IN THE MATTER OF ARBITRATION BETWEEN

American Federation of Government Employees, Council of Prison Locals, Local 1612 [Assignments for non-work related injuries with medical restrictions]

OPINION AND AWARD
FMCS Case #13-02265

And

United States Department of Justice, Federal Bureau of Prisons, US Medical Center for Federal Prisoners, Springfield, Missouri

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ARBITRATOR
Joseph L. Daly

APPEARANCES
On behalf of AFGE, Council of Prison Locals, Local 1612
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AFGE
Washington, DC

On behalf of United States Department of Justice, Federal Bureau of Prisons
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JURISDICTION

In accordance with the Master Agreement between Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees, March 9, 1998 – March 8, 2001; and under the jurisdiction of the United Federal Mediation and Conciliation Service, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on February 12 and 13, 2014, and on October 22, 2014, at the Medical Center for Federal Prisoners in Springfield, Missouri. Post-hearing briefs were filed by the Agency (Federal Bureau of Prisons) on April 16, 2015; and by AFGE, Local 1612 on May 2, 2015. The decision was rendered by the arbitrator on June 10, 2015.

ISSUES AT IMPASSE

AFGE states the issues as:

1. Whether the Agency's light duty denials, for off duty injuries, violated a binding past practice and/or the CBA's Article 3, and/or Article 4, and/or Article 6, and/or Article 18, and/or Article 38?
2. If so, what is the proper remedy? [Post-hearing brief of AFGE at 1].

The Agency states the issues as:

1. Is the grievance untimely? If not,
2. Did management violate the Master Agreement, Article 6, Section b.2., or Article 18, Section 1.1-3 when it denied some employees reassignment to the outside staff house due to medical restrictions imposed by their personal physician for off-duty, non-related work injuries?
3. If so, what is an appropriate remedy?

POTENTIALLY RELEVANT CONTRACT LANGUAGE

ARTICLE 3 – GOVERNING REGULATIONS

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

1. local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section d. All proposed national policy issuances, including policy manuals and program statements, will be provided to the Union. If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.

1. When national policy issuances are proposed, the Employer will ensure that the President, Council of Prison Locals, each member of the Executive Board of the Council of Prison Locals, and each local President receives a copy of the proposed policy issuance within thirty (30) calendar days that the proposed policy issuance is completed. This will be accomplished by the policy issuance being sent, by certified mail, to the appropriate Union official at the institution/location where the Union Official is employed;

2. after the last Council of Prison Locals Executive Board member receives the proposed policy issuance, the Union, at the national level, will have thirty (30) calendar days to invoke negotiations regarding the proposed policy issuance. The date on the signed "Returned Receipt" card will serve to verify the date that the last Council Executive Board member was notified;
3. should the Union invoke their right to negotiate the proposed policy issuance, absent an overriding exigency, the issuance and implementation of the policy will be postponed, pending the outcome of the negotiations;
4. should the Union, at the national level, fail to invoke the right to negotiate the proposed policy issuance within the time required above, the Agency may issue and implement the proposed policy issuance; and
5. when locally-proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

Section e. Negotiations under this section will take place within thirty (30) calendar of the date that negotiations are invoked. Negotiations will take place at a location that is mutually agreeable to the parties, and the Agency will pay all expenses related to the negotiations.

ARTICLE 4 – RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114 and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section b.
2. to be treated fairly and equitably in all aspects of personnel management;

ARTICLE 18 – HOURS OF WORK
Section l. The employer is committed to its responsibility regarding the health of all employees. Toward that end, the Employer may require that the health condition of employees requesting assignment changes for medical reasons be reviewed by the Chief Medical Officer. If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who

will fully consider this information before making reports to the supervisors with appropriate recommendations.

1. Employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duties. Such employees will continue to be considered for promotional opportunities for which they are otherwise qualified;
2. The Employer will continue to accommodate employees who suffer disability in accordance with applicable laws, rules, and regulations; and
3. Employees must report any planned or anticipated requests for leave due to medical or psychiatric hospitalization, treatment, or recuperation as early as possible so that necessary staffing adjustments may be planned.

ARTICLE 19 – ANNUAL LEAVE

Section g. Leave must not be denied for arbitrary or capricious reasons. Denial or cancellation of leave should be based on work-related reasons.

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. The first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and
2. The second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

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 an alleged grievable event more than forty (40) calendar days from the date 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 statues provide for a longer filing period, then the statutory period will control.

1. if the matter is informally resolved and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

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

ARTICLE 32 – ARBITRATION

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

POTENTIALLY RELEVANT STATUTES

Back Pay Act 5 U.S.C. §5596(b)(4): "The pay, allowances or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which unjustified or unwarranted personnel action is bound, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than six years before the filing of a timely appeal or, absent such filing, the date of the administrative determination."

