

ARBITRATION DECISION

IN THE MATTER OF ARBITRATION

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Between

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FEDERAL BUREAU OF PRISONS

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FMCS NO. 16-50613

FEDERAL TRANSFER CENTER

)

OKLAHOMA CITY, OKLAHOMA

)

GRIEVANT CHRIS DAWKINS

And

)

EMPLOYEES, COUNSEL OF PRISONS LOCAL 33,

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A.F.G.E., LOCAL 171 OKLAHOMA CITY, OK

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HEARING : DECEMBER 8, 2016

BRIEFS EXCHANGED: MARCH 30, 2017 (AGENCY GRANTED EXTENSION OF ORIGINAL DATE)

DECISION: JUNE 4, 2017

APPEARANCES:

EMPLOYER: KEYWAUNA DUNN, ESQ.

LABOR RELATIONS SPECIALIST ,US DEPARTMENT OF JUSTICE

BOP, GRAND PRAIRIE, TEXAS

UNION : TOM TOWNLEY, PRESIDENT

AFGE LOCAL 171

EL RENO, OKLAHOMA

ARBITRATOR: JAMES M. O'REILLY

SOUTHLAKE, TEXAS/ST, LOUIS, MISSOURI

ISSUE

Was Management's issuance of a sick leave restriction letter to Officer Chris Dawkins on September 16, 2015 in accordance with the Master Agreement, the Local Supplemental Agreement and applicable laws, rules and regulations? If not, what is the appropriate remedy?

BACKGROUND

Captain Dennis Letter has been with the Federal Bureau of Prisons for some twenty-four (24) years and with his current position as the only captain of the Federal Transfer Center for the past four (4) years. According to his testimony, Captain Letter had been advised to perform periodic audits of all staff within the Correctional Services Department under his Supervision. Accordingly, the Captain conducted six (6) months of unscheduled sick leave for all staff within his department.

The Grievant, Senior Officer, Chris Dawkins sick leave usage was reviewed by Captain Letter for the period December 2014 to June 2015. The review found that the Grievant had utilized a total of 78 hours sick leave. During this period, the Grievant used sick leave three (3) times on a Sunday, five (5) times on a Thursday and seven (7) times in conjunction with his days off. While Captain Letter prepared a "questionable sick leave letter" (UX-2) it was not issued to the Grievant.

Three (3) months after the June 2015 audit, Captain Letter conducted another six (6) month review of the Grievant's sick leave usage. The audit revealed that the Grievant had used eighty (80) hours of sick leave. Eight of the sick leave occasions were taken in conjunction with his days off or annual leave; three (3) occasions were on a Sunday; three (3) were on a Thursday; one (1) each on a Tuesday and Wednesday (UN-1).

As a result, Captain Letter issued the Grievant a "questionable sick leave letter" which required the Grievant to provide medical certification for all sick leave used for a period of three (3) months from September 16, 2015 (UX-1). On February 1, 2016 the "questionable sick leave letter" was not extended beyond the original three (3) month period (AX-4).

On or about September 21, 2015, the Union, America Federation of Government Employees AFL-CIO, Council of Prison Locals #33 Local 171, filed the subject grievance (JX-2) with the Agency, Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, which was processed to arbitration under the terms of the Grievance and Arbitration provisions of the Master Agreement (JX-1).

An arbitration hearing was held and transcribed on December 8, 2016 before Arbitrator James M. O'Reilly, selected by the parties from a panel of arbitrators provided by the Federal Mediation and Conciliation Service. At the hearing both parties were competently represented, had the opportunity to present and cross examine witnesses and to offer exhibits into evidence. The parties were permitted to and did file post hearing briefs. The Agency requested an extension of the date to file their brief, which

the Arbitrator granted, due to the attorney presenting their case in arbitration subsequently leaving that position before the briefs were to be filed.

