FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION	)	
	)	
Between	)	
	)	
U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS	)	
	)	
and	)	
	)	FMCS Case No. 110610-56424
COUNCIL OF PRISONS LOCALS (AFL-CIO) AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, CPL 33	)	

Arbitrator: Lawrence M. Cohen, selected by the parties pursuant to the procedures of the Federal Mediation and Conciliation Service.

Appearances: For the Federal Bureau of Prisons ("the Agency"): Joseph D. Powers, Labor Relations Specialist
For the Council of Prison Locals ("the Union"): Daniel Bethea, CPL National Representative

ISSUES:

As formulated by the Arbitrator, the issues are:

1. Is the grievance procedurally defective because (a) the formal grievance was not submitted on the proper Agency form; (b) because the grievance did not contain sufficient specificity to allow the Agency to resolve the matter; or (c) there was a failure by the Union to initially attempt to resolve the matter informally.

2. If the grievance is procedurally arbitrable, did the Agency violate the parties' collective bargaining agreement when, in February 2011, it granted administrative leave to some bargaining unit employees and denied administrative leave to other bargaining unit employees and , if so, what shall the remedy be.

BACKGROUND FACTS:

The Agency's North Central Region contains 19 penal institutions ("the institutions") with over 6,000 staff employees. Other employees work at various administrative and Residential Reentry Management offices and at the North Central Regional Office located in Kansas, City, MO ("the offices"). Employees at the institutions and the offices are represented by the Union under the same collective bargaining agreement.

The present dispute arises out of a February 1-3, 2011 severe winter storm that affected various portions of the North Central Region. Employees at both certain institutions[1] and certain offices could not come to work. The storm also impacted the safety and security of the institutions; as stated by Agency Emergency Management Specialist Bobbie Gourdouze, "those items which are necessary to control the inmates inside a secure facility." The Federal Executive Board ("FEB")[2] in Chicago and Kansas City recommended that federal offices be closed and that, with respect to non-essential[3] personnel who could not telework or report to work, they should be granted administrative leave.[4] Pursuant to the FEB's recommendation, the affected offices, including the Kansas City Regional Office, were closed part of the day on February 1 and all of the day on February 2. Employees who could not come to work at those offices were given administrative leave for this period. The institutions affected by the storm were, of course,

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[1] The parties stipulated that the institutions affected by the storm where employees could not report to work were those located in Leavenworth, KS, Greenville, IL, Springfield, MO., Chicago and Pekin, IL.

[2] The FEB, under the parties' contract Article 19(f), "in metropolitan areas... [is] responsible of the development and dissemination of special adverse weather leave notices and procedures for their locales."

[3] The Union's position was that, in addition to the employees working at the offices, apart from the institutional correctional staff and food service employees, other institutional employees (the 'unit staff") should be non-essential employees. The Agency's position is that all institutional employees are trained to and may function as correctional officers and consequently should be regarded as essential employees.

[4] Administrative leave is nonchargeable leave with pay which does not count against an employee's annual vacation leave.

not closed. Employees at those institutions who could not report to work were not granted administrative leave and, as a result, had to take chargeable annual or sick leave.

On February 1 and 8, Michael Rule, the Union's North Center Regional Vice President, after he had received numerous calls from local Union presidents, spoke to Agency Senior Deputy North Central Regional Director Amber Nelson at the Kansas City Regional Office to inquire as to how leave would be handled. According to Rule, during these conversations, after he was informed that the Regional Office staff had been granted administrative leave, he asked Nelson "to do the right thing... if you gave administrative leave to the staff... in the regional office, it would be only right that you give administrative leave to other people that couldn't make it.... it wasn't fair that those people had to use their personal annual leave..." Nelson deferred Rule's inquiry to Regional North Central Human Resources Administration Kelli Harpe. Rule and Harpe conversed during the week after the storm. Rule testified that, as the Union later stated in the grievance, he also expressed to Harpe that he believed it was "unfair" that office staff received administrative leave and the institutional staff did not. Rule further testified, without contradiction, that during the same period he spoke to former North Central Regional Director Nalley because "I was frustrated at what I was told by the deputy as well as the regional HRM, Kelli Harpe, and with the fact that he [Nalley] acknowledged that those staff were given administrative leave and why administrative leave was not permitted for the other employees that was affected by the same storm."

