Before
LISA SALKOVITZ KOHN
Impartial Arbitrator

In the Matter of the Arbitration between	)
American Federation of Government Employees	)
Local 720, Council of Prison Locals (C-33)	)
Union,	)
	) **FMCS Case No. 16-52016**
and	)
	) **Issue: Sick Leave Letter**
U.S. Department of Justice	)
Federal Bureau of Prisons	) **Grievant: Tracy Heiser**
Federal Correctional Complex	)
Terre Haute, Indiana,	)
Employer.	)

DATE OF HEARING:	June 16, 2016
HEARING CLOSED:	August 21, 2016
APPEARANCES:	
For the Union:	David Gardner, AFGE Local 720
For the Employer:	Keywauna Hall, Federal Bureau of Prisons

ARBITRATION AWARD

Issues Presented:

The parties were unable to agree on a statement of the issues. Based on their separate proposals and the evidence and argument presented, the Arbitrator concludes that the issues are best stated as follows:[1]:

> 1. Did the Union fail to comply with Article 31, Section f of the Master Agreement requiring specificity of charge, and if so, should the grievance be dismissed without reaching its merits?
>
> 2. Did the Agency violate the Master Agreement and applicable laws, rules and regulations when management issued a Sick Leave Restriction Letter to the Grievant on October 5, 2015, and if so what should be the remedy?

I. INTRODUCTION

This dispute arises out of the Agency's issuance of a Sick Leave Restriction Letter to the Grievant on October 5, 2015 without explanation of why three absences had been deemed "questionable." After the parties were unable to resolve the matter through the grievance process, the dispute was heard in arbitration on June 16, 2016, at which time both parties had the opportunity to present and cross-examine all witnesses, and to submit documentary and other evidence, and to make such objections and

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[1] The Union posed the issue as "Did the Agency violate the parties' Master Agreement and federal law, rule or regulation when it placed the grievant on sick leave restriction without providing a reason or explanation for doing so? The Agency bears the burden of proof for declaring an employee's use of sick [leave] as questionable."

The Agency posed two issues: "1. Did the Union comply with Article 31, section f of the Master Agreement (with respect to specificity) when it filed the instant grievance? If not, are further proceedings in this matter barred? 2. Was management's issuance of a sick leave restriction letter to Tracy Heiser on October 5, 2015, in accordance with the Master agreement and applicable laws, rules, and regulations? If not, what shall the remedy be?"

argument as desired. A 107-page stenographic transcript of the hearing was taken. The parties submitted their post-hearing briefs electronically, the last being received on August 21, 2016. Other than the Agency's objection to the lack of specificity in the grievance, neither party raised any procedural objections to this matter being presented to the arbitrator for resolution on its merits with finality. The arbitrator has carefully considered all evidence and argument presented by the parties in rendering this Award, including material not expressly recounted or addressed herein.

II. RELEVANT CONTRACT PROVISIONS AND RULES

Relevant provisions of the parties' Master Agreement between the Federal Bureau of Prisons and Council of Prison Locals, AFGE, effective July 21, 2014 through July 29, 2017 ("the Master Agreement") include the following:

> **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 b.** In the administration of all matters covered by this Agreement, Agency officials, Union officials and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.
>
> **ARTICLE 7 - RIGHTS OF THE UNION**
> * * *
> **Section b.** In all matters relating to personnel policies, practices and other conditions of employment, the Employer will adhere to the obligations imposed on it by the State and this Agreement. . . .
> * * *

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.
Additionally, if appropriate, sick leave requests will be handled in accordance with the provisions of the Family Friendly Leave Act, and the employee may also elect leave under the Family and Medical Leave Act:
* * *
Section b. Employees will not be required to furnish a medical slip to substantiate sick leave for three (3) days or less. However, in cases of questionable sick leave usage of any length, the employee will be given advance notice, in writing, that all future absences due to sickness must be substantiated by a medical certificate. This requirement will be reviewed every three (3) months by the Employer and the determination of whether to continue will be forwarded to the employee in writing. When the decision to require or continue to require a medical certificate is discussed with the employee, the Employer will notify and give the Union the opportunity to be present. Sick leave records will be provided to the Union in accordance with Section e. of this article.