Position of the Union:

1. The Agency violated laws, rules regulations and the Collective Bargaining Agreement, by treating the Grievant, Officer Dawkins disparately and harassing him with the questionable sick leave letter.
 - A. The Agency failed to utilize any type of a standardized formula ensuring all staff are treated fairly and equitable when questionable leave letters are being considered for possible issuance. Captain Letter testified that he met with Officer Carlos Sanchez and Officer Louis Mancha, who both had utilized greater amounts of unscheduled sick leave and failed to require them to provide supporting medical documentation or issued them a letter.
 - B. Carlos Sanchez had utilized eighty (80) hours of unscheduled sick leave and was not issued a letter or required to provide medical documentation. Officer Louis Mancha had utilized 136 hours of unscheduled sick leave and was not issued a letter or required to provide any supporting medical documentation. The Grievant, Officer Dawkins, was issued a sick leave letter indicating that he had used a total of eighty (80) (AX-I) hours while the grievance response (JX-3) states he had used only fifty-six (56) hours.
 - C. The Master Agreement, Article 20 Section B (JX-1) provides that leave usage will be reviewed every three (3) months not six (6) months as completed by Captain Letter. If the review was done in three (3) months as required by the Master Agreement, it would have shown that Grievant Dawkins had curtailed his sick leave to only twenty-eight (28) hours.
 - D. Warden Fox testified that sick leave use letters had to be reviewed every three (3) months as required by the Master Agreement Article 20 (JX-1). Captain Letter waited five (5) months before reviewing the Grievant's sick leave letters and advising the Grievant that he would no longer be required to bring supporting medical evidence.
 - E. Captain Letter violated Title 5 CFR 630.405 UX-4) and the Local Supplemental Agreement when he required Officer Dawkins to provide his medical documentation upon his return from Sick Leave, "If you do not provide this certification upon your return to duty from sick leave, you will be charged (AWOL) and may be the subject of disciplinary action".
2. The Union requires the Arbitrator to sustain its grievance and issue the following remedies:
 - A. The Agency be ordered to Immediately rescind all "questionable sick leave" letters from all records and files issued by Captain Letter at once.
 - B. That an e-mail/posting from the Captain apologizing for the issuance of the questionable sick leave letters.
 - C. Increased training provided to Captain Letter by Local 171 that covers the Master Agreement and the improper use of Government power.
 - D. The agency be ordered to not coerce, intimidate, deny any staff member from requesting/using sick leave or family leave at any time.

- E. The agency be ordered to repay any medical bills, co-payments or requested medical forms incurred with having to acquire medical documentation to use sick leave prior to this being resolved.
- F. Anything else deemed appropriate by the Arbitrator.

Position of the Agency:

1. For the first time, the Union claimed a violation of CFR 630.405 and the Local Supplemental Agreement at the Arbitration hearing on December 8, 2016. The Union's grievance did not include the above claimed violations and under Article 32 (a) of the parties Master Agreement the alleged violations can only be modified by mutual agreement. The arbitrator does not have the authority to disregard, modify, change, alter, add to or subtract from the terms of the Master Agreement and accordingly should not consider any alleged violation of 5 CFR 630.405.
2. Captain Letter routinely conducts six (6) months audit of unscheduled sick leave. The Grievant, Officer Dawkins, use of sick leave in conjunction with his days off and repeated use of sick leave on specific days from June 10 to September 10, 2015 without any explanation would lead to a reasonable conclusion that his use of sick leave was questionable.
3. Under 5 CFR 630.405 © an Agency may require an employee requesting sick leave to care for a family member to provide a written statement from the health care provider concerning the family member's need for psychological comfort and/or physical care. Captain Letter's request for administratively acceptable evidence to substantiate the Grievant's use of sick leave did not constitute harassment.
4. There was no evidence presented that the Grievant was disciplined for failure to provide the required medical documentation within the three (3) month time frame.
5. The Union's requested remedies under the subject grievance are improper:
 - A. The questionable sick leave letter issued by Captain Letter to Mr. Dawkins on September 16, 2015 was consistent with DOJ Order 1630.1B and Article 20 (b) of the parties Master Agreement.
 - B. The Authority has held that Managements rights to assign work encompasses decisions regarding the type of training to be assigned and the duration of training (65FLRA638 (2011); 61 FLRA 113 (2005))
 - C. There is no provision of law, policy, or the contract which requires the Agency to reimburse employees for any medical fees incurred to substantiate their use of personal or family friendly sick leave©AFGE, CPL Local 2343, 59 FLRA 147 (2004); FAA, 52 FLRA 46 (19996)
 - D. Inherent in management's right to assign work is the right to excuse employees from work as appropriate.
 - E. The Union has failed to prove that the Agency; engaged in a prohibited personnel practice; the actions were clearly without merit or wholly unfounded; actions were taken in bad faith to harass or exert improper pressure on any employee; committed gross procedural error which prolonged the proceeding or severely prejudiced any employee; knew or should have

known it would not prevail on the merits of the case. Moreover, the Union's representative in the matter is not an attorney.