POTENTIALLY APPLICABLE PROGRAM STATEMENT UNDER THE HUMAN RESOURCE MANAGEMENT MANUAL

Program Statement 3000.03, Human Resource Management Manual, Section 339.1 Physical Requirements for Institution Positions:

All positions located in correctional institutions are hazardous duty law enforcement officer positions, and require individuals to be physically able and

> medically qualified to perform correctional work safely and successfully... Current employees in law enforcement positions will not normally be subject to a further examination. However, employees must be able to perform the following physical activities: (1) walking for up to one hour; (2) standing for up to one hour; (3) seeing a human figure at a distance of one-fourth of a mile; (4) seeing a target at a distance of 250 yards; (5) hearing and detecting movement; (6) hearing commands and radio broadcasts; (7) ability to use various firearms, including pistols, rifles, and shotguns; (8) ability to perform self-defense movements; (9) running an extended distance; (10) dragging a body for an extended distance; (11) carrying a stretcher with one other person; (12) abilities to smell smoke and drugs; (13) climbing stairs; and (14) lifting objects weighing 25 pounds.

INTRODUCTION

On June 21, 2012, the union filed a grievance stating that it had recently discovered that the Agency was not honoring a decision in a previous arbitration matter [Soll Decision, see below] i.e. the Agency had failed to inform the union of their actions. The union stated in its grievance that the Agency has established a past practice in granting light duty assignments for non-work related illnesses or injury and that the Agency had not filed an exception to the rule. The union further stated in the grievance that it had never agreed to make the practice of light duty assignments exclusive to employees with work-related injuries only. Basically, the union contends that employees were not being treated fairly and equitably in all aspects of personnel management. As a remedy the union asks that all bargaining union staff who were denied accommodations, i.e. light duty assignments, during the six year period, in accordance with 5 U.S.C. §5596, be made whole. Essentially the union asks that the union be required to abide by *Local 501, Council of Prisons Locals, American Federation of Government Employees and United States Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Miami*, 112 LRP 52499, FMCS Case #03-12032 (Arbitrator Martin A. Soll, September 7, 2012). [Soll Decision].

On July 20, 2012 the Agency responded to the Union's grievance, contending that the Agency has, and always will, consider requests made for job modifications as a result of an injury. However, the institution must review any restrictions and consider the impact on the overall safety of the institution prior to approval for light duty. The grievance was denied because the employees who were injured off the job were not physically able or medically

qualified to perform correctional work safely and successfully during the time of recuperation from their injuries.

The Agency further contends that the union filed the grievance in an untimely manner. The Agency contends that the grievance filing date of June 21, 2012 is beyond the forty-day requirement under Master Agreement Article 31, Section d. The Agency contends that the Union had knowledge of an alleged grievable occurrence at least as of May 2011.

The Union alleges that Vice President of the Union, Karrie Wright, the person who filed the grievance, testified that she first became aware of a pattern and practice of denials in May or June 2012. Consequently, the union says the grievance of June 21, 2012 was filed with-in the forty-day requirement.

The thrust of the Union's argument is that the Agency made a unilateral decision to cancel light duty assignments in violation of a long standing past practice; and that the Agency failed to give notice to the Union of a change in working conditions. A previous Warden had "typically" granted light duty assignments for out of work injuries. The new warden stopped doing so. The Union argues that it is not asking the Agency to make decisions that jeopardize staff safety. Rather, "the [U]nion wants the [A]gency to follow already established past practice that those individuals who can work should work." [Post-hearing brief of Union at 12].

As an appropriate remedy, the Union asks that all the specific grievants who testified at the arbitration hearing be made whole with either leave restoration or payments equal to the amount of leave used or requested through the advanced sick leave program. The Union further asks for an order that all other employees whose light duty requests were denied during the six years prior to them filing of the grievance be made whole. The Union requests that the arbitrator retain jurisdiction in order to decide whether or not the Union is entitled to reasonable attorney's fees and expenses, if and when the Union decides to file an application for such.

The Agency asks that the arbitrator rule that the Union had knowledge of an alleged grievable occurrence more than 40 days prior to the filing of their grievance on June 21, 2012. As such, the Agency contends the negotiated grievance procedures bar this grievance from being arbitrable.

The Agency further contends that both statute and the Master Agreement give management the right to determine when, and if, an employee can be accommodated with their medical conditions/restrictions. The Agency's decision to deny employees the right to work a

shift outside the fence perimeter is a right given solely to management under the statute and the Master Agreement. The Agency argues there was no violation of Article 6, Section b.2, or Article 18, Section l.1-3, in this case and requests that the grievance be denied.

