ARBITRATION AWARD

In the Matter of the Arbitration between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, OPERATING LOCATION LOCALS, Local 1227 (Union) and DEFENSE FINANCE AND ACCOUNTING SERVICE (Agency)	FMCS No. 05-01827 San Bernardino, California (Sick leave call in policy)

BEFORE: Eduardo Escamilla, Arbitrator

APPEARANCES:

For the Union:	Stephan F. Thompson
For the Agency:	Peter Heins
Place of Hearing:	San Bernardino, California
Date of Hearing:	January 19, 2006
Date of Award:	February 10, 2006

Eduardo Escamilla
Arbitrator

ISSUES

Did the Agency establish new procedures for reporting sick leave? If so, did the procedures violate Article 15 of the contract and if so, what is the appropriate remedy?

Did the Agency remedy the alleged violations? If so, is the grievance arbitrable?

STATEMENT OF FACTS

Relevant contract provisions

Article 15-Sick Leave
Section 2.B-Approval and Notice

An employee who becomes ill is responsible for personally notifying his or her supervisor, normally within two (2) hours after normal reporting time. Under unusual circumstances, a supervisor will accept such requests from an intermediary. If the degree of illness or injury of the employee's remote duty station prohibits compliance with the two-hour limit, the employee will report his or her absence as soon as possible.

Findings of fact

The parties enjoy a collective bargaining agreement, which was in effect when the instant grievance was filed on October 1, 2004.[1] The Union alleges that the Agency violated Article 15.2.B through its agent, Katty Chu, Chief of Foreign Military Sales Branch at the San Bernardino, California facility by unilaterally adding call in procedures when employees take sick leave. The Union further alleges that the new procedures established a change in working conditions with following threats by Chu to her staff of AWOL if they did not follow the

[1] On August 9, 2004, the Agency denied the grievance and refused to retract Chu's August 2 email. On November 8, the Union requested the matter be sent to arbitration.

procedures. The Union requests that the Agency immediately rescind the new procedures and instruct Chu from making any further threats. Most of the relevant facts are discerned from emails. The following sets forth the undisputed sequence of events.

On August 2, 2004, Chu sent the following email to her staff,

"In the morning, when you call in sick for requesting sick leave, you need to talk to a real person. If I am not here to answer your phone call, please call my supervisor, Jerome Nezart X3166 for approval. Or Jerri X3128, and she will find a supervisor to approve your leave. Same with the email, you need to send a copy to Jerome in case I am not here to receive your emails."[2]

On August 16, 2004, Chu sent the following email to her staff,

"I know some of you have a doubt about what I said in my first email. However, this is a regulation:
The MUMA states that employee must personally notify his or her supervisor. If they didn't contact the 1st line supervisor or any other supervisor they have no approval for the unscheduled leave they are asking for. If they leave a voicemail they are in violation of the MUMA when it states they must "personally notify" their supervisor. Even a message on voicemail does not meet the requirements of the MUMA. Until that employee has spoken with management and *received approval* for the leave they are requesting, the leave is not approved.
Again, if I am not here to answer your phone calls, please call any supervisor for approval of call in leave. The supervisor could be Jerome, Tony, and John or others."

On September 16, 2004, Chu sent the following email to her staff,

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[2] The above email is the basis for this grievance.

"I have sent a message before regarding the call in/annual situation.
Basically, in the morning, when you call in for requesting sick leave or annual leave, you need to talk to a real person. If I am not here to answer your phone call, please call my supervisor, Jerome Nezart, X3166 or any other supervisor for approval. (Please keep a copy of phone roster at home). Since Jerri Adtkins will be retired on 9/30/2004, you can call Rose Casto, X3004, and she will find a supervisor to approve your leave."

On September 29, 2004, Chu sent the following email to her staff,

"I like to send this message again for a reminder. You need to receive the approval from a supervisor for all leaves and credit hours on all occasions. To leave the message on the telephone or email to the managers are not valid. Please follow this rule.
Any leave without supervisor's approval will be an **AWOL**."

On January 13, 2006, John Francis, Site Director, sent the following email to Chu's staff,

"This is to notify you that effective immediately, the below emails [referring to Chu's August 2, September 16 and September 29] are rescinded."

On January 18, 2006, Stephen Thompson, Union president, responded to Francis' January 13 email. Thompson complained that during a staff meeting on October 27, 2004, Francis had instructed the managers and supervisors at the San Bernardino facility to follow the below cited policy when employees call in sick.

"Reminder that employees calling to say they will be late or to request sick or annual leave must personally speak to their supervisors. In the event, the supervisor is not in, they must go up the chain of command. They can speak to any supervisor if they are unable to contact their supervisor or management. Conversely, if an employee leaves a message, the supervisor needs to call the employee to verify the details of the absence."

Additionally, Thompson complained that on November 1, 2004, Francis' policy was sent to all managers and supervisors and was posted at the facility's bulletin board.