ARTICLE 31 - GRIEVANCE PROCEDURE
* * *
Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union.

ARTICLE 32 - ARBITRATION
Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violates and the remedy requested in the written grievance may be modified only by mutual agreement.
* * *
Section h. . . . .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.

The parties have also cited a number of policies and regulations, including:

BOP PROGRAM STATEMENT 3000.03, HUMAN RESOURCE MANAGEMENT MANUAL, CHAPTER 6

600 ATTENDANCE AND LEAVE

600.1 ELECTRONIC TIME AND ATTENDANCE REPORTING (PC-TARE)

* * *

4. RESPONSIBILITIES.

* * *

b. Supervisors

(1) Individual supervisors shall: be aware of existing leave policy and regulations published in DOJ order 1630.1B; ensure that staff understand leave policy and regulations; and, exercise fair and honest enforcement of this policy and regulations.

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DOJ ORDER 1630.1b - LEAVE ADMINISTRATION

CHAPTER 1 - GENERAL PROVISIONS

5. AUTHORITY TO APPROVE, DENY, OR CANCEL LEAVE, OR TO EXCUSE AND ABSENCE WITHOUT CHARGE TO LEAVE.

1. Approval of Leave.

(1) Authority to approve leave may be delegated to the lowest supervisory level having personal knowledge of the work requirements and the employee's leave record and attendance patterns; . . . .

* * *

6. RECORDING LEAVE.

1. An absence is considered approved once it has been recorded in an approved leave category on an official time and attendance record upon which salary payments are made.

* * *

CHAPTER 4. SICK LEAVE.

* * *

30. REQUESTING, GRANTING AND USING SICK LEAVE.

* * *

2. Mandatory Approval of Sick Leave. In certain instances, the approval of requests to use accrued sick leave is mandatory provided the employee has followed leave procedures and submitted acceptable supporting evidence. Sick leave shall be granted to an employee when the employee:

(1) Is incapacitated for duty by sickness, injury, or pregnancy and confinement. . . .

* * *

31. SUPPORTING EVIDENCE.

* * *

3. Cases Involving Excessive Absenteeism or Possible Abuse of Sick Leave. In those instances in which a problem of excessive absenteeism or possible abuse of sick leave is developing, supervisors may require supporting evidence or documentation, in addition to that required of other employees, by providing the employee with a written notice which explains:

(1) The reason for requiring the evidence.

* * *

CODE OF FEDERAL REGULATIONS
Title 5: Administrative Personnel
PART 630-ABSENCE AND LEAVE
Subpart D - Sick Leave

§630.405 Supporting evidence for the use of sick leave.
An agency may grant sick leave only when the need for sick leave is supported by administratively acceptable evidence. An agency may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence. An agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a) for an absence in excess of 3 workdays, or for a lesser period when the agency determines it is necessary.

III. FINDINGS OF FACT

The Agency operates a correctional facility in Terre Haute, Indiana. The Union, AFGE Local 720, represents a bargaining unit of employees at the Terre Haute facility and is a member of the Council of Prison Locals. The Council and the Agency are parties to a national Master Agreement. The Grievant, a registered nurse, has been employed by the Bureau of Prisons at the Federal Correctional Complex in Terre Haute, Indiana, for ten years. Her supervisor is Sara Booth, a supervisory clinical nurse. At the time of the hearing, Booth had been a supervisor for 1½ years; for several years before she became supervisor, she and the Grievant had worked together as peers. At all times relevant Andrew Rupska was Health Services Administrator at the Terre Haute complex[2].

