

IN ARBITRATION

In the Matter of Arbitration Between:

UNITED STATES DEPARTMENT OF LABOR

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, NATIONAL COUNCIL OF

FIELD LABOR LOCALS

Before M. David Vaughn, Panel Arbitrator

Grievance of:

85-day suspension

Case No. ARB-06-04-044

OPINION AND AWARD

This proceeding takes place pursuant to Article 16 of the National Agreement effective July 1, 2002 (the "Agreement") between the United States Department of Labor (the "Department" or "DOL") and the National Council of Field Labor Locals (NCFL), American Federation of Government Employees ("AFGE" or the "Union") (collectively, the Agency and the Union are the "Parties"), to resolve a grievance filed on behalf of Ms. Debra McDavid ("Grievant") protesting an 85-day unpaid disciplinary suspension from her position as a Safety Engineer with the Dallas Area Office of the Department's Occupational Safety and Health Administration ("OSHA") for failure to follow directions. The Agency denied the grievance and the Union invoked arbitration. In accordance with the procedures of Article 16, Section 1, of the Agreement, I was selected from a panel of arbitrators maintained by the Parties to hear and decide the dispute.

A hearing was convened in the matter in Dallas Texas, on January 13, 2005 at which the Agency was represented by Robert C. Beal, Esq. and Michael Schoen, Esq. and the Union by NCFL Vice President Richard Coon. The hearing continued on January 14<sup>th</sup> and concluded on January 21<sup>st</sup>. The Parties stipulated that the dispute is properly in arbitration and before me, there being no challenge to arbitrability. The Parties were afforded full opportunity to present witness testimony and documentary evidence and to cross-examine witnesses and challenge documents offered by the other. For the Agency testified Area Director of the Dallas Area Office of OSHA Kathryn Delaney, Regional Administrator for OSHA John Miles and Administrative Assistant Kathryn Mueller. For the Union testified Industrial Hygienist Monty Cole, Systems Administrator

Deborah Coler, Industrial Hygienist Sandra Boudloche, Chief Union Steward ESA Donnie Rhymes and Grievant, who was present throughout the hearing. Witnesses were sworn and, with the exception of Grievant, sequestered. Joint Exhibits 1-4 ("JX\_\_"), Agency Exhibits 1-34 ("AX\_\_") and Union Exhibits 1-32 ("UX\_\_") were offered and received into the record. A verbatim transcript ("Tr\_\_") was taken, constituting, by agreement of the Parties, the official record of the hearing. At the conclusion of the hearing the evidentiary record closed. Following the end of the hearing, the Parties, by agreement, submitted Union Exhibit 32. The record closed with the receipt of the last post-hearing brief on March 23, 2005. This Opinion and Award is based on the record. It interprets and applies the Agreement and applicable law and regulations.

### ISSUES FOR DETERMINATION

At the hearing, the Parties agreed (Tr.5) that the issues for determination in this case are:

Was Grievant's suspension of 85 days for reasons which will promote the efficiency of the Department? If not, what shall be the remedy?

### APPLICABLE PROVISIONS OF THE AGREEMENT

The Agreement provides, in relevant part:

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#### Article 14 Adverse Actions

Section 1.C No bargaining unit employee will be subject to an adverse action except for reasons which will promote the efficiency of the Department.

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#### Article 36 Annual Leave

Section 1 Annual leave is a right of the employee and not a privilege. Consistent with the needs of the

Department, annual leave which is requested in advance will be approved.

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#### Article 40 Sick Leave

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#### Section 2 Approval and notice

A. Approval of sick leave will be granted to an employee who is incapacitated to do his/her job....

B. An employee who becomes ill is responsible for notifying his/her supervisor normally within two hours after normal reporting time....

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#### Section 4 Advance of sick leave

An employee who is ill or injured without sick leave to his/her credit should normally be advanced a maximum of 30 days sick leave provided the employee substantiates the request with medical evidence and the employee is expected to return to duty after the period of illness or injury.

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#### Section 5 Charge to annual leave

An approved absence which would otherwise be chargeable to sick leave may be charged to annual leave if requested by the employee and approved by Management.

### FACTUAL BACKGROUND

#### The Parties

The Agency's Dallas Area Office ("DAO") of the Occupational Safety and Health Administration ("OSHA" or the "Agency") of DOL is responsible to ensure that all industrial facilities assigned to its region comply with OSHA regulations. DAO employees are organized into three separate teams that are each designed with specific functions in mind: the Strategic Team led by Team Leader

Robert Flye, the Response Team led by Team Leader Gloria Conway and the Construction Team led by Team Leader Steve Boyd.

The Union represents the Agency's bargaining-unit employees who conduct field inspections in order to ensure OSHA compliance in the region.

### **Grievant's Employment History And Protected Activities**

Grievant has been a Safety Engineer at the Agency's Dallas Area Office since she was hired in 1986. As a Safety Engineer, Grievant's duties are to visit various industrial facilities and enforce OSHA regulations. Tr.414-415. She also prepares warrants and subpoenas and performs outreach activities as needed. Tr.415. At the time of the events giving rise to the instant dispute, Grievant achieved the grade of GS-12. Id.

From at least April of 2003 through September 30, 2003, Grievant's Team Leader was Robert Flye. She was assigned to Team Leader Gloria Conway on October 1, 2003 after Grievant complained that she did not work well with Mr. Flye. Tr. 28-29. Team Leaders have only limited supervisory authority, and the primary supervisor at the Dallas Area Office was at all relevant times Area Director Kathryn Delaney. The Regional Administrator, to whom Ms. Delaney reports, is John Miles.

In addition to her position as a Safety Engineer, Grievant has engaged in protected Union activities as a Union Steward for approximately seven years prior to her 2004 suspension. In her capacity as Union Steward, Grievant represented matters of Union concern before Management. Grievant testified that she has filed several Equal Employment Opportunity ("EEO") complaints with the Department of Labor citing Ms. Delaney as the source of discrimination. Tr.325. Ms. Delaney acknowledged that Grievant has been filing EEO claims against her for approximately two to three years. Tr.31. The disposition of these claims is not a part of the record.

Grievant has also filed a number of Worker's Compensation claims in recent years. She filed a Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation on September 16, 2003 for injuries to her forehead and nose sustained on September 11, 2003 when she struck her head on the trunk of her car while on duty. AX30. Later that day, Grievant ran into the wall in a hotel when the lights suddenly went out. Id. It appears that Management has been skeptical of some of the claims, but it does not appear that any have been contested; and insofar as the record indicates, none have been rejected.

### **Grievant's 1993 Suspension**

Grievant was issued an unpaid disciplinary suspension of 60 days beginning on October 8, 1993 for insubordinate defiance of authority. Tr.100 and AX21. Grievant was instructed to attend a training course in Boulder, Colorado from August 17, 1993 through September 3, 1993. AX34. Grievant had been in a car accident at around this time and was experiencing back pain. Id. She provided medical documentation stating that it would be best if she did not go but that she would still be able to attend the training with certain medical restrictions. Id. Grievant refused to attend the training and was subsequently removed for insubordinate defiance of authority. Id. and AX21. The Merit Systems Protection Board ("MSPB") overturned the removal, reinstated Grievant to employment and reduced her discipline to a 60 day suspension. Id. and AX21.

### **The Backdating of Performance Appraisals**

Grievant testified that in October of 2002, Mr. Flye, who was then her Team Leader, issued her the incorrect performance plan against which Grievant's performance for that year would be evaluated. Tr.477. She further testified that she brought this matter to Mr. Flye's attention in July of 2003. Id. Grievant testified that employees on two teams in the DAO were instructed to backdate performance standards. Id. She further testified that, when she received the correct performance plan at some point at a

meeting in October of 2003, Mr. Flye asked her to date the correct performance plan as if she had received it in October of 2002. Tr. 479. The two performance appraisals were virtually identical. Grievant testified that she believed that Ms. Delaney was aware that Grievant was being asked to backdate the performance plan and that Ms. Delaney did not order Grievant to refrain from doing so. Tr.480. Grievant did not sign the backdated performance plan. Id.

A grievance was filed by the Union on behalf of Grievant on September 23, 2003 concerning Grievant's performance management plan and her relationship with Management vis-à-vis her role as a Union Steward. AX29. A second grievance was presented to Mr. Flye that same day. Id. An informal meeting had previously been held on the matter on July 25, 2003, and a first-step grievance meeting was held on October 9, 2003. Id. Grievant was represented by Mr. Rhymes in the grievance procedure. Grievant testified that she contacted the Department's Office of the Inspector General ("OIG") concerning the backdating issue. It does not appear that the OIG took formal action; it is not clear whether some less formal inquiry was made.

At the hearing, Mr. Miles testified that he reprimanded one supervisor and suspended another supervisor for a day for their connection to the backdating of performance appraisals. Tr.177. Ms. Delaney testified that Mr. Flye was disciplined for his role in connection with the backdating of performance appraisals. Tr.145. By way of memorandum dated August 13, 2003, Mr. Miles also issued a written reprimand to a supervisor for placing employees under a performance plan which was no longer current. AX24. The name of that supervisor was omitted from the memorandum prior to its being admitted into the record. Id. Mr. Miles refused to name the second supervisor at the hearing. Tr.181. In her testimony, Ms. Delaney denied that she took part in the backdating of performance appraisals or that she was disciplined for doing so. Tr.144. Ms. Delaney further denied in her testimony that the OIG investigated the backdating of performance appraisals in the DAO. Id.