When the dispute remained unresolved, on March 7, 2011, the Union filed the instant formal grievance on behalf of the "Bargaining Unit Staff North Central Region." The grievance detailed the background facts and Union position described above. On April 4, 2011, the Agency denied the grievance on both the merits and its contention that it lacked "specificity...

you fail to identify the institutions affected by the severe weather or provide the names of the staff required to take annual leave." The grievance was thereafter processed to arbitration. An arbitration hearing was held in Chicago on August 6 and 7, 2013. On or before approximately November 6, 2013 post-hearing briefs were received by the Arbitrator from both parties.

REVELANT CONTRACT PROVISIONS:

ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:...

d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

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ARTICLE 6 – RIGHTS OF THE EMPLOYEE

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

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ARTICLE 9 – ANNUAL LEAVE

Section f. In accordance with applicable laws, rules, and regulations, the Employer may grant administrative leave or other appropriate leave during emergency situations in the local area for affected employees. These may include, but are not limited to, extreme weather conditions, serious interruptions in public transportation, and disasters such as fire, flood, or other natural phenomena. In metropolitan areas, the heads of Federal Executive Boards are responsible for the development and dissemination of special adverse weather leave notices and procedures for their locales. In areas not covered by Federal Executive Boards, the Chief Executive Officer will consider information from local, county, and/or state law enforcement officials, Department of Transportation officials, and weather services, who often disseminate information concerning hazardous traveling conditions in various localities. This information will be used in the decision process as to whether or not to grant appropriate forms of leave.

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ARTICLE 31 – GREIVANCE PROCEDURE

> Section b. The parties strongly endorse the concept that grievances should be resolved informal and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution....
> Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant of the Union...

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POSITION OF THE UNION:

The Union initially submits that the grievance is procedurally arbitrable. It contends that the grievance was written on the correct form;" that the Agency, more than likely, understood the nature of the grievance"; that there is no contractual "specificity burden"; and that there was the requisite "informal resolution attempt" in this case.

On the merits, the Union claims that the differential leave treatment of bargaining unit employees affected by the February 2011 storm constituted a contractual violation. According to the Union, "the argument is not which staff were unable to come in or was sent home. It is once the agency decided to grant leave, then all staff should have been afforded the same type of leave.... The union's contention is simple, once leave was approved the employees affected by the storm should have been treated equally in regards to what type of leave would be granted."

POSITION OF THE AGENCY:

The Agency argues first that the grievance is "procedurally defective" for three reasons: (1) the grievance did not comply with contract Article 31(f) because it was not filed on the Agency's "formal grievance form"; (2) the grievance was not "written with enough specificity to allow the Agency the ability to resolve the issue"; and (3) the Union failed to meet its Article 31(b) obligation to attempt to resolve the grievance informally prior to filing a formal grievance.

On the merits, the Agency asserts that it had the "option of granting administrative leave, or other appropriate leave" and that it did not exercise that discretion here in an arbitrary or capricious manner. It argues that the different missions and the underlying correctional nature of institutional staff, as well as its concern that if institutional staff were granted administrative leave the result could be that the institutional inmate population could be under-supervised, provided legitimate justifications for its disparate action.

DISCUSSION:

A. Procedural Arbitrability Issues

1. Under Agency practice, as adhered to without objection in prior cases in the North Central Region, an electronic grievance form can be obtained from the Agency website and that form can then be "opened, viewed, saved and printed." The Union followed that accepted procedure in this case. However, in doing so, the Union inadvertently failed to print the heading of Block 6 of the grievance form ("6. In what way were each of the above violated? Be Specific") although the grievance did contain the contents of Block 6.[5] This alleged defect was apparently not raised as an objection during the grievance process. Nevertheless, at the arbitration hearing Harpe asserted that the omission of the Block 6 heading improperly "altered" or "modified" the Agency's grievance form. This argument is specious. The omission was not intentional. It was de minimis and did not render the form inadequate or alter it in any significant manner. Nor did it impair the Agency's ability to respond to the grievance.

2. The Agency did reject the grievance in its answer on the ground that it lacked specificity. The specificity requirement, it should be noted, is not a contractual requirement but

[5] There was also a reference to the Union's use of an "outdated" grievance form. The Agency's brief concedes that "it seemed to be an [acceptable] trend in Chicago to use outdated forms"

simply an admonition on the grievance form ("Be specific"). A grievance does have to have sufficient clarity and information to notify the employer of the nature of the dispute. Here, the grievance failed to do so, the Agency contends, because it did provide the identity of the institutions affected or the names of the staff required to take annual leave. Harpe testified, however, that she "could have" obtained this information; that she could have ascertained both the particular affected institutions and which institutional employees had to complete personal leave forms. The absence of this information on the grievance consequently did not affect the Agency's ability to understand and potentially remedy the alleged violations. See, e.g. AFGE Local 1242 and USP Atwater, FMCS No. 06-509131, at p. 7 (Fincher 2006). ("A grievance is not a pleading at law. A grievance that, on its face, provides sufficient information for the employer to respond is sufficient.") In this case, as in Atwater, the grievance process assumes there will be additional steps of communication between the parties prior to arbitration to flesh out each point in the grievance.