[2] At the hearing the Union objected to the Agency's calling Rupska as a witness, because his name had not been included on the Agency's initial witness list, nor on any revised witness list provided up to the day prior to the arbitration. Article 32, Section f of the Master Agreement permits the exchange of revised witness lists "up to the day prior to the arbitration." The email from the Agency to the Union adding Rupska as a witness was not sent until 4:41 p.m. on the day before arbitration, which was after

In the six months preceding February 3, 2015, the Grievant had missed work or left early 16 times. On February 3, 2015, the Grievant met with Booth and Rupska, and a third management representative, Ms. Klink. Although the Grievant requested the presence of a Union representative, Booth refused to call one, stating that it she did not need one because the Grievant "wasn't in any trouble." According to Booth, the meeting was not disciplinary; instead, the purpose was to find out what was causing the Grievant's absenteeism, whether there were issues to address, and whether the Grievant would like the assistance of the Employee Assistance Program. According to Booth and Rupska, the Grievant referred generally to medical issues for herself and her daughter, but did not disclose that she had fibromyalgia. This differs from the Grievant's account: According to her, Booth and Rupska questioned her directly, seeking more information than she was comfortable providing, and she specifically told them about her fibromyalgia. In addition, the Grievant testified, she had discussed her illness with Booth when they worked together as peers, before Booth was promoted to supervisor. Booth acknowledged that they had discussed the Grievant's health during that time.

Following the February 3 meeting, the Grievant's sick leave record did not improve. By the beginning of October she had used sick leave 16 times. On October 5, 2015, Booth and Rupska gave the Grievant a Sick Leave Restriction Letter in a meeting

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duty hours at the facility. The Arbitrator overruled the objection and permitted Rupska to testify because it appeared that his testimony would be cumulative to the record already made and not prejudicial to the Union. However, the Arbitrator invited the Union to renew its objection if it deemed his testimony prejudicial. The Union did not renew the objection. The Arbitrator also called the objection a wake-up call to the parties to watch the time of their last-minute changes to witness lists.

also attended by Union Secretary Ken Swick. The Sick Leave Restriction Letter stated:

> On February 3, 2015, the Health Services administrative staff had a meeting with you, in which we discussed your usage of sick leave. Since that date, your sick leave usage on July 31, 2015, September 22, 2015, and September 26, 2015, were questionable.
>
> In the future, sick leave will not be approved unless you provide me with a medical certification. For sick leave used, you are required to provide me a signed, written statement from your physician attesting to your incapacity for work in your job category and giving the expected length of incapacitation.
>
> I will continue to require medical certification from you, for all sick leave used, for a period of three months beginning on the date you receive this letter. At the conclusion of this three month period, a written determination of whether to continue this requirement will be made.
>
> If you do not provide this information upon your return to duty from sick leave, you will be charged Absent Without Leave (AWOL). You may also be subject to disciplinary action.

Swick repeatedly asked why the restriction was being imposed. All Rupska and Booth said was that the three absences were questionable. When Swick asked why the three absences were considered questionable, Booth first said that she did not have to provide an explanation according to Article 20(b) of the Master Agreement, that management was no longer required to prove a pattern of abuse, and that management merely had to declare any sick leave questionable in order to impose a Sick Leave Restriction Letter. After continued debate, Booth said, "It's questionable because we say so." Swick asked the same questions of Rupska, who also said that management did not have to provide an explanation of why absences had been declared

questionable. Booth and Rupska maintained their position even when Swick referred to DOJ Order 1630.1b (on Leave Administration) and the related provisions in the Code of Federal Regulations. At the meeting, the Grievant was not given the opportunity to provide documentation of her absences during the preceding period.