## Grievant's Car Accident and OIG Investigation

From October 8, 2003 through March 9, 2004, Grievant was investigated by OIG based on a referral from OSHA that she had vehicle repair work done to her Privately Owned Vehicle ("POV") while on duty. UX3. Grievant was investigated to determine whether she had left a work site to perform non-work-related activities. Id. The investigation was apparently initiated by Management. An initial Investigative report was filed on March 9, 2004. Id.

The facts adduced are that Grievant was driving her POV to Longview Texas on September 10, 2003 where she was scheduled to perform a work-related inspection. Id. While en route, Grievant was involved in a minor car accident which caused damage to the plastic part of her car's fender. Id. Grievant stopped at a vehicle repair shop that was on the way to the facility to be inspected. Id. Grievant stayed at the shop for approximately five to fifteen minutes but did not have repair work performed on her car that day. Id. The following day, Grievant returned to the same vehicle repair shop and, over a period of around twenty minutes, had the necessary repairs performed on her car. Id. The total cost for repairs was around \$20.00. Id.

The synopsis of the initial Investigative Report indicates that Grievant was counseled by her supervisors for her conduct in connection with the accident, but this language was changed through a later Investigative Report. In response to a letter dated June 4, 2004 from Ms. Boudloche who was acting as Grievant's Union representative, Disclosure Officer Kimberly Pacheco of the OIG agreed to amend the second to last sentence of the synopsis to read: "This agent was advised by OSHA that [Grievant] will be counseled by her supervisor." Id. James Duermeyer responded to the OIG's investigation by way of e-mail dated March 5, 2004. Id. In that e-mail, he informed OIG that he found no substantive misconduct on Grievant's part and that Grievant would be counseled by a supervisor at the DAO. Id.

At the hearing, Grievant testified that OIG took no action against her for the incident. Tr.523. She also testified that she never received counseling from any supervisor in connection with the incident. Tr. 336. That testimony was unrebutted.

### **People Time System**

Bargaining-unit employees of the Agency are required to record their duty hours as either hours worked or as hours covered by some form of leave on timesheets stored on a computerized database known as the People Time System ("PTS"). Employees access PTS using a password and are responsible to make accurate, complete and timely entries. Non-worked hours are required to be classified with the appropriate earning code which indicates the type of leave used for those particular hours. For example, the earning code designating Advance Sick Leave is "ASL." A drop-down menu on the PTS can be accessed in the event that an employee needs to look up the earning code corresponding to the proper form of leave. Entries are supposed to be made and closed by each employee for each two-week pay period.

Once an employee has completed his or her timesheet and checked it for accuracy, the employee then closes the timesheet for certification by a supervisor. Employees generate a timesheet on the PTS system for each pay period of the fiscal year. Once the timesheet has been certified by a supervisor, it is then forwarded to the payroll department for processing. If a timesheet is not certified by a supervisor after the pay period has ended, that timesheet remains in "reconcile" status until such time as it is closed by the employee and certified by a supervisor. It does not appear that, without more, lack of certification results in non-payment of the employees time.

At the Dallas Area Office, Ms. Delaney was in charge of certifying employee timesheets. In her absence, other supervisors were authorized to certify timesheets. Even after an employee's



time has been certified for a particular pay period, the time can be reopened ("uncertified") by a Manager.

Ms. Delaney testified on the first day of the hearing that, in order to change an existing earning code, an employee would have to highlight and delete the existing code and type in the appropriate code. Tr. 35. She further testified that the process of changing an earning code should not reasonably take longer than five minutes. Tr. 35.

PTS was relatively new during the period relevant to this dispute. There were still "bugs" in the system, and odd features, such as the apparent display of an employee's current leave balances when an earlier pay period would be accessed.

#### **Procedure for Obtaining Advance Sick Leave**

Employees earn and accrue leave and sick leave at specified rates each pay period. Employees may use accrued leave in accordance with specified procedures and record the leave as used on PTS. Employees who wish to use sick leave which is not yet earned (advance sick leave) may do so only with supervisory approval. There is dispute who is authorized to approve of advance sick leave.

Ms. Delaney testified that, in order to qualify for advance sick leave, an employee is required to submit a written request to the Regional Administrator for approval, which must be supported by medical documentation. Tr.43-44 and AX5. Furthermore, the illness or injury must extend beyond three consecutive workdays. AX5. Ms. Delaney testified that she had informed Grievant of the proper procedure for obtaining advance sick leave on several occasions prior May of 2003.

Ms. Delaney sent Grievant a letter on November 22, 1999 in which she summarized the discussions that were held on the subject of Grievant's request for 80 hours of advance sick leave for

injuries sustained in a car accident. AX3. The letter states in relevant part that "requests for advanced sick leave are handled through the Regional Office. Additionally, I [Ms. Delaney] shared with you [Grievant] that a letter from your physician will be needed to evaluate your request." Id.

At the hearing, Ms. Delaney testified that she decided to review several key policies, including the procedure for requesting advance sick leave, with the office staff during the first general staff meeting of the new fiscal year on November 5, 2001. Tr.41. The policies discussed at the meeting were memorialized through a handout produced by Ms. Delaney. AX4. The handout states that "more than three consecutive days of sick leave require a doctor's note. Advance sick leave requires Regional Administrator approval." Id. Ms. Delaney again circulated this handout among the office staff on October 6, 2003. Tr.42.

**Grievant's Alleged Failure to Change the Earning Codes  
for the Dates of May 13 and 14, 2003 for Pay Period 11**

Grievant filed a Form CA-2 - Notice of Occupational Disease and Claim for Compensation - on April 10, 2003 in which she claimed that she experienced headaches from looking at her computer screen at work. Tr.439 and AX26. Grievant testified that she planned to take leave for several dates during April and May of 2003 to recuperate from her headaches and to obtain medical attention. Tr.441. By way of five SF-71 forms - Applications for Leave - (UX1 and UX2), Grievant requested advance sick leave for eight non-work hours for each of the following five dates: April 14 and 16, 2003 in pay period 9, April 24, 2003 in pay period 10 and May 13 and 14, 2003 in pay period 11. Tr.442. It should be noted that at the hearing, Mr. Beal objected that, due to the illegibility of the handwriting on these documents, the SF-71s submitted by the Union did not clearly establish that Mr. Flye<sup>1</sup>, the signing official, understood the type of leave Grievant was requesting. Tr.291-292.

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<sup>1</sup> Mr. Flye retired at sometime prior to the hearing and did not testify at the call of either Party.

Grievant testified that Mr. Flye told her that he was authorized to certify up to 40 hours of advance sick leave. Tr.431-434.

Grievant was apparently aware of the procedure and the record establishes that she said she submitted such a request in early 2003 to Mr. Flye. Tr.285. She testified that she produced a handwritten statement along with a doctor's note. Id. It does not appear that the request was received; and it was not approved.

As Ms. Delaney was out of the office at this point in pay period 9, Mr. Flye certified Grievant's pay period 9 timesheet and James Duermeyer, a Manager at the Regional Office, certified her pay period 10 timesheet. At the end of May and prior to the end of pay period 11, Ms. Delaney noticed that Grievant's timesheets for pay periods 9 and 10 had been certified and included three dates reflecting use of advance sick leave. Ms. Delaney spoke with Mr. Flye about Grievant's pay period 9 timesheet and determined that he certified the timesheet without following the prescribed procedure. Tr.46. Ms. Delaney testified that she counseled him for improperly certifying a timesheet with advance sick leave.

Ms. Delaney testified that she informed Grievant in May of 2003 that she (Ms. Delaney) was unable to certify timesheets with requests for advance sick leave and that Grievant's pay period 11 timesheet would, therefore, be placed in reconcile status until the earning codes were changed to reflect a form of leave that Ms. Delaney could certify. Tr.48. Ms. Delaney testified that she could only certify a timesheet with advance sick leave only after the Regional Office approved the request for sick leave. Tr.49. As of early 2003, supervisors were allowed to place timesheets in reconcile status if they believed that they could not certify certain timesheets as submitted. Tr.48. As indicated, the employee would still be compensated for the full 80 hours covered in that pay period while the necessary changes were made to the timesheet. Id. Ms. Delaney testified that she believed that Grievant understood her instruction and that she would change her pay period 11 timesheet to reflect a form of leave to which she was entitled such as annual leave. Tr.49.

Ms. Delaney testified that she repeated her instruction to Grievant at least once a month to make the requested changes on her pay period 11 timesheet but that the changes had not been made from June of 2003 through August of 2003. Tr.50. On or around September 11, 2003, Ms. Delaney reviewed Grievant's timesheets on the PTS and noticed that Grievant closed the pay period 11 timesheet on September 9, 2003. Tr.51 and AX1.

