 2010 should be the subject of the current grievance.

The Warden is the Chief Executive Officer who has disciplinary authority and the authority over her supervisors. Therefore, the grievance should have been filed at the institutional level. The Union cannot justify its attempt to give the complaints to the Warden and then file at the Regional level if it did not get the sought relief. The Union must first attempt to settle the grievance at the lowest level which would be the Associate Warden over

Medical. The grievance does not indicate this was done.

### Merits

The Union failed to prove that the Agency ratings given to the Grievant in her April 2010 performance entries were lowered due to her union activities. The Grievant suffered no harm.

The Grievant has been in the Union since 2001, a Union Steward since 2001, and was assigned to the National Negotiation Union team in October of 2009. In 2005, the Grievant's overall evaluation was Exceeds, in 2006 it was Exceeds, in 2007 it was Exceeds, in 2008 it was Outstanding, in 2009 it was Outstanding and in 2010 it was Exceeds. On April 26, 2010, the Grievant received all Satisfactory and above ratings.

The various issues raised by the Grievant concerning Supervisors Peterson and Vanderheiden were trivial, and not retaliation. The Grievant thinks she can do what she wants and when appropriately challenged, she hides behind the fact that she is a union official.

## **VI. DISCUSSION AND DECISION**

### Timeliness, Specificity and Improper Filing of the Grievance

Block 5 of the Formal Grievance Form simply requires the Union to list the Directive, Executive Order, or Statute violated as required. Although the body of a grievance is generally written in a summary form, due to the complexity of the subject matter, the Union did provide specific details about the incidents which it believed supported the grievance under Block 6. How the specific details violated what cited Agreement Articles or federal

regulations commonly become more precise as the grievance develops during the grievance process as the parties' attempt to reach a resolution. Under Block 6, the Union states in the first sentence that the Grievant's fourth quarter evaluation has been affected by the continuing retaliations by supervisory staff. Moreover, the grievance lists the Grievant as "Sandy Parr, Steward." The grievance made it more than clear that the Union was grieving perceived retaliation by management toward the Grievant based upon her Union activities, thereby enabling an Agency response.

The Union gave a full and reasonable explanation why the grievance was filed at the Regional level. The grievance stemmed from the Union's continuing concern regarding Union animus and retaliation at the institutional level. Because the Union believed the violations were continuing with the Warden's tacit acquiescence, it understandably chose to bring the issue to the Regional level. The Regional level would presumably have disciplinary authority over the Warden.

Once the grievance was filed with the Regional level, the grievance could have simply been managerially referred to the Warden for a response, rather than outright rejected. If the Regional level had no authority over the grievance, then it would have been up to the Warden to state that it was untimely or lacked specificity, even though the Warden had previously responded to a similar grievance on March 10, 2010. The preamble in the Master Agreement states that the "parties recognize that the administration of an agreement depends on a good relationship . . . built on the ideals of mutual respect, trust and commitment to the mission and the employees who carry it out." Due to the seriousness of the alleged conduct and violations in this grievance, it was incumbent on the Region and the Agency, to take steps to

see that the matter was investigated and resolved if possible.

The grievance does have timeliness issues. The Union first filed a grievance on February 9, 2010, alleging that management was retaliating against the Grievant due to her Union activities based on an incident that occurred on December 29, 2009, and appeared in her January 7 third quarter evaluation. The Warden denied the grievance on March 10, 2010, and the Union did not pursue it any further. Consequently, when the Grievant received her fourth quarter and yearly evaluations on April 26, 2010, the issue of what occurred on December 29, 2009, and what was written in her third quarter evaluation, had been "resolved" by the parties and could no longer be used to establish a pattern of retaliation.

The Grievant's additional citing of events that occurred 40 days prior to her April evaluation are also untimely. Such incidents were not grieved at the time of the occurrence, and do not establish a recurring pattern of retaliation. The Grievant's status of a Union Steward or National Committee Member does not insulate her from following floor rules or procedures, excuse insubordinate behavior, or guarantee a certain performance rating. More important, the cited incidents were isolated and sporadic in nature and do not support a finding of continuing, concerted, retaliation based on Union animus. Consequently, the only timely issue left is whether the Grievant's fourth quarter performance evaluation, and yearly performance evaluation rating, resulted from retaliation by supervisors/managers in response to the Grievant's union activities.

#### Merits

The Union/Grievant understood that her third quarter evaluation would be factored into her overall yearly rating. Therefore, if the Union/Grievant believed the third quarter

rating was incorrect or based upon retaliation, the February 9 grievance needed to be pursued. Once the Union dropped this grievance and its allegations, the Agency was not precluded from factoring in the third quarter ratings.

The Grievant's fourth quarter satisfactory rating for #2 Performs Technical Procedure is not supported by the record. On one hand, the Grievant is credited with performing life "several" lifesaving procedures on patients, then rated down for failing to return emergency suction equipment to Central Supply on one occasion. Although the prompt return of equipment to Central Supply was generally required under Agency rules or procedures, the record fails to establish that the Agency enforced this rule consistently or that only employees were similarly treated when they failed to abide by this rule or procedure. To the contrary, it appears that the rule or procedure is loosely enforced based upon many intervening factors on the floor, and lax procedures for signing out and returning the equipment. Moreover, although the Grievant was talked to about the incident by her supervisor, she was not timely made aware that the incident was logged as a performance entry to be used in her quarterly evaluation.

The Agency further failed to establish why the Grievant was rated as Satisfactory in her fourth quarter evaluation for #5 Communicates. Other than the December 29, 2009 incident, Supervisor O'Donnell testified that the Grievant listened and accepted her directions. Supervisor O'Donnell had previously given the Grievant an "Unrated" under #5 Communicates on her third quarter evaluation based upon the December 29, 2009-incident. In the Grievant's fourth quarter evaluation, the language used in the #5 Communicates is exactly identical to the language used in past evaluations rated Outstanding or Exceeds for the

category. Consequently, the Agency failed to establish good cause for rating the Grievant Satisfactory in #5 Communicates in her fourth quarter evaluation.

It is clear that Supervisor O'Donnell's two Satisfactory ratings in the Grievant's fourth quarter evaluation were not fairly based on objective criteria and job-relatedness as required by Article 14 of the Master Agreement. There was no evidence produced of similar complaints filed by other employees under O'Donnell's supervision. The reasons provided for the Grievant's two Satisfactory ratings in her fourth quarter evaluation were pretextual and more likely than not a violation of Article 6, Section b. Supervisor O'Donnell was holding the Grievant to a higher and unfair performance standard in reprisal for her position and activities with the Union.

Based upon the foregoing discussion, the Arbitrator deems it appropriate to make the Grievant whole by requiring the Agency to re-rate the two categories of #2 Performs Technical Procedures and #5 Communicates in the Grievant's fourth quarter evaluation based upon the log entries, and adjust her overall yearly evaluation accordingly, and reconsider the Grievant's qualification for any Awards, if applicable. The re-rating shall not be done by any of the management members responsible for, or a party to, the Grievant's fourth quarter and yearly evaluation in April of 2010. The Arbitrator does not deem it necessary to grant the Union any of the other seven requested remedies.