A grievance was filed on November 10, 2015, alleging that management violated "Article 6(b)(2)(6), Article 7(b), Article 20 (entire article); 5 USC 6307; 5 CFR 339.301-304; 5 CFR 630.401; any other applicable laws, rules, and/or regulations." The grievance in Block 6 described the violation as follows:

> On October 5, 2015, Tracy Heiser was given a sick leave restriction letter, which stated her usage of sick leave on the three dates indicated were questionable. This letter required Heiser to provide medical certification from a physician for any future sick leave absences. The letter fu1ther stated that if this information was not provided, Heiser would be charged with Absent Without Leave (AWOL) and be subject to disciplinary action. The supervisor refused to provide any explanation or reason as to why her use of sick leave was questionable. Pursuant to 5 CFR 339.302, the reasons for ordering a medical examination must be documented. Pursuant to 5 CFR 630.401, an agency must grant sick leave to an employee when he or she receives medical, dental, or optical examination or treatment; is incapacitated by illness, injury, pregnancy or childbirth; or provides care for a family member who is incapacitated by illness or injury, or receiving medical examination or treatment. Managers are not qualified to make decisions about what constitutes incapacity, nor are they qualified to make judgments about what constitutes abuse. Not all conditions require a visit to the doctor, so, requiring this documentation is not an effective way to respond to alleged sick leave abuse. Pursuant to 5 CFR 339.304, if the agency requires an employee to undergo an examination by a physician to obtain medical certification, the agency must pay for the examination and also pay the employee mileage if they do not offer a government vehicle. By its actions, the agency has denied Heiser her right to due process, threatening her with disciplinary action if she does not comply with their directive. The agency does not have the authority to require a medical examination except as outlined in 5 CFR 339-.301.

> Employees have a right to use sick leave they have earned. The agency has not provided or offered any proof that her use of sick leave was not legitimate and in accordance with law, rule or regulation.

The Terre Haute Complex Warden responded on December 3, 2015, rejecting the grievance procedurally on the ground that Block 6 failed to fulfill the requirement that a grievance be specific in its claim, and stating that if it were not rejected, the grievance would be denied on its merits.

On December 15, 2015, while the grievance was pending, Booth issued a letter relieving the Grievant of the obligation to provide medical certification for all sick leave used. Booth testified that because the sick leave restriction imposed on October 5, 2015, had to be evaluated within 3 months, or by January 5, 2016, and with holidays, vacation and training coming up, management reviewed the Grievant's attendance record in mid-December. They found that her attendance had improved to the point that she had had only one absence during the period of the sick leave restriction, and that absence, which she had documented, pertained to an emergency room visit for her daughter rather than herself. Because of this improvement, management decided to lift the sick leave restriction. The December 15, 2015 letter lifting the restriction stated in pertinent part:

> The Health Services administrative staff have met to discuss your fulfillment of the requirements set forth in the [Sick Leave Restriction] letter. You complied with the directives in the letter and fulfilled all requirements. Therefore, beginning on January 5, 2016, the requirement to provide medical certification for any sick leave used will no longer be in effect.

The Union filed a notice of arbitration on December 29, 2015, and this proceeding followed in due course. At the arbitration hearing, Booth explained why the absences were declared questionable. According to her, of the approximately 16 times between February 5 and the beginning of October that the Grievant had called in sick to work and/or left early, approximately 50 of those approximately 80 hours were taken in conjunction with the Grievant's days off, so that they extended her period of days off. The three absences were questionable because the Grievant was missing so much work. Rupska also testified that the absences were questionable because the Grievant had been absent 16 times in six months, and noted that the Grievant was using the leave as soon as it was earned and frequently in conjunction with other time off.

IV. THE PARTIES' CONTENTIONS

A. The Union's Contentions

The Union asserts that the grievance was proper and should not be dismissed on procedural grounds. The grievance listed specific articles of the Master Agreement, and specific statutes and regulations, and the description in Block 6 of the form gave the Agency enough information to understand the issue and formulate a response. Nothing in the Master Agreement addresses the level of specificity required. In light of this and the presumption in favor of arbitrability, the grievance should be heard on its merits, the Union urges.