At that time, Ms. Delaney performed an audit of Grievant's sick leave balance from pay period 9 through pay period 11 and concluded that Grievant had a negative balance of -15.75 hours of sick leave for pay period 11. Tr.53. She testified that Grievant's sick leave balance was, therefore, almost two full days in arrears. Id. Ms. Delaney testified that she again spoke with Grievant after reviewing her timesheets in September of 2003 at which time she informed Grievant that she could not certify a request for advance sick leave. Tr.54.

Later in September, Ms. Delaney testified that she and Grievant had a series of discussions and exchanged e-mails on the subject of her pay period 11 timesheet. Tr.64. She sent Grievant an e-mail on October 16, 2003 that states in relevant part that "I [Ms. Delaney] am unable to certify your timesheet for pay period 11. I have no authorization to certify advance sick leave. Please adjust your [Grievant's] timesheet and reclose it so that it can be certified." Tr.66 and AX9. In response to this e-mail, Grievant sent Ms. Delaney an e-mail later that day in which she insisted that she submitted all required paper work for Ms. Delaney to forward to Mr. Miles. AX9. Grievant also asserted that "John Miles or the Regional Office will always respond even if it [the request for advance sick leave] is negative." Id. The following day, October 17, 2003, Ms. Delaney responded to Grievant's e-mail with a statement that she had not received paperwork for advance sick leave and provided Grievant with a copy of the Regional Office's policy for obtaining advance sick leave. Id. It does not appear that Grievant ever thereafter submitted any further request for advance sick leave.

On October 24, 2003, Ms. Delaney met with Union Steward Eugene Freeman - who was representing Grievant in her dealings with Management - and Grievant to discuss several problems she was having with Grievant. Tr.68-69. Ms. Delaney testified that Grievant had been walking out of Management meetings without permission (Tr.57-59), that she was failing to follow instructions to complete travel vouchers (Tr.57, 59-60) and that she had not made the requested changes to her pay period 11 timesheet (Tr.57. 64-64 and AX8). At the meeting, Ms. Delaney testified that Grievant stated that she would refuse to attend a meeting with Management if a Management witness were present. Tr.69.

When Grievant had finished speaking at the meeting, Ms. Delaney testified that she outlined her concerns regarding Grievant's behavior and concluded that Grievant enjoyed engaging in a "tussle of strong wills." Id. Ms. Delaney then informed Grievant that the rule of law had to prevail in the office and used a metaphor of colored zones to describe the relationship between conduct and discipline. Id. If Grievant complied with all rules and regulations and stayed in the "green zone," Ms. Delaney would leave her alone. Tr.69-70. If Grievant began to violate rules and entered the "yellow zone," Ms. Delaney would warn her. Tr.70. And if Grievant continued a pattern of misconduct and entered the "red zone," Ms. Delaney would be forced to take action. Id. Following her speech, Ms. Delaney testified that Grievant laughed and stated that she enjoyed being just inside the red zone, to which Ms. Delaney responded that in such she would have to take action against Grievant. Id. Ms. Delaney concluded the meeting by explaining to Grievant that meetings with Management and instructions from Management are required, not optional. Id.

Grievant denied that Ms. Delaney's speech about the colored zones metaphor occurred on October 24, 2003 but believed instead that Ms. Delaney gave this speech at another meeting with Mr. Freeman in attendance. Tr.328-329. Grievant recalled that Ms. Delaney used a chalkboard for the speech and that Ms. Delaney may have used Grievant as a general example. Tr.330.

Following the meetings in October of 2003, there were apparently no interactions between Grievant and Ms. Delaney with respect to pay period 11 until December 15, 2003.

**Grievant's Testimony on the Events  
Prior to December 15, 2003**

Grievant testified that in early 2003 she had been informed by Mr. Flye that he was authorized to certify up to 40 hours of advance sick leave. Tr.286. She testified that she submitted a handwritten letter and a doctor's note for approval of her request for advance sick leave. Tr.285. Grievant testified that she did not have copies of her request as Mr. Flye had the original copy and never provided her with a copy. Tr.286. Grievant testified that she explained to Ms. Delaney in either May or June of 2003 that she had given requests for advance sick leave to Mr. Flye. Tr.297. She further testified that Ms. Delaney informed her that she [Ms. Delaney] intended to discuss the matter with Mr. Flye. Id.

In her testimony, Grievant denied that Ms. Delaney ever instructed her to change the advance sick leave earning codes on her pay period 11 timesheet in June of 2003. Tr.298. Grievant further testified that, at this time, she informed Ms. Delaney that she had advance sick leave entries on the timesheets for pay periods 9 and 10 and that Ms. Delaney did not instruct her to change those at the time. Id.

Grievant testified that the next time she spoke with Ms. Delaney about time records was in September of 2003. Tr.299. Grievant testified that she initiated the meeting with Ms. Delaney to discuss difficulties she was having with the PTS. Id.

**Ms. Delaney's Testimony on the  
Events of December 15, 2003**

Ms. Delaney testified that the Agency's Human Resources Division ("HR") informed her in early December of 2003 that all timesheets in reconcile status were required to be closed and

certified by the close of business on December 15, 2003. Tr.72. On the morning of December 15<sup>th</sup>, Ms. Delaney opened the timesheets on the PTS in order to determine which entries required her certification and discovered that Grievant's timesheet for pay period 11 was still not in reconcile status. Tr.72-73 and AX11. She testified that she found this surprising as she did not at that time recall ever certifying that timesheet as being true and correct. Tr.73.

When Ms. Delaney opened Grievant's pay period 11 timesheet, she noticed that it had recently been certified by Laura Miller, an HR employee for the Office of the Assistant Secretary. Id. Ms. Delaney testified that she contacted the Regional Office to inquire as to whether the matter of Grievant's timesheet had been resolved and learned that Ms. Miller had been trying to close out all timesheets in reconcile status in order to meet the December 15<sup>th</sup> deadline. Id. When Ms. Delaney explained to the Regional Office that Grievant's timesheet had been in reconcile status for a reason, she was informed that she could re-open the timesheet so that Grievant could change the appropriate earning codes. Id. After re-opening the timesheet, Ms. Delaney informed Grievant that Ms. Miller had improperly certified it and that Grievant would have to make the necessary changes. Tr. 75.

Ms. Delaney testified that December 15<sup>th</sup> was a busy day which included the office Christmas party and gift exchange, annual office lunch out of the building and several meetings in the afternoon. Tr. 78. The Team Leaders in the Dallas Area Office had also been aware of HR's deadline for closing and certifying timesheets and were checking them on December 15<sup>th</sup>. Id. Following one of these afternoon meetings, Ms. Delaney received a note from Ms. Conway that asked how Grievant could go from having a balance of negative 15.75 hours of sick leave in pay period 10 to having a positive balance of 19 hours of sick leave in pay period 11. Id. As Ms. Delaney was reading the note, Grievant entered Ms. Delaney's office to discuss a separate Union item. Id.

At some point during the conversation between Ms. Delaney and Grievant, Ms. Conway entered the office to discuss a matter relating to Grievant that required all three people to be present. Tr. 78-79. While Ms. Conway and Grievant were talking, Ms. Delaney accessed the PTS on her computer and found that Grievant had changed the timesheet for pay period 11. Tr.79. Ms. Delaney testified that Grievant changed advance sick leave to sick leave even though Grievant did not have sick leave available for pay period 11. Id.

As she was looking through the timesheets on her computer, Ms. Delaney noticed that Grievant and Ms. Conway were speaking over one another and were not able to communicate effectively. Id. Ms. Delaney interrupted the conversation and insisted that Grievant listen to what her Team Leader was telling her. Id. Grievant then began to talk over Ms. Delaney and accused Ms. Delaney of yelling at her. Tr.80. When Ms. Delaney believed that the conversation was no longer productive, she stopped the meeting and excused Grievant from her office. Id. As Grievant was exiting Ms. Delaney's office, Ms. Delaney realized that the matter of the pay period 11 timesheet had still not been resolved. Id. Ms. Delaney went into the hall and called Grievant back. Id.

Ms. Delaney testified that she did not want to have a situation where she would again have to excuse Grievant from her office, so she decided to hold this subsequent meeting in Ms. Mueller's office which was adjacent to hers. Id. In attendance were Ms. Delaney, Grievant, Ms. Conway and Ms. Mueller. Id. Ms. Delaney again informed Grievant that she would not be able to certify her timesheet for pay period 11 as there was no available balance of sick leave at the time leave was used. Id. Ms. Delaney explained to Grievant that she could not use sick leave accrued in pay period 25 for pay period 11. Tr.81. Ms. Delaney instructed Grievant to change her pay period 11 timesheet to reflect a form of leave to which she was entitled and indicated that she would be willing to approve leave without pay. Id. As Grievant turned to leave the office, she muttered something under her breath that Ms.



Delaney did not understand. Id. Before Grievant left the office, Ms. Delaney gave Grievant a direct, verbal instruction to change her timesheet. Id. Grievant then left the office. Once Grievant had left Ms. Mueller's office, Ms. Conway and Ms. Mueller turned to Ms. Delaney and informed her that Grievant had muttered under her breath that she would not make the change. Tr.81-82.