POSITION OF UNION

1. The Agency failed to provide reasonable light-duty assignments to employees who suffered off-duty injuries.

2. The Union requests that all the members of the grieving class – anyone who has requested, but was denied, light duty assignments for injuries sustained off-duty during the six years prior to the filing of the grievance and continuing to the present day – be made whole through the restoration of leave and, in the case of employees who no longer work for the agency, a payment of funds.

3. Martin C. Anderson worked as Warden of the US Medical Center for Prisoners in Springfield, Missouri from July 2007 to July 2011 when he retired. He testified that "typically" when an employee was injured or restricted by his physician he "usually put them outside the secure perimeter of the institution" to work; and tried to get them back as soon as possible. Former Warden Anderson testified he "worked as hard as I could to accommodate the injured person." He further testified that this was a "typically ad hoc process." He testified, for example, that Dr. Hare, a physician at the prison, got around inside the prison on a scooter, after he had a leg injury. Warden Anderson viewed temporary light duty assignments as a "win-win" in that the employer "gets something out of it" and the employee did not have to "burn all his/her sick leave."

4. When Warden Castillo replaced Warden Anderson in 2011 the practice ceased. Warden Castillo never notified the Union that he was changing the policy, thus violating the contractual obligation for notice.

The Union contends that by clear and uncontroverted evidence, light duty was granted by prior wardens to practically every employee who requested it for non-work related injuries. Karrie Wright, the Vice President of Local 1612 for ten years, testified that she was unaware of any employee who had a light-duty request denied prior to Warden Castillo's tenure. The union highlights that Warden Castillo was not called to testify by the agency; nor did he testify.

The Union argues that the light-duty assignments for off duty injuries was a long standing, mutually accepted past practice, not at variance or in conflict with any clear or explicit written terms and conditions of the collective bargaining agreement. The Union points to the Soll arbitration decision that clear and long standing past practices can establish conditions of employment as binding as any written provision of the collective bargaining agreement. The Union points out that as far back as 2004 Arbitrator Richard Horn held that the agency did have a past practice of granting light duty requests. As a consequence, the Union contends, the Agency was on notice as early as 2004 that its policies regarding light duty applications were unclear, yet arguably made no attempt to remediate the problem.

In 2013 when Warden Sanders took over from Warden Castillo, she established a "Worker Accommodations Committee" to permit all stakeholders to have a seat at the table when decisions are made on whether to grant or deny light duty requests.

The Union contends it is clear that the practice of granting light duty to those who were injured off work has been long standing.

The Union contends that the practice was mutual. The evidence is overwhelming that all management and bargaining employees were well aware that light duty was offered to those suffering off-duty related injuries. Several employees testified that even management officials believed that light-duty opportunities were still being offered.

Several witnesses, including Warden Anderson, testified that an employee with some kind of limitation could still respond to emergencies. The Agency's assertions that all employees must be operating at 100% are simply belied by the testimony offered by Warden Anderson. 100% standard is a very subjective standard and is not explained in any policy in any kind of detail, most noticeably the "Position Descriptions" themselves. For example, Dr. Hare was allowed inside the secure perimeter of the institution on a scooter. Karrie Wright confirmed that, at one point, she was allowed to work in the institution with a "cam boot" despite admitting that she could not run as fast in a "cam boot" as she could in regular shoes. Warden Anderson testified that an employee in a "cam boot" could still respond to an emergency. The Union contends that in granting the request of Dr. Hare, Ms. Wright, and many others, the Agency admits that impaired employees can still function within the walls of the institution. Consequently, the Agency's latter day concerns about responding to emergencies should be given little credence by the arbitrator.

The Union is very interested in safety and security issues. The Union represents Correctional Officers who put their lives on the line every day to ensure that the rest of the citizenry can live their lives in a safe environment. While it is true that Karrie Wright wrote "although the union and agency agree this practice compromises the safety and security of the institution," she explained at the arbitration hearing that this sentence was "in-artfully phrased." What she testified to at the arbitration hearing is that safety is a subjective concept. Warden Anderson, who no doubt cares about the safety of the institution, apparently thought it was acceptable and within the job descriptions and Policies to place Dr. Hare and his scooter within the secure perimeter; it appears that Warden Castillo would likely disagree with Warden Anderson. Warden Anderson testified that even if an employee is on crutches, it would not be an automatic disqualification from work in or outside the fence perimeter.

Regardless of which Warden is correct, one thing is clear: safety is in the eyes of the beholder. The Union is not asking the Agency to make decisions that jeopardize the safety of its staff. Rather, the Union wants the Agency to follow already established past practice that those individuals who can work should work.