On the merits, the Union contends that management violated the Master

Agreement applicable statutes and regulations. Pursuant to 5 USC 6307 and 5 CFR 630.401, employees are entitled to use sick leave when they are incapacitated by illness, injury, pregnancy or childbirth. When management issued the Sick Leave Restriction Letter, they gave no reason or explanation for deeming three specific absences questionable. DOJ Order 1630.1b governs leave administration in the Department of Justice, which include the Federal Bureau of Prisons, and under BOP Program Statement 3000.3, BOP supervisors are required to be aware of the policies in DOJ Order 1630.1b.. Chapter 4, Section 31 of the DOJ Order states that when there is a possible abuse of sick leave developing, supervisors may require supporting documentation, by providing the employee with a written notice that explains the reason for requiring the evidence. The Union objects that merely labeling absences "questionable" does not satisfy this requirement. The Agency violated these provisions by failing to provide a reason or explanation for the enhanced documentation requirement.

Contrary to the Agency's argument, the Union asserts, Article 3, Section a of the Master Agreement does not exempt the Agency from compliance with DOJ Order 1630.1b. BOP Program Statement 3000.3 itself contradicts that position. Moreover the DOJ Order is derived from government-wide laws, rules and regulations, specifically 5 USC 6307 and 5 CFR Part 630, so it is not preempted by the Master Agreement.

There was no reason for management to classify the three absences as questionable: The Grievant had called in, requested and been granted sick leave,

followed up with written requests as required, which were also approved by her supervisor and documented in her Time & Attendance Records. The meeting regarding her attendance on February 3, 2015, was not to question her past sick leave but to determine whether the Grievant needed assistance regarding any medical issues. The Grievant had previously discussed her medical issues with Booth in the past and did so in detail at the February 3 meeting. There was no evidence that the Grievant's use of sick leave on those dates was not valid. As a result, Management's decision in October 2015 that three absences were questionable was arbitrary and unreasonable.

As a remedy, the Union requests that the Arbitrator order that the Agency shall not issue a sick leave restriction letter to any bargaining unit employee without first providing said employee with a written notice that clearly explains specifically and in detail why their absences were considered unauthorized or questionable, that the Agency will comply with all government-wide laws, rules and regulations governing the granting and use of sick leave, and that the Agency will fully comply with DOJ Order 1630.1b governing leave administration, and award any other remedy deemed necessary and appropriate by the Arbitrator.

B. The Agency's Contentions

The Agency contends that the grievance must be dismissed without addressing the merits because the Union violated Article 31, section f, which directs that formal grievance be filed on the "Formal Grievance" form that requires that the grievance

describe specifically how the applicable contract provisions, statutes or regulations have been violation. The Union altered the form by typing in "including but not limited to" in Block 5 of the form calling for the list of provisions violated, the Agency asserts, and failed to provide sufficient specificity to place the Agency on notice of the alleged violations.

The Agency also urges that the grievance be denied on its merits. The Code of Federal Regulations gives the Agency the authority to request medical certification from employees, and in particular provides that the Agency may require a medical certificate for an absence in excess of three workdays, or for a shorter period when the agency deems it necessary. In addition, Article 20, Section b, of the Master Agreement empowers the Agency to impose the sick leave restriction imposed on the Grievant in this case, and provides for the three-month review that resulting in the lifting of the restriction in December 2015. In this case the Agency determined that the Grievant had questionable sick leave usage - the three cited absences were unscheduled, and two of those absences were in conjunction with her days off. Management had previously counseled the grievant about her excessive call-ins and leaving work early, and the Grievant's supervisors were within their rights to issue the Sick Leave Restriction Letter, the Agency concludes.

Addressing the remedies requested by the Union, the Agency contends that the Grievant is not entitled to reimbursement for the cost of an emergency room visit by her daughter during the three-month Sick Leave Restriction period. That visit was not for an

examination ordered under 5 CFR 339, which grants reimbursement for fitness for duty exams ordered by the Agency. The Agency further contends that the Union is not entitled to reimbursement of attorney fees. The Back Pay Act is inapplicable, because the Union has failed to prove that the Grievant was affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of their pay, allowances, or differentials during the alleged date of violation.