Upon returning to her office shortly thereafter, Ms. Delaney found a note from Grievant on her chair. Tr.82 and AX15. In the note, Grievant indicated that she had changed the earning code from advance sick leave as requested and that doing so created a problem that required an audit of her time records. Tr.90 and AX15. Ms. Delaney, at approximately 4:30 p.m., then turned to her computer to consult the PTS timesheets to confirm that the change had been made as instructed. Tr.90-91. After reviewing Grievant's closed out timesheet for pay period 11, Ms. Delaney determined that Grievant had not made any changes since they last spoke as it still reflected use of regular sick leave to which she had not been not entitled at the time. Tr.91. Ms. Delaney hoped that Grievant would eventually make the changes to her timesheet prior to the close of business that day and remained in the office until approximately 6:00 p.m., at which time no changes had been made to the timesheet in question. Id.

When Ms. Delaney reported to work the following morning on Tuesday, December 16, 2003, she again consulted Grievant's timesheet on PTS and discovered that no changes had been made. Tr. 91 and AX16. Ms. Delaney, believing that Grievant intentionally failed to follow her instructions to change and close the timesheet, determined that Grievant exhibited insubordinate defiance of authority. Tr.94. She documented what had occurred the previous afternoon (AX18) and also instructed Ms. Conway (AX19) and Ms. Mueller (AX20) to do the same. Tr. 94-95.

Once Ms. Delaney had obtained and reviewed the statements from both Ms. Conway and Ms. Mueller, she determined that Grievant's failure to follow instructions to change her timesheet required a

disciplinary response. Tr.97. Ms. Delaney believed that neither an oral or written reprimand would be sufficient to modify Grievant's behavior as both oral and written requests to change the timesheet had previously been given without result. Id. As mitigating factors in the proposal of discipline, Ms. Delaney noted that Grievant had been with the Agency for approximately 20 years and had satisfactory performance appraisals up to that point. Tr.98. As to aggravating factors, Ms. Delaney determined that Grievant's actions disrupted the operations of the office, undermined Management's authority and constituted a pattern of inappropriate behavior. Id. Furthermore, Ms. Delaney noted that Grievant had a prior incident of discipline for insubordinate defiance of authority on her employment records in the form of a 60-day suspension. Id. Ms. Delaney also testified that she believed Grievant's role as a compliance officer required her to follow rules as meticulously as she enforced them. Tr.98-99.

**Grievant's Testimony on the  
Events of December 15, 2003**

At the hearing, Grievant testified that she arrived late to work on the morning of December 15, 2003 because she had been feeling so ill that she had decided she needed to hire a driver to take her to work. Tr.300. Grievant testified that December 15<sup>th</sup> was the date typically reserved for the office Christmas party and that the first half of the day was spent on training, after which the employees are treated to lunch at a restaurant. Id. In the afternoon, the employees will spend around an hour or two exchanging gifts. Tr.301.

Grievant testified that shortly after she arrived at work at approximately 10:00 a.m., she was asked by Ms. Delaney to attend a meeting with her and Mr. Freeman to discuss a Union item involving an employee named Mimi Thaung. Id. The office staff then went to lunch at a restaurant and then returned to the office where they participated a gift exchange. Tr.302. Following the gift exchange, testified Grievant, she went to her desk to access her timesheets

but was unable to log on to the PTS. Tr.303. She testified that she had been having ongoing problems accessing her computer. Grievant spoke with Debra Coler, the office's computer technician, about her computer difficulties and Ms. Coler was eventually able to log Grievant onto her computer. Id.

Once she had access to her computer, Grievant attempted to review her timesheets on the PTS but was locked out. Tr.304 She again had Ms. Coler assist her with unlocking her computer. Id. Grievant then looked through her pay period 11 timesheet and determined that she needed to speak with Ms. Delaney about it. Id. When she went to Ms. Delaney's office, Grievant learned that Ms. Delaney was in a private meeting with Mr. Freeman and would not be available in the near future. Tr.305. She returned to her desk and was again locked out of her computer. Id. Grievant spoke again with Ms. Coler about her computer difficulties, but Ms. Coler was in the process of leaving. Id. Grievant testified that she felt that there was no use in working at her computer without Ms. Coler available to assist her, so she decided not to do work that required the use of her computer. Id.

At the hearing, Ms. Coler confirmed that Grievant had been experiencing computer difficulties over a period of time, including on December 15, 2003. Tr.639. She further testified that if Grievant turned her computer off or left her desk that Grievant would sometimes not be able to log into her computer without technical assistance and that there were times when Grievant was not able to access her computer at all. Tr.638-639. Ms. Coler testified that Grievant also had complained about the dimness of her computer screen for a period between four and six years. Tr.640.

A few minutes after ceasing work on her computer, Ms. Thaung approached Grievant about interpreting a provision of the Agreement. Id. Grievant spoke with Ms. Thaung briefly before realizing that her ride would be coming to pick her up from work shortly. Id. At approximately 4:00 p.m. (Tr.311) Grievant went to

sign out for the day at the sign out sheet located near Ms. Delaney's office when she noticed that Ms. Delaney's office door was open. Tr.306. She knocked on the door to Ms. Delaney's office and asked Ms. Delaney if they could discuss the matter that Ms. Thaung had just brought to her attention. Id. Ms. Delaney and Grievant briefly discussed that matter and were able to reach a compromise. Tr.307.

Grievant testified that as she prepared to leave the office for the day, Ms. Delaney then raised the issue of her timesheets for pay periods 9, 10 and 11. Tr.308. Grievant informed Ms. Delaney that she had just taken a dose of Vicodin and that it was imperative that she leave before the medication took effect. Id. Ms. Delaney agreed that Grievant could leave for the day when Ms. Conway entered the office to discuss an OSHA case that Grievant had worked on. Tr.308-309. Grievant reiterated her need to leave soon due to her taking of medication. Tr.309. Grievant answered several of Ms. Conway's questions before they began to disagree on a certain issue. Id. Grievant acknowledged that they exchanged some words back and forth but assured Ms. Delaney that they were not having an argument. Id.

At this point, testified Grievant, Ms. Delaney stood up and came over to where Grievant was sitting and began to raise her voice along with Ms. Conway. Tr.310. As the debate continued, Grievant stated that she felt threatened and insisted that Ms. Delaney lower her voice and continue the conversation calmly or allow her to leave the office. Id. Ms. Delaney opened the door to her office and gestured for Grievant to leave. Id. Grievant exited the office and signed out before preparing to leave for the day.

As Grievant was walking down the hall, Ms. Delaney called out the name "Debra." Tr.311. As there was more than one Debra in the office at the time, Grievant testified that she did not immediately respond as she was accustomed to being specified by her first and last name in such situations. Id. When Ms. Delaney called out "Debra" again, Grievant realized that she was the only Debra in the

office and turned around to see Ms. Delaney making a beckoning gesture with her hand. Id. Ms. Delaney indicated for Grievant to enter Ms. Mueller's office along with herself and Ms. Conway. Tr.312.

Grievant testified that, in Ms. Mueller's office, Ms. Delaney began to speak with Grievant about timesheets from pay periods 24 and 25. Id. Eventually, the discussion turned towards her pay period 11 timesheet. Tr.315. Grievant testified that she informed Ms. Delaney that she had difficulty accessing her timesheets due to the malfunctioning of her computer. Id. Grievant further stated that, as Ms. Coler had left for the day, she could not get into the PTS to amend her timesheets. Id. Ms. Delaney asserted that Grievant needed to change the earning codes for advance sick leave on her pay period 11 timesheet to annual leave. Id. Grievant testified that she was confused by what Ms. Delaney was saying and denied that she was required to use annual leave for any of the timesheets for pay periods 9, 10 and 11. Tr.316. Grievant asserted that she was unable to access the PTS to make any changes to her timesheets. Id.

Grievant testified that she did not understand if Ms. Delaney was issuing her a direct order to make changes to the pay period 11 timesheet during the meeting in Ms. Mueller's office. Id. She insisted that, earlier on December 15<sup>th</sup>, she was able to access her pay period 11 timesheet in which she replaced the earning codes for advance sick leave with those designating sick leave. Tr.318. Grievant explained to the three attendees at the meeting that she had used all her sick leave in pay period 11 and did not take any sick leave in pay periods 9 or 10. Tr.320. According to Grievant, all three attendees appeared confused about her explanation. Id. Grievant denied that she ever refused to make changes to her timesheets and then prepared to leave the office for the day. Id.

Grievant returned to her desk and wrote a note on a piece of paper. Tr.321. As indicated, the note states in relevant part that "I [Grievant] changed the advance sick leave as requested

previously so that all timesheets can be not in reconcile status." AX15. In the note, Grievant requests that an audit of her time records be conducted "so that all confusion and confrontations can be avoided." Tr.322 and AX11. The note indicates a time of 4:30 p.m. Tr.322 and AX11. She testified that she handed the note to Team Leader Steve Boyd to give to Ms. Delaney and left the office for the day. Tr.321.