Several witnesses, including Warden Anderson, testified that an employee with some kind of limitation could still respond to emergencies. The Agency's assertions that all employees must be operating at 100% is very subjective and is not explained in any policy in any kind of detail, most notably the "Position Descriptions" themselves. Ms. Wright while in a cam boot, despite admitting that she could not run as fast in those as she could in regular shoes, was allowed to work in the institution. Warden Anderson admitted that an employee in a cam boot could respond to an emergency. Apparently, Warden Castillo would not permit any employee who had an impairment, caused by off duty injury, to function within the walls of the institution. But these concerns about responding to emergencies should be given little weight by the arbitrator. 100% is subjective. The Union is vitally interested in safety and security issues. The Union represents correctional officers who put their lives on the line every day to ensure that the rest of the citizenry can live their lives in a safe environment. Ms. Wright's point is that safety is a subjective concept.

It is not necessary for the arbitrator to engage in statutory interpretations. The Union is asking that this case be resolved by a finding that the Agency violated a contractual bargaining

obligation, not a statutory bargaining obligation. The Agency's constant references to federal statutes is a "red herring." There are many parts of the contract the arbitrator can rely upon:

A. The contract requires that local Union President be notified of locally proposed policy issues. Article 3, Sections d and e;
B. The contract requires that the Agency have "responsibility for informing the union of changes in working conditions at the local level." Article 4, Section a;
C. The contract requires that the Agency provide expeditious notification of changes to the implemented and working conditions at the local level. Such changes will be negotiated in accordance with the provision of this agreement. Article 4, Section c;
D. The contract requires that employees be treated fairly and equitably in all respects of personnel management. Article 6, Section b.2;
E. The contract states that employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignments to other duties. Article 18, Section 1.1;
F. The contract states that the employer will continue to accommodate employees who suffer a disability in accordance with the applicable laws, rules and regulations. Article 18, Section 1.3.

5. The Agency's purported threshold argument, that the only relevant time period is 40 days prior to the filing of the grievance, must be rejected. While it is true that Article 31, Section d states that "grievances must be filed in 40 days of the date of the alleged grievable occurrence", Article 31 continues, "if a party becomes aware of an alleged grievable offence more than 40 days after its occurrence, the grievance must be filed within 40 calendar days from the date the party filing the grievance can reasonably be expected to have become aware the occurrence."

While the Agency may bring up an arbitrability issue at the arbitration hearing, it is important to note that most arbitrators will cast a wary eye on such arguments that are brought up at the eleventh hour. The Agency's July 20, 2012 grievance response contains no such procedural/arbitrability objections to the time limits set out in the grievance. In contrast the Soll decision did include a rejection based on a procedural issue. It is clear that the Agency understands procedural threshold issues. It is difficult to understand why the Agency did not

raise a threshold issue in the grievance response, opting to wait until the first day of the arbitration hearing to raise it.

In this case, Warden Anderson ended his tenure at the institution and retired in July 2011. At some time in the midst of Warden Castillo's tenure, the Union became aware that the Agency was routinely denying light-duty requests for employees who suffered non-work related injuries. During the arbitration hearing, Union Vice President Karrie Wright, the person who filed the grievance, alleged that she first became aware of the pattern of denials in May or June of 2012. Ms. Wright filed a grievance on June 21, 2012, within the 40-day requirement.

6. Regardless whether a light-duty request denial was issued more than 40 days prior to the filing of the grievance, the Union should still be allowed to proceed in this instant arbitration to request back pay/leave restoration for its members. The denials were part of a pattern and practice initiated unilaterally by Warden Castillo without notice to the union. It is reasonable that the Union would not become aware of the size and scope of the problem within 40 days prior to the filing of the grievance. Several employees had to be denied before the Union became aware that it was a systemic problem. Although the Union officials may have been aware that problems were brewing more than 40 days prior to the filing of the grievance, it took them awhile to learn that the problem was systemic and continuing in nature. When a grievance involves one employee, such as a termination, it is generally easier to ascertain when the Union became aware of the alleged grievable action. However, a grievance involving multiple employees is often more complicated and difficult to pinpoint an exact date on which the Union became aware of the alleged grievable actions. Such is the scenario in this case. It is important to note that Agency brought up a similar threshold argument during the Soll arbitration, an argument that was rejected by Arbitrator Soll. Arbitrator Soll noted "the allegations put forth by the union constituted a continuing violation and that violation of this kind are often filed beyond the applicable CBA's negotiated time limits." As a remedy back pay liability should stretch back six years, and continue to the present day, rather than the abbreviated time periods embraced by the Agency and/or Arbitrator Soll.