For all of these reasons, the Agency requests that the grievance be dismissed or denied.

V. ANALYSIS AND CONCLUSIONS

A. The arbitrability of the grievance

The Agency has raised a procedural objection to this arbitration that must be addressed before proceeding to the merits of the grievance. The Agency objects that the Union violated Article 31, Section f, by failing to satisfy the requirement of the BOP Formal Grievance form that the material entered in Block 6 of the form "be specific" in explaining in what way were each of the "Federal Prison system Directive, Executive Order, or Statute" listed in Block 5 violated. However, the narrative the Grievant and the Union provided in Block 6 (and quoted in full above at page 9) was sufficiently specific and detailed to provide the Agency the information sought by the form, as required by Section 31, Section f. The information was sufficient to put the Agency on notice not only of the Agency's actions that were being challenged but also why they were being

challenged as violations of the cited provisions. The grievance narrative was sufficient to enable the Agency to conduct an investigation of the alleged violations and to prepare an appropriate defense.

Moreover, that specificity was not impaired merely because the Union added the catch-all "Including but not limited to" to the list of regulations, statutes and contract clauses allegedly violated. The catch-all did not prevent the Agency from understanding the alleged violation and preparing a defense, particularly since the Union did not seek to expand the grievance beyond its specifics. Although it is easy to imagine the possibility that a union might abuse such a catch-all by attempting to tack on a brand new argument or allegation at arbitration that had not been addressed previously and could not have reasonably been anticipated or prepared for by the Agency, that eventuality is best addressed when it occurs. In this case, the Union's evidence and arguments at the arbitration hearing were consistent with the specifics in the grievance. The Union did not violate Article 31, Section f and the procedural objection is overruled.

B. The merits of the grievance

The grievance here does not challenge discipline: it raises a question of contract interpretation. As a result, it is the Union that bears the burden to prove that a violation has occurred.

As operators in the Federal Sector, the Agency and the Union are subject not only to their negotiated Master Agreement, but also to a web of Federal statutes and

regulations, and orders and policies of the Agency's parent, the Department of Justice, and of the Agency itself. The parties have recognized and set the guidelines for navigating within this web, in Article 3, Section b: The administration of all matters covered by the Master Agreement is governed by "existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect." On the other hand, the Master Agreement takes precedence over Agency policy, procedure and regulation which is not derived from higher government-wide laws, rules and regulations. Article 3, Section a. With those interrelationships in mind we turn to the immediate dispute.

The facts here are largely undisputed. The most important disparities in testimony are whether the Grievant had informed Ms. Booth of her specific medical condition, fibromyalgia, when the two worked as peers prior to the February 2015 meeting, and whether the Grievant discussed the specifics of her medical condition with Booth and Rupska at the February 2015 meeting, but these disparities prove irrelevant to a resolution of this dispute. The crucial point is that Booth and Rupska gave as the reason for imposing the stricter documentation requirement that three identified sick leave absences were "questionable," and when asked for further explanation, stated that it was enough for management to state that the Grievant's sick leave usage had been found to be questionable, and that they was not required to give any other reason

for the decision.[3]

Article 20 of the parties' Master Agreement grants employees the benefit of sick leave. Section b provides that

> Employees will not required to furnish a medical slip to substantiate sick leave for three (3) days or less. However, **in cases of questionable sick leave usage of any length the employee will be given advance notice, in writing, that all future absences due to sickness must be substantiated by a medical certificate.**

This section is consistent with Federal statute, as implement by the Code of Federal Regulations: 5 CFR 630.405 provides that "An agency may also require a medical certificate or other administratively acceptable evidence as to the reason for an absence for any of the purposes described in § 630.401(a) for an absence in excess of 3 workdays, **or for a lesser period when the agency determines it is necessary**." (Emphasis added). In the Master Agreement, the parties have limited the Agency's discretion in this area, by agreeing that the restriction may be imposed only "in cases of questionable sick leave usage of any length."