### **The Investigation and Issuance of Discipline**

Ms. Delaney proposed that Grievant be issued a 90-day disciplinary suspension for her failure to change the ASL earning codes on her timesheet for pay period 11. JX2. Grievant and Mr. Freeman met with Regional Administrator Miles on February 9, 2004 and gave an oral response to the proposed discipline. JX3. By way of memorandum dated February 17, 2004, Mr. Miles sustained the charges against Grievant but reduced the duration of the suspension from 90 days to 85 days. JX4.

### **POSITIONS OF THE PARTIES**

The positions of the Parties were set forth at the hearing and in detailed post-hearing briefs. They are summarized as follows:

**The Agency argues** that it met its burden to prove Grievant guilty of the charged misconduct and that the 85-day suspension was issued for such cause as will promote the efficiency of the Agency.

The Agency points out that adverse actions may be taken for only such cause as will promote the efficiency of service. DOL asserts that it was only obligated to prove that the employee's misconduct had an adverse impact on the Agency's operations. It maintains that Grievant's failure to follow her supervisor's instructions constitutes a serious offense and that, if all employees were allowed to disregard instructions, then there would be chaos in the office. Furthermore, the Agency points out that Mr. Miles testified that he believed that Grievant intentionally

failed to follow instructions to change her timesheet as she had been ordered to do over a seven-month period. DOL argues that the mission of OSHA cannot be carried out effectively if employees repeatedly fail to follow instructions issued by supervisors.

The Agency asserts that there is no dispute that Grievant failed to follow the instructions to change the "ASL" entries for May 13 and 14, 2003. It points out that Ms. Delaney testified that Grievant did not make the requested changes for pay period 11 by the close of business on December 15, 2003 or at any time in the previous seven months. The Agency further points out that Grievant admitted in her testimony that she understood that she was required to follow the instructions of her supervisors.

The Agency asserts that it is not required to prove that Grievant's failure to follow directions was intentional. It points out that Grievant does not have the right to disregard her supervisor's instructions even if she believed the instruction to be improper. The Agency maintains that, unless compliance would pose a danger to her or others, Grievant was required to follow her supervisor's instructions and that she could have subsequently filed a grievance if she believed the instructions to have been improper.

As to the Union's argument that Grievant believed that she had an available balance of sick leave for pay period 11, the Agency argues that Grievant was required to follow Ms. Delaney's instructions to change the earning codes and, if she felt it necessary, grieve the matter at a later time. It contends that Grievant's belief is not credible as she most likely would have claimed sick leave rather than advance sick leave when she originally filled out her timesheet for pay period 11. The Agency points out that Mr. Miles testified that Grievant did not have an available balance of sick leave at the beginning of pay period 11. It asserts that Grievant was not able to use sick leave accrued after pay period 11 to cover leave taken in pay period 11.

With respect to the Union's possible argument that Mr. Flye approved Grievant's request for advance sick leave, the Agency argues that Grievant was aware of the proper procedure of requesting advance sick leave and was aware that Mr. Flye lacked authority to approve such leave. It points out that Ms. Delaney informed Grievant that Ms. Delaney would not be able to certify the timesheet for pay period 11 at the end of May of 2003. DOL asserts that Grievant's testimony that Mr. Flye indicated to her that he could approve up to 40 hours of advance sick leave did not excuse her from following Ms. Delaney's instructions. The Agency argues that the leave slips Grievant filled out are unclear and inconsistent as to what type of leave was requested.

DOL challenges Grievant's testimony that she had signed out on December 15<sup>th</sup> prior to Ms. Delaney giving her instructions in Ms. Mueller's office. The Agency points out that Grievant left a note on Ms. Delaney's chair which indicated that she had made the change to her timesheet for pay period 11. It further points out that the note indicated a time of 4:30 p.m. and that Grievant did not sign out on the signout sheet until 4:35 p.m. DOL argues that, even if Grievant had signed out prior to receiving instructions from Ms. Delaney, Grievant was still required to follow instructions.

With respect to the Union's argument that the records obtained in February 2004 (UX30) demonstrate that Grievant had an available balance of sick leave at the beginning of pay period 11, the Agency argues that Grievant did not have an available balance of sick leave at the end of pay period 11. DOL asserts that PTS indicated on December 15<sup>th</sup> that Grievant had sick leave because she had accumulated four hours of accrued sick leave in each subsequent pay period since pay period 11. That does not change the fact that she lacked sick leave for use in pay period 11. It maintains that, even if she did have available sick leave, Grievant was still required to follow the instructions of her supervisor. The Agency points out that Grievant admitted in her testimony that Ms. Delaney informed her that Ms. Delaney would not certify her timesheet for pay period 11 at the end of May of 2003. DOL further points out



that Grievant also testified that she understood that Ms. Delaney could not certify the timesheet as it was submitted.

As to Grievant's assertion that she was too sick to make the change to her timesheet on December 15, 2003, the Agency argues that this assertion is specious. It points out that Grievant was not so sick as to be prevented from attending the Christmas lunch or the gift exchange or from representing an employee in discussions with Ms. Delaney.

The Agency challenges the Union's argument that Grievant was unable to change the earning codes on her timesheet on December 15, 2003 due to a malfunction of her computer. DOL argues that Grievant could have used another employee's computer to make the appropriate change. It points out that Grievant testified that she did not ask to use another employee's computer to make the change. The Agency also points out that Grievant testified that she did not complain to the computer systems administrator, Ms. Coler, that she was unable to access the PTS on December 15, 2003. DOL asserts that there were at least four other computers to which Grievant had access on that date. The Agency further asserts that Grievant failed on December 15, 2003 to claim to have computer problems.

The Agency asserts that the deciding official, Mr. Miles, considered all relevant *Douglas*<sup>2</sup> factors in his decision to reduce the proposed penalty of a 90-day suspension to an 85-day suspension. It argues that, in determining the appropriate penalty to be imposed, the Agency considered and exercised all management discretion within the tolerable limits of reasonableness. DOL maintains that, taking into account the *Douglas* Factors, Grievant's 85-day suspension was an appropriate and reasonable penalty.

As to the argument that Grievant's discipline was excessive in light of what Mr. Flye received for attempting to backdate performance appraisals, the Agency argues that the two employees

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<sup>2</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

are not similarly situated and the reasons for the discipline not analagous. DOL points out that Mr. Flye was a supervisor and not a part of the bargaining unit. It further points out that the circumstances leading to discipline in the two examples are substantively different. The Agency asserts that there were mitigating circumstances in Mr. Flye's case that were absent from Grievant's. It points out that, at the time he was disciplined, Mr. Flye had no prior record of discipline, while Grievant had a prior suspensions of 60 days for insubordinate defiance to authority.

The Agency argues that the Union failed to meet its burden to prove that DOL suspended Grievant as an act of reprisal for her engagement in protected Union activities. DOL asserts that, in order to prove reprisal, the Union was obligated to prove first, that Grievant engaged in protected activity; second, that he deciding official was aware of these activities; third, that the adverse action under review could, under the circumstances, have been retaliation; and fourth, that there is a genuine nexus between retaliation and the action taken. It maintains that the Union failed its burden to prove that the disciplinary action taken against Grievant was retaliatory.

For all these reasons, the Agency urges that the grievance be denied in its entirety.

**The Union argues** that the Agency did not meet its burden to prove Grievant guilty of the charges of failing to follow directions.

The Union contends that Grievant followed Ms. Delaney's instruction and changed the advanced sick leave earning code on the timesheet for pay period 11 to a form of leave to which she was entitled on December 15, 2003. It asserts that when Grievant was able to access her timesheets on PTS on that date, the system showed that she had a balance of 19 hours of sick leave and that she changed the 16 hours of advance sick leave to 16 hours of sick

leave. AFGE points out that Ms. Delaney ordered Grievant to change earning codes on pay period 11 to reflect the type of leave to which she was entitled. The Union maintains that Grievant reasonably believed that she was entitled to sick leave for May 13 and 14, 2003 as indicated by the PTS and thus did not intentionally fail to comply with the instruction.

NCFLL asserts that there is a great deal of confusion as to how much sick leave and annual leave Grievant actually had at any given point in 2003 based on the timesheets from the PTS. It points out that the timesheet for pay period 10 indicates that Grievant had a negative sick leave balance of -15.75 hours and an annual leave balance of 4.25 at the end of that period, while the balances for the subsequent pay period are 4.25 hours and 69 hours respectively. The Union maintains that the leave balances on the PTS were incorrect from the end of one pay period to the beginning of the next pay period, hence Grievant's request for an audit of her leave balance.

The Union argues that Grievant did not understand that Ms. Delaney was giving her a direct order on December 15, 2003 to change the dates in question for pay period 11. It points out that Grievant testified to as much at the hearing. NCFLL denies that Grievant refused to change anything following her conversation with Ms. Delaney, Ms. Conway and Ms. Mueller. The Union maintains that, in any event, Grievant was unable to access her computer to make the change.

The Union challenges the Agency's argument that Grievant should have used a computer at another employee's workstation on December 15, 2003 and that, since she did not do so, she is, therefore, guilty of failing to follow directions. It points out that testimony at the hearing establishes that it is a violation of office policy and procedure for employees to share workstations. It further points out that Ms. Coler was not in the office at the this time to assist Grievant in accessing her computer. The Union maintains that it would have been reasonable for Ms. Delaney, Ms.