7. As remedies the Union requests that the arbitrator find a past practice by the Agency of granting light-duty opportunities to those employees injured off-duty. The Union believes that back pay liability stretches back six years prior to the filing of the grievance. Further, an appropriate remedy for all of the specific grievants, who testified at the hearing, be made whole

with either leave restoration or payments equal to the amount of leave used or requested through the advanced sick leave program. The Union further asks for an order that all other employees whose light duty requests were denied during the six years prior to the filing of the grievances be made whole. Additionally, the Union also requests that the Agency shall commence allowing or approving bargaining unit employees light-duty requests at the institution in the same manner, procedures and terms and conditions as did Warden Anderson during the time frame he served as the Chief Executive Officer of the medical center. Further, in accordance with the Back Pay Act 5 USC Sec. 5590(b)(4), as amended in 1998, interest be awarded on all back pay awards. This is nondiscretionary and is required according to statute along with the arbitrator's award. Finally, the Union asks that the arbitrator retain jurisdiction for remedial and enforcement purposes. The Union asks that it be given an opportunity to request more records from the agency so that more exact figures can be determined in the event the grievance is sustained. This will enable the parties to come to a settlement regarding the exact amount of back pay/leave owed to each affected employee. The Union asks that the arbitrator retain jurisdiction in his award so as to decide the issue of attorneys' fees and expenses if, and when, the union files an application for such.

POSITION OF AGENCY

1. Timeliness is a vital issue. Article 31, Section d specifically requires a party to file a grievance within 40 calendar days of the alleged violation. In addition, Article 31, Section e allows any party to raise a timeliness threshold issue and this provision does not include any deadline or waiver in the timeframe to raise the issue. In their written grievance, the Union listed May 10, 2004, as the violation date. Yet, they did not file their grievance until June 21, 2012. Further, Mark Travue, the Union steward, testified that he represented Jeff Daniels on the issue of this grievance with the Warden in April 2012 and again on May 11, 2012. TX 149-150. Mr. Travue also testified he represented two other employees with the same issue approximately one year before Mr. Daniels. TX 154:3-5. This shows the Union had knowledge of an alleged grievable occurrence at least as of May 2011. Therefore, the negotiated time limit of 40 days began at the very latest on May 31, 2011. The expiration date for the 40-day time test period would have been July 10, 2011, but this grievance was not filed until June 21, 2012 – 348 days beyond the time limit for the filing of a grievance. The technical requirements for filing a

grievance were negotiated by the Union and the Agency. The clear meaning of the language should be enforced even though the results might be harsh or contrary to the original expectations of one of the parties. It is very clear that the Union had knowledge of any perceived violation many years ago, the grievance was untimely filed and is not arbitrable.

2. With regard to the merits of the grievance, the burden is upon the union to prove the violations. In the instant case, all the grievances pertain to employees who have off-duty, non-work related medical conditions or injuries. The case does not pertain to those employees who received on the job work-related medical conditions or injuries for which they are covered by Worker's Compensation laws and regulations, as well as Agency policies.

Additionally, the availability and use of sick leave, advanced sick leave, annual leave, advanced annual leave, or leave without pay are all forms of accommodation. *See* 29 CFR §1630.2(o), Reasonable accommodations.

3. Management's right to fill a certain post/assignment or leave a certain post/assignment vacant is granted to management under 5 USC §7106, which has been incorporated in the Master Agreement in Article 5. Under the law, management has the right to determine its budget; number of employees; internal security practices; to hire, to assign; to direct; to assign work; and, to determine the personnel by which agency operations shall be conducted. The Union is attempting to tie management's hands by requiring the Agency to place all employees who have medical restrictions, which cannot be accommodated in house, to be placed outside the secure fenced perimeter. For example, outside the fence is the "Staff House." It is on prison property and is owned by the prison. Some inmates are present and perform work on the prison property outside the fence, as well as in and around the "Staff House." Management must make daily decisions to ensure the best possible security and safety to the public, the employees, and the inmates. The Master Agreement places a duty upon management to reduce the inherent hazards of a correctional environment to the lowest possible level. Master Agreement, Article 27, Section a.

Even Union Vice President Karrie Wright agreed in her testimony that placing all employees at the "Staff House" without regard to their specific restrictions negatively affects the security of the institution. The Union's written grievance itself specifically states: "Although the [U]nion and the [A]gency agree this practice compromises the safety and security of the institution..."

4. The parties' Master Agreement does not mention the term "light-duty." Rather the controlling language is found in Article 18, Section 1.1, which states: "Employees suffering from health conditions or recuperating from illnesses or injuries and temporarily unable to perform assigned duties, may voluntarily submit written request to their supervisors for temporary assignments to other duties." An employee's written request envisions a supervisory approval or disapproval. Otherwise, the language would have read that employees "will be placed in a temporary assignment to other duties." There is no such language directing management to place individuals in a temporary assignment. Management retains its right to assign or not to assign under Article 5 and 5 USC §7106.