3. The Agency claims that, contrary to Article 31(b), the Union failed to attempt to informally resolve this controversy prior to filing a formal grievance. This contention is incorrect. Before filing the grievance, Rule spoke with the Deputy Regional Director Nelson, Regional Human Resources Director Harpe and Regional Director Nalley and repeatedly expressed the Union's position that the disparity in administrative leaves between the offices and the institutions was "unfair". None of the Agency personnel were able to resolve the situation. There was thus a "reasonable and concerted effort" by the Union "toward informal resolution" that complied with Article 31(b).

For all of the foregoing reasons I find that the grievance was not procedurally defective and should be decided on the merits.

B. The Merits

1. There is no disagreement that the Agency had the discretion under Articles 5 and 19, notwithstanding the FEB's recommendation, to refuse to grant administrative leave to all bargaining unit employees. See AFGE Local 709 and FBOP Englewood, Co., 105 FLRR-253 (Rappaport, 2005) ("If the parties had intended to require the Employer to grant administrative leave... then the language [of Article 19(f)] would have so indicated by stating that the Employer 'shall' or 'must' grant administrative leave.... it does not appear to the Arbitrator to have been an unreasonable, arbitrary or capricious decision by Management... not to grant administrative leave in this case"). The issue in the instant case is different from that in Englewood: if the Agency exercises its discretion to grant some bargaining unit employees in a particular situation administrative leave may it concurrently decline to grant administrative leave to other similarly situated bargaining unit employees in the same situation. In my opinion, Article 6(a), requiring bargaining unit employees "to be treated fairly and equitably in all aspects of personnel management", prohibits such disparate treatment.

2. The Agency presents a compelling argument that the offices and the institutions have different missions; as Pekin Warden Ricardo Rios testified, "we do have a different mission [than the offices] and as a result of that mission, we can't close down the institution because we have to maintain safety of the staff, the safety of the inmates, the security of the institution and the safety of the public." Rios also credibly testified that all of the institutional employees, not merely the correctional officers and food service employees admitted by the Union to be essential, were essential employees who were trained to and, especially in emergency situations, did exercise correctional responsibilities. The Agency also had a legitimate concern, as expressed by Rios, that "if I would have approved administrative leave for my staff, then I would

have had more staff not coming in to work; thereby leaving the inmate population under-supervised."[6] These considerations would certainly justify a contractual distinction between the leave to be given to office and institutional employees. Here, however, not only is there no such contractual differentiation, the parties' agreement conversely provides that the bargaining unit employees are to be treated "equitably in all aspects of personnel management." "Equitable" means, according to the Merriam-Webster Dictionary, "dealing fairly and equally with all concerned." (emphasis added). See AFGE Council 220 and Social Security Administration, 102 FLRR 2-1037 (Kaplan, 2002) (disparate application of holiday pay benefit violates provision that all employees "be treated fairly and equitably in all aspects of personnel management"). This principle of equal treatment has been applied to employee leaves in snow storm emergencies such as existed in this case. AFGE and Social Security Administration, 90 FLRR 2-1898(Lovell, 1989); IAM Local 292 and Department of Defense, 82 FLRR 2-2209 (Williams, 1982).

An arbitrator cannot disregard clear and unambiguous contract language such as that set forth in Article 6(b)(2); "if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." Elkouri and Elkouri, How Arbitration Works, p434 (6th ed). See also the Englewood, Co. case cited above, relied upon by the Agency (arbitrator is bound by "clear and unequivocal" contract language), Indeed, to do so would contravene contract Article 32(h) which provides that the arbitrator "shall have no[sic] power to add to, subtract from, disregard, alter, or modify any of the terms of ... this Agreement." I find that Article 6(b)(2) is dispositive and that, based on this provision, the grievance must be sustained.

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[6] Rios did testify that some of this concern could perhaps have been alleviated by not advising the employees until after the emergency was over as to whether their leave would be deemed administrative or annual.

AWARD:

The grievance is sustained. All bargaining unit employees that were not granted administrative leave and who were required instead to take chargeable leave during the February 1-3, 2011 weather emergency shall be made whole and have their chargeable leave restored.

Dated: December 6, 2013

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Lawrence M. Cohen
Arbitrator