Conway or Ms. Mueller to offer Grievant the use of one of their computers.

The Union argues that Management had motivation to retaliate against Grievant for her activities in connection with the disciplining of her supervisors. It points out that both Ms. Delaney and Mr. Flye were disciplined in connection with Mr. Flye's attempt to falsify appraisal documents in response to Grievant's complaints. The Union maintains that the discipline assessed to Mr. Flye was unfair as he backdated official documents. NCFLL asserts that the backdating of official documents is a serious offense and warrants punishment greater than the one-day suspension he received.

The Union asserts that Management attempted to portray Grievant in an unfavorable light by asking her questions about her occupational injuries and filings to the Office of Worker's Compensation Programs ("OWCP") at the hearing. It points out that there are hazards to her position as an OSHA Safety Engineer. AFGE maintains that the Agency failed to offer any evidence or testimony that Grievant's injuries or compensation claims were above average in frequency for employees in her position.

NCFLL argues with respect to the claim that Grievant refused to meet with Mr. Flye to discuss her performance appraisal that Mr. Flye had over six weeks prior to October 17, 2003 - the date on which he wanted to meet with Grievant - to conduct Grievant's performance appraisal. The Union asserts that Mr. Flye waited until 2:50 p.m. on a Friday to address the matter with Grievant and ordered her to drop whatever official Agency business she was involved with at the time. It points out that in October of 2003, Mr. Flye was not Grievant's Team Leader. NCFLL further points out that Grievant never received advance notice from Mr. Flye about the meeting and that she was working on an OSHA complaint at that time.

The Union argues that Mr. Miles failed to conduct an adequate investigation into the facts in Grievant's case before deciding to

suspend her. NCFLL asserts that Mr. Miles contradicted himself at several points in his testimony. It points out that Mr. Miles made his decision to suspend Grievant on February 17, 2004 whereas the timesheets furnished by Management (UX30) were printed on February 10, 2004. The Union challenges Mr. Miles' testimony that Grievant did not have any sick leave in pay periods 9, 10 or 11 and asserts that the timesheets in UX30 show otherwise.

The Union asserts that Ms. Coler substantiated Grievant's testimony that she had technical problems with her computer on December 15, 2003. It points out that Ms. Coler testified that she had to unlock Grievant's system several times that day. AFGE asserts that Grievant was unable to use her computer late in the afternoon as Ms. Coler had left early on December 15<sup>th</sup>. It points out that Ms. Coler testified to as much at the hearing.

NCFLL argues that the Agency is retaliating against Grievant for her participation in protected Union activities such as filing EEO claims, filing Worker's Compensation claims, and for her role in the disciplining of two supervisors.

The Union argues, in its post-hearing brief, that the Agency has reassigned Grievant in retaliation for her failure to drop her grievance and for her complaints and grievances about Management.<sup>3</sup>

The Union urges that the grievance be sustained, that the

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<sup>3</sup> The Union submitted with its post-hearing brief a memorandum issued by Deputy Regional Administrator Joe Reina and dated March 8, 2005 through which Grievant has been reassigned to the Agency's Fort Worth Area Office. Grievant will retain her position as GS-0803-12 Safety Engineer and her pay and benefits will not be affected through the reassignment. The memorandum states that Grievant had been reassigned on the grounds that the Fort Worth Area Office had no Safety Engineer, that Grievant has expressed displeasure with the Dallas Area Office Management and that the reassignment would allow her to work with different Management personnel. It also maintains that the Agency made off-record settlement offers during the course of the hearing which were rejected, prompting the Agency's reprisals. Those actions are not a part of the grievance before me. They occurred either off the record or after the close of the record. They are not, therefore, part of the record. Moreover, the Agency lacked opportunity to present other evidence or to respond to the Union's arguments. I lack jurisdiction over the alleged actions and am not able to take actions and arguments into account in deciding the dispute which is before me.

suspension be expunged from her record and that Grievant receive all due back pay and benefits.

### **DISCUSSION AND ANALYSIS**

It was the burden of the Agency to prove Grievant guilty of failing to follow directions. For the reasons that follow, I conclude that the Agency met that burden. The assessment of the penalty of an 85-day Suspension in consequence of the violation can only stand if it was for reasons which will promote the efficiency of the Agency. For the reasons which follow, I am not persuaded that the 85 day Suspension meets that requirement. The penalty will be reduced as set forth in the Award.

#### **Management's Right to Instruct Employees**

The right of the Agency to direct its employees is basic to the employment relationship. Managers have the right to give reasonable instructions to their employees; and employees have the obligation to comply with such instructions. If an employee believes that a particular instruction is in conflict with the employee's rights under law or contract, the ordinary and expected response is that the employee will comply with the instruction and challenge the propriety of the instruction through the grievance procedure. This principle, for which the short description is "obey now, grieve later" is applicable to almost every workplace circumstance. Only in extreme and unusual circumstances, such as where compliance would create a risk to the safety of the employee or where compliance would require the employee to violate the law, does disobedience escape disciplinary consequences, and then only when there is no reasonable way other than disobedience to resolve the situation.

It is also clear that an Agency may enforce compliance with its instructions through the disciplinary process. To sustain discipline for failure to comply with supervisory instructions - insubordination by another name - the employer must demonstrate

that the employee responded improperly to Management's exercise of authority. See, e.g., Section 16.04 in "Common Causes of Discipline", Steven J. Goldsmith and Louis Shuman, Ch. 16 of *Labor and Employment Arbitration, Second Edition*, Bornstein, Gosline and Greenbaum, Eds. (LexisNexis/Matthew Bender, New York, 1988 with Supplements through 2004).

**Requirement of Employees to Only Take Leave  
to Which They are Entitled**

The requirement that employees take only leave to which they are entitled at the time and, in circumstances where employees certify their own time, to record their hours worked accurately, is so basic to an employee's obligation as not to require further discussion. Instructions to employees to certify their hours in a timely manner and to do so accurately, using categories of leave to which they are entitled, are clearly appropriate and enforceable. Taking advance sick leave is contemplated by the Agreement, but is subject to the Agency's approval process.

The Agency alleges in this dispute that Grievant failed to follow the instruction given by Ms. Delaney to enter her PTS entries for pay period 11 to document her time for May 13 and 14 with leave other than sick leave (which she had not accrued at the time) or advance sick leave (for which she had not been approved by proper authority). To prove the charges and support the imposition of discipline, the Agency was obligated to prove that Grievant failed to comply with the instructions and was not excused from compliance.

The proof is complicated under PTS because an entry constitutes a certification by the employee that the entry made is an accurate and appropriate assessment of the time for the pay period. At the hearing, Ms. Delaney testified that it is imperative that employees accurately record their time. Tr. 32-33. Grievant also admitted in her testimony that she was aware that she was required to ensure that the entries on her timesheets were

accurate. Tr. 424-429. It would be an improper instruction to compel an employee to make a certification which the employee believes in good faith to be false and which would thereby be taken beyond challenge. Mr. Miles testified that Grievant was required to follow supervisory instructions even if she felt the instruction to be improper. Tr. 215. However, in this instance the record is clear - or easily could have been made so - that Grievant's certification of the hours not using sick leave advance sick leave would have only been because her supervisor ordered her to do so and that she did not agree with the result. There is no proof that Grievant would have foregone her right to challenge the propriety of the time certified had she complied with Ms. Delaney's instruction.

Proof of an employee's failure to take types of leave to which the employee is entitled is also complicated by the way PTS presents its data and by the several pay periods Grievant kept open; for any particular pay period for which the hours not certified at the close of the period, future displays of the pay period will apparently display leave totals as may have been subsequently adjusted, rather than the amounts of leave available at the time of the pay period.

#### **Grievant's Lack of Entitlement to Sick Leave or to Advance Sick Leave**

Agency records demonstrate that Grievant had insufficient accrued sick leave during pay period 11 to cover her two days of absence with sick leave. She had, according to her time records, an opening balance of only 4.25 hours of sick leave for pay period 11. JX2.

Grievant expressed confusion as to her actual leave balances and requested a leave audit. It is true that PTS displayed a variety of leave balances available to Grievant during the period around the time of the pay period 11 and at later times. See, e.g., UX30. Indeed, as indicated, it appears that the system displays leave available to an employee at the time the system is



accessed. However, that was a quirk of which Grievant was, or reasonably should have been, aware. Her lack of entitlement at the time to sick leave was communicated to her by Ms. Delaney. The fact that Grievant may have accrued sick leave at a later time does not entitle her to use the leave at an earlier time.

Three factors bear on Grievant's claim to cover her pay period 11 absences with sick leave: first, the sick leave balance of 4.25 hours which PTS showed at the time of pay period 11. That balance was insufficient to cover her absences, as Grievant recognized at the time by claiming Advance Sick leave for the period. If Grievant believed that she had sufficient sick leave, that would have been unnecessary.