5. Former Warden Martin Anderson testified that although he was a bit more liberal, every Warden has management rights to his/her own analysis in attempting to accommodate employees with non-work related medical issues. He acknowledged that every situation has to be judged on a case-by-case basis. The Agency produced evidence that showed that all employees who work at the prison must meet established physical requirements. *See* Agency Exhibit #7, Physical requirements for institutional positions. These physical requirements are considered essential functions of the position. Consideration for accommodations based on medical restrictions must be based on a case-by-case basis and cannot be incorporated into a one-fits-all standard. There can be restrictions placed by an employee's personal physician which would not allow for an accommodation. For example, if a physician states that the employee may "not have inmate contact", then the only accommodation that the Agency could provide the employee would be sick leave, annual leave, etc. Placing the employee at the "Staff House" would not be a viable accommodation as the undisputed evidence shows that inmates can be anywhere on the prison property. The Union did not show any provision in the Master Agreement that states that employees must be placed in an assignment, or modified assignment, if a medical condition or restriction cannot be accommodated. The burden of proof is upon the Union and not management. The Union does not meet its burden with scant or no medical documentation and mere assertions from employees. Full and complete medical records may provide more information in regards to actual restrictions, implied restrictions or other relevant information from competent medical authority – not solely the employee's assertions. Furthermore, for many of these medical documents, there is no indication that the physician had knowledge of the physical requirements for the employee's position.

6. The Union's reliance on past practice is faulty. For a past practice to exist, there must be an established pattern that is: 1) clear and consistent; 2) long standing; 3) known and accepted by both parties; and 4) consistent with law, regulations, and the contract. Two people with the same medical can have different medical restrictions. Former Warden Martin Anderson testified that his approach was "ad hoc". This shows that any past practice argument fails since there were no consistencies in the practice.

7. Arbitrators should not substitute their judgment over management's decisions, unless it can be shown that management abused its authority. The work environment of a correctional facility is very different from most places of employment. The US Supreme Court has noted this fact by stating that there are many different security concerns than in other work environments. Therefore, prison administrators are entitled to more deference on the issue of internal security. *See Bell v. Wolfich, 141 US 520, 547 (1979).*

8. Restricting the Agency's right to staff its correctional facility without considering an employee's medical restrictions would limit the Agency's authority to determine its ability to maintain the security of its facility. Authority has long held that the right to determine internal security practices includes the right to determine the policies and practices that are part of an Agency's plan to secure or safeguard its personnel, physical property or operations against internal and external risks.

9. In summary, the evidence established that the Union had knowledge of an alleged grievable occurrence more than 40 days prior to the filing of the grievance. The statute and the Master Agreement give management the right to determine when, and if, an employee can be accommodated with his/her specific medical condition/restrictions. The Agency's decision is a right given to management under the statute and the Master Agreement. The Union failed to meet its burden of proof in this case. There is no violation of Article 6, Section b.2, or Article 18, Section l.1-3. The grievance should be denied.

DECISION AND RATIONALE

a. Arbitrability – 40-day requirement to file grievance

Article 31, Section d of the Collective Bargaining Agreement requires that "grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."

Article 31, Section e states: "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue."

The Agency contends that the union filed the grievance in an untimely manner. The Union filed the grievance on June 21, 2012. The Agency points out that the written grievance itself listed May 10, 2004, as the violation date. The agency further contends that Union Steward Mark Trabue testified that he represented one of the grievants on the issue before the Warden in April 2012 and again on May 11, 2012. Further, Mr. Trabue testified that he represented two other parties with the same issue approximately May of 2011. Thus, the Agency contends that the negotiated time limit of 40 days began at the very latest on May 31, 2011. Therefore, the expiration date for the 40-day time limit would have been July 10, 2011. Yet this grievance was not filed until June 21, 2012, 348 days beyond the time limit for filing of the grievance. The Agency argues that this technical requirement for filing a grievance has been negotiated by the Union and the Agency. The clear meaning of the language of the Collective Bargaining Agreement should be enforced even though the results might be harsh or contrary to original expectations of one of the parties. It is clear, says the Agency, that the Union had knowledge of any perceived violation many years ago. Therefore the grievance was untimely filed and consequently is not arbitrable.