6. The Agency respectfully request that the Union's grievance be denied.

DISCUSSION AND FINDINGS

The right of supervision to conduct periodic audits of an employee's use of sick leave is a proper function of managerial rights. Nowhere in the documents submitted are specific guidelines as to what may constitute "questionable sick leave usage". Thus, for the arbitrator to establish specific guidelines for supervision to use in its determination of "questionable sick leave usage" would be a violation of the Arbitrator's authority under Article 32-Arbitration Section (A) which states in part (JX-1, p. 76):

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

Thus, supervision's review of an individual's use of sick leave, must meet the test of reasonableness and not be arbitrary or discriminatory:

On June 9, 2015,, Captain Letter conducted a review of the Grievant's unscheduled sick leave usage over a six (6) month period of time. The six (6) month audit is also periodically performed for all staff within Captain Letter's department. The audit revealed that Grievant Dawkins had utilized a total of seventy-eight (78) hours over twelve (12) times, seven ((7) of which were in conjunction with his days off, three (3) on Sunday and five (5) on Thursdays.

According to Captain Letter's testimony, he then prepared a memorandum (UX-2) to the Grievant that he had determined that the findings of the audit revealed a questionable use of sick leave.

Captain Letter did not issue the memorandum but held it pending on giving the Grievant the opportunity to explain the need for his use of unscheduled sick leave. A meeting was held between the Grievant and Captain Letter along with a Union representative.

The Arbitrator is of the opinion that the pattern of the Grievant's sick leave usage where; seven (7) days were in conjunction with his days off, five (5) days on a Thursday and three (3) days on a Sunday presented a reasonable reason for Captain Letter to prepare his memorandum. Based upon the Grievant's later explanation of his need to have taken the unscheduled sick leave days, Captain Letter made a decision to not issue the memorandum (UX-20) based on the Grievant presenting his need for the pattern of sick leave usage.

In conclusion, the Arbitrator finds that Captain Letter's decision as related to the Grievant's use of unscheduled sick leave was reasonable and not arbitrary or discriminatory.

On or about September 10, 2015, Captain Letter conducted a review of Grievnat Chris Dawkins sick leave for the past six (6) months. Three (3) months of this review contained sick leave usage that

had been received as part of the June 9, 2015 memorandum. The Memorandum of June 9, 2015 was not issued and, as such, the Arbitrator would have to conclude that the sick leave taken as part of that June 9, 2015 Memorandum was reviewed and found not to constitute questionable use of sick leave. To now use that same data to support a charge of "questionable use of sick leave", rises to a charge of double jeopardy.

The Arbitrator is of the opinion that Captain Letter improperly used sick leave data that was previously viewed as not supporting a charge of a "questionable use of sick leave memorandum" to now support a charge of a "questionable use of sick leave". As a result of that determination, Grievant Dawkins was issued a memorandum requiring the Grievant to submit medical certification for all sick leave used for a period of three (3) months from September 10, 2015 (AX-1). Captain Letter's six (6) months reviews of employees sick leave use is consistent but can not contain sick leave usage that has previously been reviewed and determined not to constitute a questionable use of sick leave.

Captain Letter's use of improper data to determine that the Grievant's use of sick leave was questionable and resulted in the Grievant being required to present medical certification, can not be supported. Accordingly, the Memorandum for Grievant Chris Dawkins dated September 10, 2015 (AX1) must be removed from his record.

All other issues and remedies raised by the Union were reviewed even though not discussed in this award as the grievance could be decide without their inclusion. Accordingly, the following AWARD is issued;

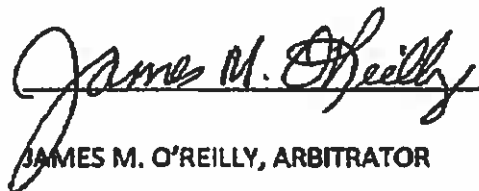
AWARD

The grievance of Chris Dawkins shall be resolved as follows (IX-2)

1. The Memorandum to Grievant Chris Dawkins dated September 10, 2015 from Captain Letter shall be removed from the Grievant's record along with any record indicating that the Grievant had been placed on medical certification as a result of the Memorandum.
2. Captain Letter will remove from the record any Memorandum issued to any other employee on or after September 10, 2015 that was prepared using improper data as was determined in the Chris Dawkins grievance.

IT IS SO ORDERED

DATED THIS JUNE 4, 2017


JAMES M. O'REILLY, ARBITRATOR