The Agency contends that management satisfied Article 20, Section b by identifying that the Grievant had engaged in "questionable sick leave usage" and by giving the Grievant written notice of the restriction being imposed. It is true that Article 20, Section b, does not itself require the Agency to notify an employee of anything other

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[3]As background, it is notable that Swick asked Booth and Rupska whether they had found a pattern of sick leave abuse by the Grievant, and they responded that they were no longer required to find a pattern. According to Union President Gardner, the Agency had previously issued sick leave restriction letters based on a finding of a pattern of abuse, but when those actions had been challenged in arbitration, the Agency settled the grievances. There is no other evidence in the record about this history, but Booth and Rupska did not rebut this testimony.

than the requirement to document every use of sick leave. On the face of Article 20, Section b, the Agency must simply give the employee advance written notice of the documentation requirement, and this was done.

However, the Union asserts that the Master Agreement must be read in light of other applicable statutes and regulations. In particular, Section 31(3) of DOJ Order 1630.1b on Leave Administration provides that

> In those instances in which a problem of excessive absenteeism or possible abuse of sick leave is developing, supervisors may require supporting evidence or documentation, in addition to that required of other employees, **by providing the employee with a written notice which explains:**
>
> **(1) The reason for requiring the evidence.**
>
> * * *

The crux of the parties' disagreement here is whether the Agency was required to follow Section 31(3) of the DOJ Order, and, if so, whether the notice's (and Booth's and Rupska's) reference to three absences being "questionable" was an explanation of "the reason for requiring the evidence" that satisfied Section 31(3).

The Union's interpretation is correct. Under Article 3, Section b, the administration of sick leave, as covered by the Master Agreement, is governed by all laws, rules, and government-wide regulations in effect at the time of the Agreement. Nothing in the Master Agreement exempts the Agency, the Bureau of Prisons, from the requirements of the rules stated in Order 1630.1b of its parent, the Department of Justice, including the requirement that written notice of the enhanced documentation requirement explain the reason for requiring the evidence. Indeed, the Agency's own

Human Resources Management Manual requires that its supervisors involved with Leave Administration "be aware of existing leave policy and regulations published in DOJ order 1630.1B, ensure that staff understand leave policy and regulations; and, exercise fair and honest enforcement of this policy and regulations." BOP Program Statement 3000.3, Section 600.1(4)(B)(1). Although Section a of Article 3 of the Master Agreement gives the Agreement precedence over any Bureau policy, procedure or regulation which is not derived from "higher government-wide laws, rules and regulations" this proviso in the BOP HRRM is derived from the DOJ Order, which is in turn derived from a host of government-wide laws, rules and regulations listed at the beginning of the Order. Therefore management's implementation of Article 20, section b must be measured in light of the requirement of Section 31 of DOJ Order 1603.1b that the written notice of an enhanced sick leave documentation restriction include "the reason for requiring the evidence."

The question remains whether it was enough, under Article 20, Section b (and Section 31 of DOJ Order 1603.1b) for management to say that three identified sick leave dates were "questionable," without explaining <u>what</u> was questionable about those three dates even in the face of Union inquiry. Yes, a "reason for requiring the evidence" was that management believe those three absences to be "questionable," but it fails to satisfy the essence of the requirement for written notice. Employees are entitled under Section 31 to know <u>why</u> their sick leave usage has been adjudged "questionable" under the Master Agreement. The label alone does not identify for the employee or his or her

Union representative the basis for the Agency's action so as to enable the employee or the Union to assess whether the action has been properly taken and, perhaps equally important, fails to inform the employee how to bring his or her use of sick leave within the norms reasonably expected by the Agency. The failure to provide a reason why the leave usage has been adjudged questionable renders meaningless the notice requirements of DOJ Order 1603.1b, Section 31(1) and Article 20, Section 31 of the Master Agreement.