The Union counters this argument by highlighting language in Article 31 which states "If a party becomes aware of an alleged grievable offence more than 40 days after its occurrence, the grievance must be filed within 40 calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence." The Union contends that when Warden Anderson ended his tenure at the institution and retired in July 2011, it was not immediately aware that Warden Castillo was routinely denying light-duty requests for employees who suffered non-work related injuries. Union Vice President Karrie Wright filed the grievance only when she first became aware of the pattern and practice of denials in May or June 2012. She filed a grievance on June 21, 2012, within the 40-day requirement. The Union did not become aware of the pattern and practice or the size and scope of the problem within 40 days prior to filing the grievance. While several employees had been denied light-duty assignments, the Union did not become aware that it was a systematic problem until May or June of 2012. This grievance involves multiple employees, consequently making it more complicated and

difficult to pinpoint an exact date on which the Union became aware of the grievable actions. In fact, it was the continuing violation by Warden Castillo and the Agency.

The Union's arguments are correct. The Solle Decision noted that similar allegations put forth by the union "constituted a continuing violation and that violation of this kind are often filed beyond the applicable CBA's negotiated time limits." This is exactly what happened in the instant case. Ms. Wright did not understand the systematic nature of the alleged violations until May or June of 2012. The filing date of June 21, 2012, is well within the 40-day Collective Bargaining Agreement limitations. Further, the continuing violation permits a look back over the six-year limitation under the "Back Pay Liability Act".

b) Accommodation of off-duty injured/ill employees

Article 18 of the Collective Bargaining Agreement states "employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duty." Article 18 also states "If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who will consider this information before making reports to the supervisors with appropriate recommendations."

Warden Anderson testified, "Those individuals who can work should work." Warden Anderson during his term "typically" tried to accommodate people who were injured both on and off duty so that they could still work. One of the things he did was permit light-duty at the "Staff House" an office outside the fence perimeter. He also accommodated by having the injured person working in the guard tower.

It is clear that Warden Anderson read the Collective Bargaining Agreement, specifically Article 18, to try to accommodate injured employees, even those injured off duty, "for temporary assignment to other duties." [Article 18]

When Warden Castillo replaced Warden Anderson upon Warden Anderson's retirement in 2011, apparently Warden Castillo, who was not called by the Agency nor testified at the arbitration hearing, determined that bargaining unit members who were injured off-duty could not fulfill the physical requirements laid out under Program Statement 3000.03, Human Resource Management Manual, Section 339.1 Physical Requirements for Institutional Positions. Initially, unknown to the union, he began systematically denying bargaining unit members who were injured/ill off-duty and faced medical restrictions temporary light duty assignments, even

possibly within their medical restrictions. Since Warden Castillo was not called by the Agency nor did he testify at the arbitration hearing, the arbitrator assumes that Warden Castillo viewed such employees as not capable of fulfilling the physical activities laid out in Program Statement 3000.03, Human Resource Management Manual, Section 339.1 Physical Requirements for Institutional Positions. This arbitrator can only assume that when Warden Castillo analyzed the requests of each individual employee and the medical restrictions placed on each individual employee he automatically concluded that off-duty injuries/illness could never be accommodated by assignment to light-duty. As a consequence the employees were required to take vacation, sick leave or other leave in order to accommodate their specific injuries/conditions with their specific medical restrictions.

c. Past Practice

The union contends that the Agency made a unilateral decision to cancel light-duty assignments in violation of a long-standing past practice; and the Agency failed to give notice to the Union of a change in working conditions. The Union contends the long standing past practice of "typically" granting light-duty assignments is as binding as any written provision of the Collective Bargaining Agreement. The Union argues that the practice of granting light-duty to those who are injured off work has become a term of the Collective Bargaining Agreement. "In the absence of a written agreement, 'past practice', to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Elkouri and Elkouri, **How Arbitration Works Sixth Edition** 608 (Bureau of National Affairs 2003) (citing *Celanese Corp. of America*, 24 Labor Arbitration Awards 168, 172 (Arbitrator Justin 1954) (Other citations omitted). The Agency contends that even though Warden Anderson had a longstanding, consistent and known approach to granting light duty to bargaining unit members who were injured off-duty, nevertheless this is not established past practice because Warden Anderson approached this on an "ad hoc" basis. The Agency contends the past practice argument must fail because there were no consistencies and can be no consistencies on an "ad hoc" basis.

The Union through testimony and proof at the arbitration hearing has established by a fair preponderance of the evidence that a clear and consistent, long standing, known and accepted

practice consistent with law, regulations and the contract was established to "typically" provide light-duty for those injured outside of work, consistent with the medical restrictions.

d. Does an injury outside of work with medical restrictions prevent a bargaining unit member from being in compliance with Program Statement 3000.03, Human Resource Management Manual, Section 339.1 Physical Requirements for Institution Positions?