Second, none of the several different balances which appear in PTS printouts change that conclusion. The evidence establishes that, prior to December 15<sup>th</sup>, Grievant lacked sufficient accrued sick leave as of pay period 11 to cover her absences in pay period 11. Even after the ASL entries had been removed from the timesheets for pay periods 9 and 10, the revised opening balance of sick leave for pay period 11 was still not sufficient to cover her absences in that pay period. I note that adjustments made to timesheets apparently affect the leave balances of all subsequent timesheets for that fiscal year, creating discrepancies for corresponding leave balances in the same pay period. However, such system adjustments did not create entitlement on the part of Grievant to sick leave sufficient to cover pay period 11.

Third, Ms. Delaney repeatedly told Grievant that she lacked sufficient sick leave in pay period 11 and must cover her time with another type of leave to which she was entitled. Grievant's request for a leave audit was not sufficient to excuse her from compliance with Ms. Delaney's instruction pending completion of the audit. There is no indication that any such audit uncovered any additional entitlement to leave applicable to pay period 11. The evidence convinces me that Grievant was not entitled to cover her time for pay period 11 with sick leave.

As indicated, Grievant initially closed her pay period 11 timesheet as including two days of advance sick leave. The Agreement clearly contemplates the availability of advance sick leave. The evidence persuades me that the procedure required to obtain advance sick leave is to obtain the approval from the Regional Office. The evidence also persuades me that Grievant is charged with knowledge of the proper and exclusive procedure to request advance sick leave, which is through the Regional Office. AX5. Grievant knew how to obtain ASL. She had done so before. (Tr. 37 and AX2.) Indeed, Grievant testified that she made such a request to the Regional Office through Mr. Flye.

It is equally clear that Grievant never obtained the approval required to allow the use of such leave. She may or may not have submitted the request, but there is no evidence that it was approved by the Regional office. She certainly never received such approval. Grievant testified that Mr. Flye told her that he was approving her advance sick leave; however, even if that testimony is accepted as true, the evidence is that he lacked authority to do so. Under the procedures in place, only the Regional Office could do so. Thus, I am convinced that Mr. Flye lacked authority to approve advance sick leave, his apparent statements to the contrary notwithstanding.

Grievant was advised by Ms. Delaney that she was not approved for ASL and in response, asserted that she had applied and would check out the status of the request. However, insofar as the record indicates, she never followed up and she never renewed her request! Thus, I conclude, Grievant could not have reasonably assumed, at the time she initially certified her time, that she was authorized by the Agency to claim advance sick leave for pay period 11.

**Ms. Delaney's Instructions to Grievant to  
Close her Timesheet for Pay Period 11**

The record reflects that Ms. Delaney instructed Grievant to amend her pay period 11 timesheet at the end of May of 2003

(Tr.49): "I [Ms. Delaney] told her [Grievant] she had to take a form of leave to which she was entitled."; on September 25, 2003 (Tr.64): "I [Ms. Delaney] began asking about September the 25<sup>th</sup> for her to go and close her timesheet for that [11] pay period..." and on October 16, 2003 (AX9): "Additionally, I am unable to certify your timesheet for pay period 11. I have no authorization to certify advance sick leave. Please adjust you timesheet and reclose it so that it can be certified", all prior to the instructions which she gave Grievant on December 15<sup>th</sup>. These clear, sometimes written, instructions outweigh Grievant's testimony that she never understood Management to be giving her direct instructions or the terms of those orders. The record persuades me that Ms. Delaney repeatedly instructed Grievant and that Grievant understood Ms. Delaney's instructions. It is also clear that Grievant failed to comply with the instructions.

These instructions were routine, as indeed they should have been. Grievant's explanations for non-compliance (her belief in her entitlement to advance sick leave, her misunderstanding of Ms. Delaney's instructions, etc.) are vague and self-serving. In particular, Grievant's testimony that she did not understand that Ms. Delaney was giving her direct instruction is not plausible in light of the several times Ms. Delaney gave the instructions, including written instructions. Ms. Delaney not unreasonably believed Grievant to be engaging in a contest of wills, deliberately failing to comply. Even if the explanation is more mundane, the result was the same. Grievant kept open in PTS pay period 11, from May, until December, in contravention of Ms. Delaney's instructions. No sufficient reason was advanced for her to have done so.

#### **Ms. Delaney's December 15<sup>th</sup> Instructions and Grievant's Lack of Compliance**

The evidence with respect to the events of December 15<sup>th</sup> is in conflict. I find the testimony of all participants to be self-serving and somewhat suspect. None of it is compelling. However,

this much is clear from the record: Ms. Delaney, under the pressure from her superiors to close all open payroll periods, again instructed Grievant to certify her time for pay period 11 using leave to which she was entitled during that period, this time emphasizing the need for immediate compliance. While it does not appear that Ms. Delaney attached a disciplinary consequence to her direct order, she made clear the urgency of her request and gave Grievant a deadline - by the end of the day - and told her that her timesheet must reflect a type of leave to which she had been entitled at the time.

The evidence persuades me that Ms. Delaney instructed Grievant to change her timesheet at a time prior to the gift exchange and repeated that order in the late afternoon when she observed that Grievant had not changed her timesheet properly. I am convinced that Grievant understood the direction from Ms. Delaney and understood what she was required to comply. The evidence is clear that Grievant did not, in fact, comply with the instruction at the time.

When Ms. Delaney discovered that Grievant had not changed her timesheet to reflect a form of leave to which she was entitled during pay period 11, she repeated her direct order and specified that she would be willing to approve annual leave or leave without pay. The evidence is that, by the close of business of December 15<sup>th</sup>, and despite all that had occurred that day and in the several months previously, Grievant failed to comply fully with Ms. Delaney's direct order to amend her timesheet as requested and to close it for certification.

#### **Grievant's Explanations and Defenses**

In response to the charges, Grievant raises a series of defenses and explanations. I am not persuaded that they negate the charges against her. Grievant testified that she could not access her computer on December 15<sup>th</sup> to make the entry, could not obtain assistance to do so and could not use other employees' terminals.

It is uncontested that Grievant had problems accessing her computer and when she attempted to log in, she was sometimes unable to do so or was "kicked off". On December 15<sup>th</sup>, by mid-afternoon, she lacked the assistance which she had previously received from Ms. Coler because Coler had left early. Grievant's testimony in this regard is corroborated by Ms. Coler. However, Greivant never advised Management of the problems on December 15<sup>th</sup> (although she had on other occasions) and never requested to use another employee's computer. Moreover, by waiting to attempt to comply with the instruction until the last minute, after her technical support had left, she invited the problems she may have experienced.

Grievant also testified that she was ill and in pain that day and, toward the end of the day, took additional pain medication. The implication is that her judgment was fuzzed and that she needed to leave work, rather than stay, or even that she had already signed out at the time of Ms. Delaney's last instruction.

While all the foregoing explanations are possible, they are new explanations not raised at the time and, indeed, not raised until the hearing. I am not persuaded that those explanations excuse Grievant's conduct, even if true. Again, had Grievant complied when instructed, the problems would not have interfered with carrying out the instruction.

I am skeptical of the Union's assertion that her illness, pain and medication were reasons to excuse or mitigate Grievant's non-compliance with the instruction. Grievant was feeling well enough to come to work, participate in the holiday activities, stay at work that day and carry out her functions. She could have done the work in the morning, when she was apparently feeling well enough to do so, and would have had help with her balky computer. Moreover, Grievant knew very well what Ms. Delaney wanted her to do - as she had been given instructions as to what was required over a period of several months. Finally, Grievant left a note for Ms. Delaney as she departed which raised none of these points but asserted that she had complied with the request.

The record establishes that Grievant changed her pay period 11 timesheet on December 15<sup>th</sup> to reflect sick leave instead of advance sick leave. She apparently took the position that she read the positive leave balances which popped up when she opened the screen as being available for use in pay period 11. However, as indicated, I am convinced that Grievant lacked a sufficient balance of sick leave and lacked authorization for advance sick leave to cover the two absences in question for pay period 11. It does not appear that payroll procedures allowed Grievant to retroactively apply sick leave for pay period 11 that may have accrued after that period had ended.

It is still unclear to me what eventually happened with respect to the time accounting for pay period 11. Whatever it was, Grievant's handling did not negate her non-compliance with Ms. Delaney's instructions on and prior to December 15<sup>th</sup>.

#### **The Union's Affirmative Defense of Agency Retaliation**

It was the burden of the Union to prove that the Agency assessed discipline against Grievant as retaliation for protected activities in which she engaged. For the reasons that follow, I am persuaded that the Union met its burden to demonstrate that the severity of the penalty (although not the discipline itself) was influenced by Management's desire to retaliate against her. To establish retaliation, the Union was required to meet four criteria: one, that Grievant engaged in protected activities; two, that the deciding official knew of these activities; three, that the adverse action under review could, under the circumstances, have been retaliation; and four, that there exists a genuine nexus between retaliation and the action taken. *Warren v. Department of the Army*, 804 F.2d 654, 656-658 (Fed. Cir. 1986).

In a broad sense, retaliation encompasses any Management action that is taken to punish an employee for exercising protected rights. Article 5, Section 4 of the Agreement states in relevant part that "the initiation of a grievance by an employee will not

cause any reflection on his/her standing with his/her supervisor or on his/her loyalty or desirability to the Department." Moreover, employers may generally not discipline employees for conduct that is protected by statute, such as filing discrimination complaints.