The Union presented several employees to testify in support of its allegations. Their testimony revealed that prior to Chu's memo, employees could leave a voice mail with Chu or send an email to her notifying her of their intended use of leave. Following Chu's email, an employee with a hearing impediment testified that Chu refused to accept his email when he requested leave. The employee also attempted to call Chu using a phone system that allows him to key words into a device that translates the keyed words to an audible message. Chu would not accept his calls, whether she could not understand the system or simply refused to take his call is unknown. Additionally, the evidence shows that employees were aware of Chu's emails that threaten to charge them with AWOL if they did not follow the procedure.

Employees from different departments who are not supervised by Chu testified they were aware of the new policies and were instructed to follow them. Still yet, another employee who works in a department different than Chu's testified that he was still allowed to leave voice mail or send an email whenever he takes sick leave.

A Union representative testified about Article 15. She testified that during negotiations for the recent contract, management attempted to change the sick leave policy by requiring employees to complete a specific form. This is the only attempt that management made to change the sick leave policy during negotiations.

The Union representative explained that employees may have virtual supervisors that are employed at one facility while the employee is located at a different facility. The implemented procedure would require employees to call long distance at their expense to inform their supervisors of their intended use of sick leave.

Furthermore, she explained that Article 15 cannot be supplemented by the local parties. Article 44 specifically states that unless provided in the specific provisions of the contract, local parties cannot supplement any of the contract's provisions. Article 15 does not contain a

provision which allows the parties to negotiate a local supplement on this matter and thus the parties can not locally supplement Article 15.

The Agency presented John Francis as their sole witness. He is the director at the Dayton, Ohio facility who is also responsible for the San Bernardino facility. He began working at the San Bernardino facility in 2001 and achieved several higher supervisory positions until his current position. Francis recalled that Chu's email was an attempt to resolve a specific incident. Chu sent the email her staff to clarify the procedures.

On January 13, 2006, Francis sent an email to Chu's staff rescinding Chu's emails regarding call in procedures for leave. He asserts that no employee has been disciplined for failing to follow the procedures although one employee was charged with AWOL. That employee's AWOL status was later changed and leave was approved after his explanation to his supervisor when he reported to work.

Francis interprets Article 15 to mean that employees must personally speak with their supervisors. He further asserts that he discussed the policies with Thompson before implementing them however, the Union did not agree with the policies. He stated that he implemented the policies to assist the employees whenever they could not find a supervisor when calling in to take sick leave.

Francis states that after rescinding Chu's emails, the procedure for call in for use of sick leave has returned to the prior practice. He states that employees can send an email or leave a voice mail whenever they call in to report their absence. Other than Chu's staff, he has not informed other employees at the San Bernardino facility about the rescission of Chu's emails.

ANALYSIS

An initial determination of the arbitrability of the grievance is necessary before a substantive analysis and determination of the merits can be made. The Agency relies on Francis' January 13 memo to Chu's staff to support its arguments that the grievance is not

arbitrable. The Union argues that the memo is an insufficient remedy because the rescission was limited to Chu's staff while the policy applied to all employees at the San Bernardino facility.

I agree with the Agency that at times an employer's post grievance conduct may make the grievance moot and does not warrant any type of arbitral findings. However, a union has a contractual right to have the employer remedy the grievance allegations and has a legitimate right to not accept the employer's conduct as satisfactorily disposing of all the issues raised by the grievance. A close examination of the post grievance conduct is needed to resolve this issue.

The grievance's genesis began with Chu's memos to her staff. The January 13 corrective memo only address Chu's memos and more importantly was only directed to Chu's staff. The evidence is undisputed that the new policy at the facility was not limited to Chu's staff, but rather, as the witness explained, the policy was applied to other departments. Additionally, the Agency notified all employees at the facility of the new policy by posting the new policy on the bulletin board. Thus, I find that the Agency informed all employees at the facility of the new policy and by limiting the notice of rescission to only Chu's staff, the Agency has not dispelled the employees' belief that the new policy is still in effect.

Examining Francis' January 13 memo closely, it is apparent that the memo rescinds the Chu's memo but does not specifically address the issue of whether the new policy was rescinded nor does it advice employees to revert to the old policy regarding calling in sick. Under these circumstances and in light of the Union's objections to the adequacy of the remedy, I find merit to the Union's argument that the Agency's corrective actions did not clearly inform all employees that the new policy had ceased. I find that the Agency's January 13 memo is insufficient to conclude with certainty that all employees are operating under the old procedures. This is evident by the testimony of some of the employees that they are still adhering to the new policy because of lack of clear notification by the Agency. For the above reasons, I find that the Agency's corrective conduct did not make the grievance moot and thus the grievance is arbitrable.

With respect to the merits of the case, the Union's argument is based on the axiom of law that an employer may not make unilateral changes to a contract during the life of the contract without specific acquiescence by the Union or otherwise specifically permitted by other contract provisions. In this case, the Union argument is supported by Article 1, recognition clause, and Article 44, local supplement clause. Article 1 provides the Union with the right to bargain in behalf of bargaining unit employees. The Agency may not overlook this fundamental provision when implementing policies. The Agency has an obligation to bargain with the Union over any new terms and conditions of employment, if permitted to engage in negotiations during the life of a contract, and must reach agreement with the Union before implementing the policy, unless the contract provides management under the management rights clause or other provisions with the right to unilaterally implement such policies. The Agency has not advanced any argument to believe that its actions are legitimate managerial actions that do not require agreement by the Union or that its actions are derivative of any other specific contract provision.