Union Vice President Karrie Wright testified that she had a "cam boot" due to a foot injury. Did that automatically prevent her from fulfilling the physical requirements of the job? Her testimony was "no". Warden Anderson allowed Ms. Wright light-duty and allowed her to continue working within the perimeter. She testified she could respond to emergencies. Although she was not able to respond at "100%", neither can a 50-year-old person respond 100% of what they once could do when they were 21. She could do the job. Warden Anderson agreed.

Testimony also showed that Dr. Hare, the physician at the prison, got around inside the prison on a scooter after he had a leg injury. Obviously he could not respond 100%. But that is not the question. The question for an accommodation of an off-duty injured employee is can the employee do the job with the medical restrictions. The medical restrictions are the key component. Warden Anderson was correct that each case must be looked at on an ad hoc basis. Warden Castillo was incorrect by seemingly automatically saying no to light-duty assignments for those injured outside the work environment. The Agency violated: a) Article 18, section 1.1; b) Article 3, sections d and e; and c) Article 4, sections a and c, and past practice established during the time of Warden Anderson when Warden Castillo seemingly automatically excluded assignment to light-duty for those injured off-duty who had medical restrictions.

e. Remedies

The Union requests that all members of the grieving class, that is anyone who has requested, but was denied, light-duty assignments for injuries sustained off- duty during the six years prior to the filing of the grievance and continuing to the present day be made whole through the restoration of leave; and, in the case of employees who no longer work for the agency, a payment of funds. The problem with this remedy is each case must be judged on a case-by-case basis. It may be that a particular employee during the time period requested by the Union was on a medical restriction, which would not allow any accommodation to work at the Prison. For example, an employee who faces a medical restriction that he/she must avoid

inmates and employees of the institution may not be able to be accommodated for any light-duty even though that employee is healthy enough to work in the "Staff House". It may be necessary for that employee to take vacation, sick leave or another type of leave.

It is held that each individual employee must be reevaluated per Article 18 of the Collective Bargaining Agreement and this Arbitration decision to determine the specific medical restrictions and specific abilities with the injuries/condition before determination can be made whether a light-duty assignment was possible.

During the instant Arbitration a number of employees testified they were denied light-duty under the era of Warden Castillo. The arbitrator is being asked to design a remedy based mainly on the testimony of each bargaining unit member who testified at the arbitration hearing. While medical notes were provided as evidence, there was no testimony as to what light-duty was available at the time of the medical restriction and if the individual employee could do the work. The testimony and the medical notes do not provide sufficient proof by a preponderance of the evidence to permit the remedy requested by the union. Upon review of these criteria: 1) the medical documentation; 2) the specific light duty assignments available at the time of the individual request; 3) the testimony/affidavits/documentation of the doctor/medical person and the individuals affected; and 4) the ability of the medically restricted employee to fulfill the requirements of Program Statement 3000.03, Human Resource Management Manual, Section 339.1 Physical Requirement for Institution Positions it should then be possible to determine a remedy for each person. It has been said that "where there is a wrong, there is a remedy". In this case, the Agency violated a number of specific provisions of the contract and a past practice, now implied in the contract. Each affected employee should have an opportunity to present the above data required to allow the Agency, possibly the arbitrator, to make a determination as to how and if that person should be made whole.

Consequently, this arbitrator will retain jurisdiction until June 10, 2016, to allow the Union and the Agency to negotiate a specific remedy for each affected employee whose contract rights were possibly violated. Should the Agency and Union not be able to settle the matter for each affected employee, the arbitrator will make a ruling regarding each employee with the data, including affidavits and all proof of each employee provided by the Union and the Agency. Further, should the union decide to seek interest and attorneys fees, the arbitrator will retain jurisdiction to determine those matters.

It is held that the Agency violated Article 3, sections d and e; Article 4, sections a and c, and Article 18, section l.1 and past practice of the Collective Bargaining Agreement. This decision is based on the Collective Bargaining Agreement. The remedy shall consist of the Agency and the Union addressing each and every affected employee's situation for six years prior to the filing of the grievance on June 21, 2012, through the present to determine the method of making each employee whole using the above criteria. Should the Agency and the Union not be able to come to agreement, the arbitrator will retain jurisdiction and make determinations for each employee based on the above criteria. The arbitrator shall also retain jurisdiction should the Union seek interest, attorney's fees and expenses. Jurisdiction will be retained until June 10, 2016.

It is hoped that the Agency and the Union can come to resolution of the individual claims under the guidance of this Arbitration decision. The key purposes of Arbitration are quick, efficient, economical and fair resolution of disputes. This case is already several years old. If the dispute cannot be resolved then this arbitrator will decide each individual claim based on the above criteria. In order to avoid further expense and time, the parties are encouraged to negotiate settlement of each individual claim under the findings, holdings and directives of this Arbitration decision.

June 10, 2015
Date

Joseph L. Daly
Arbitrator