The record here demonstrates why the label alone fails to serve the purpose of the written notice required by Article 20, Section b of the Master Agreement. Although Booth and Rupska refused to give the Union and the Grievant any explanation other than that the three absences were "questionable," at the hearing they were more forthcoming. Among other things, Rupska explained that the three dates were considered questionable because they occurred in the context of 16 incidents of sick leave between February and October 2015, because the Grievant tended to use her sick leave as soon as it had been earned, and because the two September absences occurred in conjunction with days off. These are the reasons why management was requiring the added documentation, but the Grievant had no notice that her immediate use of sick leave, rather than accumulating it, and her apparent use of sick leave to extend days, in addition to the sheer number of absences or early departures, suggested to management that her use of sick leave was questionable.. By failing to include in the Sick Leave Restriction Letter that explanation of why the absences on

July 31, September 22 and September 26, 2015 had been deemed questionable, the Agency violated Article 20, Section b of the Master Agreement, and by that violation has also violated Article 7, Section b of the Master Agreement.

The Union also argued that the Grievant's use of sick leave should not have been deemed "questionable," observing that there was no evidence that she was not sick, or was not required to attend to a sick child, or to leave early for medical appointments, when she used sick leave; that she always called in sick in advance, and filled out the required form to request the sick upon her return to work; and that all of her sick leave requests had been approved. However, although the Agency failed to give the Grievant an adequate explanation for the Sick Leave Restriction Letter prior to the arbitration hearing, the Union has failed to show that management acted arbitrarily or capriciously in deeming the usage questionable.

C. The Remedy

As the record notes, the Grievant was relieved of the restrictions imposed in the Sick Leave Restriction Letter on December 15, 2015, and there is no evidence that she lost any back pay or benefits because of the Agency's violation. Accordingly, the appropriate remedy is simply that the Agency be ordered to cease and desist from failing to give an employee a reason or reasons why their use of sick leave has been deemed "questionable" when management acts pursuant to Article 20, Section b, in a case of questionable sick leave usage to require of the employee that "all future

absences due to sickness must be substantiated by a medical certificate." Because the Union has failed to prove that the underlying decision to impose the Sick Leave Restriction Letter was arbitrary or capricious, the record of the Letter itself (whose restrictions have expired) will not be disturbed.

Finally, although the Union requested an award of attorney's fees in the grievance filed November 10, 2015, that request was not repeated in argument at the hearing or in the Union's Post-Hearing Brief. Because it appears that the Union has abandoned that request, because the record contains no evidence or representation that attorney's fees have been incurred by the Union or the Grievant in this matter, and because an award of fees is not warranted "in the interest of justice," (see *Naval Air Development Center and AFGE Local 1928*, 21 FLRA 131 (1986), no attorney's fees are awarded.

A W A R D

1. The Union did not fail to comply with Article 31, Section f of the Master Agreement requiring specificity of charges in grievances. The grievance is arbitrable.

2. The Agency violated Article 20, Section b and Article 7, Section b of the Master Agreement and Section 31(1) of DOJ Order 1603.1b when management issued a Sick Leave Restriction Letter to the Grievant on October 5, 2015, without providing a reason for imposing the restriction.

3. The Agency is ordered to cease and desist from failing to give an employee a reason or reasons why their use of sick leave has been deemed "questionable" when management acts pursuant to Article 20, Section b, in a case of questionable sick leave usage to require of the employee that "all future absences due to sickness must be substantiated by a medical certificate."

4. The Grievant is not entitled to reimbursement for the cost of any medical examinations she may have been required to undergo as a result of the requirements of the Sick Leave Restriction Letter.

5. For the reasons stated above and incorporated herein, and no attorney's fees are awarded to either the Grievant or the Union.

Respectfully submitted,

December 13, 2016

Lisa Salkovitz Kohn