In support of the argument that the Agency retaliated against Grievant for engaging in protected activities, the Union points that she filed numerous EEO complaints and Worker's Compensation claims as well as filing grievances against Management on behalf of the Union, other employees and for herself. She also represented employees and the Union in dealing with those grievances. The Union asserts that she both grieved and contacted the OIG about the issue of backdating performance appraisals which resulted in the disciplining of two supervisors; and she was involved in negotiations in 2003 on behalf of the Union regarding an office move with the DAO that went before the Federal Impasse Panel. 5 USC 2302(b)(8)(B)(ii) prohibits retaliation against employees who disclose what they reasonably believe to be evidence of gross mismanagement. The evidence is that employees in the DAO were either instructed or pressured to backdate their performance appraisals by Team Leader Flye. I hold that Grievant reasonably believed that there was evidence of such mismanagement at the DAO and that her disclosure of such evidence was, therefore, protected activity. With respect to the first criterion of the retaliation test, the record clearly establishes that Grievant engaged in a variety of protected activities.

As to the second criterion, I am persuaded that Mr. Miles, the official who approved Grievant's suspension, was aware that she engaged in protected activity when she filed a grievance against the Agency for backdating of performance appraisals. In his testimony, Mr. Miles admitted that he was aware that Grievant played a contributory role in the suspension of one supervisor and the reprimanding of another as a result of the incident. Ms. Delaney, the official who initially proposed the discipline against Grievant, was aware of the backdating incident. Ms. Delaney was also cited by Grievant in as many as twelve EEO claims and was the

target of numerous grievances filed by Grievant for herself, for other employees or for the Union. Ms. Delaney was clearly aware of these actions and of Grievant's role in them.

With respect to the third criterion, I am persuaded that the adverse action under review could be retaliatory under the circumstances. Two supervisors in the DAO were disciplined by the Regional Administrator for their involvement in backdating documents. I infer that Ms. Delaney and Mr. Flye were the recipients of the discipline. Grievant's EEO actions and grievances clearly challenged Management. Grievant was more than a thorn in Management's side; she was an impediment and embarrassment.

I note that, in addition to Grievant's 85-day unpaid disciplinary suspension, the Union alleges that the Agency committed a prior act of retaliation when OIG investigated Grievant for a POV repair work performed while she was on duty. I am skeptical that Management believed Grievant's conduct to warrant OIG investigation. I conclude that retaliation could and likely was a motive for Management to act.

As to the fourth and final criterion - whether there is a genuine nexus between the protected activity in which Grievant engaged and the discipline taken against her - I am persuaded that the Agency and Grievant bore strong and reciprocal animosity against each other. Grievant wanted to "stick it to" agency Management; and, I am persuaded, Management wanted to "stick it to" Grievant. That does not mean that the two motives cancel each other. Grievant had a right to engage in protected activities, regardless of Management's frustration with her. And, as indicated, Grievant had an obligation to comply with Management's instructions, regardless of her dislike and mistrust toward her Managers and regardless of the availability of alternative means of proceeding or other mitigating circumstances. Management's animus toward an employee does not excuse the employee from the disciplinary consequences of proven misconduct. And it is clear that Grievant did engage in misconduct.



The record also persuades me that Management's determination as to the severity of the penalty was heavily influenced by its desire to punish Grievant and that the punishment was in substantial part in response to the pattern of Grievant's protected activity. Indeed, Management's determination to treat Grievant's conduct through the discipline process is itself indication of an abandonment of other, available alternatives. See the discussion which follows. Management's motive in applying the level of discipline it did is insufficient to invalidate the charges but is sufficient to warrant reduction in the penalty, which the Award reflects.

### ***Douglas Factors***

It is well-established that Management was obligated to take into account the *Douglas* factors and that the penalty imposed cannot stand if the record establishes that the Agency failed properly to do so. It is not the job of the reviewing authority to fly-speck Management's application of the *Douglas* factors, but where Management fails its obligations, adjustment to the discipline is appropriate. The Award reflects my assessment of the appropriate level of discipline in light of all the circumstances, including the impact of the *Douglas* factors described below.

### **Consistency with Other Penalties**

Of the Union's argument that Grievant's discipline was excessive because Managers received much less discipline for their actions in connection with back-dating documents, I am not persuaded. The violations for which Mr. Flye was suspended and Ms. Delaney was likely admonished are not comparable to those of Grievant and the Managers are not covered by the Agreement.

### **Past Disciplinary Record**

The stated basis for the long suspension assessed against Grievant was, in part, a result of consideration of her previous

suspension for the same offense. I am not persuaded that Grievant's conduct in this instances was comparable to the conduct which led to her previous discipline. Moreover, the previous discipline took place in 1993, 10 years prior to the instant discipline; and it is, by any assessment, stale. The prior discipline confirms that Grievant was aware of her obligation to comply with Management instructions and of the disciplinary consequences of failure to do so. Indeed, that prior discipline was sufficient to correct and prevent recurrences for a period of 10 years.

It is well established that prior discipline loses its value over time for purposes of assessing the level of progressive discipline in consequence of future conduct. In taking into account the *Douglas* factor of the employee's prior discipline, I am persuaded that the Agency abused its discretion in basing the length of Grievant's suspension in part on her prior suspension. Whatever might be the Agency's assessment of Grievant's other, longer term conduct, the conduct leading to the discipline at issue is much more properly treated, for purposes of progressive discipline, as a first suspension than as a second. The Award reflects my assessment of the reasonable disciplinary response.

#### Clarity of Notice

The record establishes that although Ms. Delaney repeated her instruction to Grievant on a number of occasions, she never, until December 15<sup>th</sup> made clear that immediate compliance was required and never during the period made clear that her instruction was a direct order to which disciplinary consequences would attach in the event of non-compliance. Management clearly could have made its instruction much clearer much earlier, a *Douglas* factor which it does not appear the Agency adequately took into account. Ms. Delaney also allowed her instructions to have gone without compliance for months. More to the point, Ms. Delaney never withheld or sought to recover from Grievant's pay monies representing the time for which Grievant had claimed in PTS leave to which she was not entitled. It is against the ambiguous backdrop

of Ms. Delaney's record of unenforced instructions and unexercised alternatives that Grievant's record of extended non-compliance must be viewed.

### **Availability of Alternative Sanctions**

That the situation at issue led to the issuance of a long suspension is an indictment of the attitude and abilities of all participants. But for the mutual animosity and strained communications, I am persuaded that the confrontation would never have extended as long as it did or escalated to the level it did; instead, the dispute would have been resolved far earlier and corrected without discipline or at a lower level of discipline. This was, after all, a situation in which both participants had the ability, at virtually anytime, to end the problems, at virtually no cost. Grievant could have, at any time, recast her time accounting in a manner satisfactory to Ms. Delaney and grieved had she disagreed. Indeed, the Agency could have proceeded in a non-disciplinary manner: Management controls the payroll process; the Agency determines what to pay its employees and what leave to allow. Although no specific provisions cited, I believe that the Agency would be, empowered to withhold disputed wages. Had Ms. Delaney wished to close the pay period and withhold Grievant's pay for the two days at issue, I cannot but believe that, in the exercise of Managerial prerogatives, she could have caused that to occur. The Agency's election to "resolve" the dispute through the discipline process is unfortunate and largely unnecessary.

### **Conclusion**

None of the foregoing discussion negates Grievant's simple refusal to comply with Management's instructions. However, had this dispute been addressed through non-disciplinary avenues or had it been brought to a head earlier than the six plus months which Management allowed it to fester, it could have been resolved with a significantly lower impact. It must be remembered that the dispute involved the leave status of two days, the pay for which

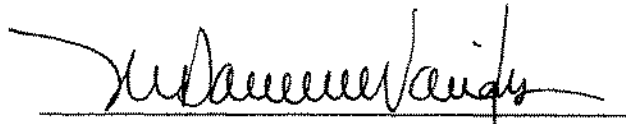
Management ultimately controlled. Management's assertion that Grievant's action threatened the Agency's mission is at the very least, exaggerated.

It may well be that Management believes Grievant's EEO complaints and grievances are baseless or even advanced for purposes of harassment. However, that is not grounds to allow the instructional process to work as it did. The Award reflects my assessment as to the impact of all of these factors on the proper level of discipline.

#### A W A R D

The grievance is sustained in part and denied in part. The Agency proved Grievant guilty of the charges against her and that the imposition of some discipline was for such cause as will promote the efficiency of the service. However, the penalty of an 85 day unpaid disciplinary was, for the reasons set forth in the Opinion, arbitrary, excessive and unreasonable. The penalty shall be reduced to a suspension of 14 days. Grievant shall be made whole for wages and benefits lost as a result of the original suspension, less the period of her reduced suspension. I retain jurisdiction for a period of 90 calendar days from the date of this Award to address and resolve disputes in connection with the implementation of this Award.

Issued at Clarksville, Maryland this 21<sup>st</sup> day of April, 2005.

  
M. David Vaughn, Arbitrator