Furthermore, the Union argues that Article 44 prohibits the parties at the local level to supplement the collective bargaining agreement by entering into local agreements. Article 44 specifically prohibits any local supplement of any provision unless that provision contains a clause that permits local supplements. Article 15 which is the operative provision regarding call in requirements does not contain any proviso which authorizes the local parties to supplement this provision.

Initially, I find the Union's argument based on Article 44 is inapplicable to the instant matter as there has never been any assertion that the parties entered into a local supplement that modified Article 15. Accordingly, Article 44 does not play a role in the disposition of the grievance.

The merits of the grievance rest solely on the interpretation of Article 15.2(B) call in requirement. Arbitrators are bound to apply provisions that are clear and unambiguous and may not modify or alter the provisions by interpreting those provisions in a manner inconsistent with their clear application. When provisions are not clear and unambiguous, arbitrators utilize general principles of contract interpretation to determine the parties' intent in adopting the specific language in question.

There are several well known and used contract interpretation guidelines that assist arbitrators in determining the parties' intent, such as applying the common and normally accepted meaning to any language in dispute; applying specific language versus general language; considering the juxtaposition of the disputed language with the rest of the provision's language; and the parties' past practice.

The disputed language in Article 15 deals with the requirement that employees are responsible for "personally notifying" their supervisor when not reporting to work because of illness. The meaning of "personally notifying" was interpreted by the Agency in this grievance that actual voice contact is required. The Union argues that the new policy also required employees to personally notify by phone other supervisors when they are unable to reach their supervisors. It asserts that this requirement is an additional step that employees are required to undertake which is not contained in Article 15 language.

I find that the term "personally notifying" is reasonable susceptible to more than one interpretation. "Personally notifying" can mean several things. Certainly it can mean as the Agency suggests that employees must speak with a supervisor when requesting sick leave. However, the provision did not use the word "speak", but rather the term "notify". Notification can be accomplished by several means, including voice messages or emails. The term "personally" means that only the employee can notify his supervisor about his use of sick leave. This interpretation is reinforced by the subsequent sentence in the provision, wherein it is intimated that supervisors will not accept notification by someone else besides the employee, absent unusual circumstances. Thus the operative phrase "personally notifying" is not clear and unambiguous. Therefore, the aforementioned guidelines in determining the intent of the parties are dispositive of the contract interpretation.

In this case, the controlling guideline for interpreting the disputed phrase is the parties' past practice. I find that the evidence established that the parties enjoyed a past practice that defined Article 15's requirements. The employees' testimony revealed that it was an acceptable procedure to leave a voice mail or send an email notifying their supervisor of their absence

when their supervisor was not available. The practice had been ongoing for an extended period of time and was acknowledged and accepted by both parties.

A departure from past practice that affects a term and condition of employment must be made by mutual agreement or can be made unilaterally if management retains that right under the auspices of another contract provision. Absent these two exceptions, the Agency may not unilaterally change a term and condition of employment that has been defined by past practice.

Firstly, I find that the reporting requirement is a term and condition of employment that is specifically covered by the contract. Secondly, I find that the past practice has defined the application of the language in Article 15 to require employees to personally call their supervisor and when not available to leave a voice mail or send an email. Prior to Chu's memo and Francis' declaration of call in policy that was posted on the bulletin board, the Agency did not require employees to personally speak with their supervisor or speak with another supervisor if their immediate supervisor was not available. Therefore, departure from this past practice is a unilateral change of the terms and conditions of employment that violates the contract. Article 15.2.B requires employees to notify only their supervisor; it does not require employees to notify other supervisors when their supervisor is unavailable. By requiring employees to speak to other supervisors, the Agency has added a new condition to Article 15.2.B as the provision is clear that notification is directed to the employees' supervisor. This procedure in itself has modified the call in requirements set forth in Article 15.2.B.

With respect to the remedy, the Union seeks that a finding be made that the Agency violated the contract by unilaterally changing the past practice and that the Agency notify all of the employees that the new policy has been rescinded. I find that a cease and desist order is sufficient remedy in this case without the additionally requirement that the Agency specifically notify all of the employees that the new policy has been rescinded. Notice to employees of the findings herein is not necessarily confined to the Agency. The Union is not foreclosed from disseminating to employees the findings made herein. Therefore, I shall deny the Union's request of Agency notification to all employees of the policy for call in procedures.

AWARD

The Agency violated Article 15 by unilaterally changing the past practice of allowing employees to leave voice messages or email messages to their supervisors when they called in to report their absence from work due to illness. The Agency is directed to cease and desist this policy and is further directed to adhere to its past practice policy regarding sick leave call in procedures.