UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICE

In The Matter of Arbitration Between:	)	Case Number 03-03192
	)	
	)	
Defense Finance and Accounting Service	)	Arbitrator Lawrence M. Oberdank
	)	
and	)	OPINION AND AWARD
	)	
American Federation of Government Employees, Local 2510, AFL-CIO	)	

APPEARANCES

FOR THE AGENCY

Deborah Kamat, Attorney
Deborah Maslanka
Tom Fasham
Teresa Briley
Sharon Arnold
Joy Booth
David Gates
Darryl Roberts
Pam Harris
Charles Warlick
Charlene Johnson

FOR THE UNION

Stuart A. Kirsch, Attorney
William Roach, Grievant
Kelly Dull
George Bout
Marion Johnson

STATEMENT OF THE FACTS

The Defense Finance and Accounting Service, herein the "Agency", is a sub-agency of the Department of Defense that provides payroll and accounting services to all branches of the military and their civilian personnel. All nonprofessional employees working at its operating location in Charleston, South Carolina are represented by American Federation of Government Employees, Local 2510, AFL-CIO, herein the "Union", for purposes of collective bargaining about wages, hours and other terms and conditions of employment.

The American Federation of Government Employees, AFL-CIO, herein the "National

Union", negotiates a master labor agreement with the agency on behalf of fourteen of its local affiliates, including the union. The affiliates and their local managers may, however, supplement the master agreement so long as they do not delete or modify any provision, policy or procedure contained therein or enter into an understanding which is in conflict with it pursuant to Article 44, Section 1 but these understandings bind only the local union and management at the operating location where they are negotiated.

Article 9 of the master agreement governs official time and travel of union officers and stewards and, in pertinent part, provides:

> SECTION 1 - GENERAL
>
> We agree that Union officials and stewards should be authorized reasonable time to represent employees and work with supervisors and managers to resolve issues and concerns. Such time will be adequate to represent bargaining unit employees and administer this Agreement with the Agency in a cooperative manner.
>
> SECTION 2 - REPRESENTATIONAL FUNCTIONS
>
> A. Official time is used to perform representational functions on behalf of bargaining unit employees. Such functions include but are not limited to the following:
>
> 1. Negotiations over the impact and/or implementation of changes in conditions of employment of bargaining unit employees.
>
> 2. Presentation and processing of grievances.
>
> 3. Attendance at management-initiated meetings.
>
> 4. Participation on committees or panels as authorized by this Agreement.
>
> 5. Participation in proceedings before the Federal Labor Relations Authority (FLRA) in accordance with FLRA's rules and regulations, and/or other third party hearings.
>
> 6. To negotiate "face-to-face" or to prepare, transmit, consider, and

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communicate on articles and issues through use of mail and telephone.

7. To consult with supervisors and management officials on matters of mutual concern.

8. To prepare requests or recommendations in connection with consultations or meetings with managers and supervisors on issues not involving grievances.

9. To conduct new employee orientations.

10. To review regulations.

11. To attend Agency meetings that advise the Union of changes in working conditions.

12. To review changes in working conditions.

13. To complete surveys.

14. To prepare the documentation that supports the Labor Management report.

15. To attend periodic meetings for the purpose of management presentations on matters of mutual concern.

***

SECTION 3 - RELEASE PROCEDURE

A. A Union representative will secure the approval of his or her immediate supervisor before performing labor management duties. The supervisor should approve the request, unless there is a mission requirement that would temporarily delay the departure. When such temporary delays occur, the parties will arrive at a mutually agreeable time for departure. The Union official will be given time to inform any bargaining unit employees involved in the delay.

B. When the Union representative leaves the work site on Union business, he or she will notify the supervisor of the purpose of the absence, departure time, and anticipated return time. The Union representative will notify their supervisor upon their return. Upon entering a work area other than his or her own to meet with an employee, the representative will advise the immediate supervisor of his or her presence, the employee to be contacted, and the estimated duration of the meeting. If there is a mission requirement that would temporarily delay the meeting the parties will arrive at a mutually agreeable time for the

meeting requested.

***

SECTION 5 - OFFICIAL TIME FOR COMMITTEES

When committees are established that address mutual concerns, the Union will be given the opportunity to participate. When participating on such committees, official time will be used.

***

SECTION 8 - TRAVEL TIME

Official time will be used when it is necessary for Union representatives to travel to other local DFAS work sites to accomplish their representational duties.

SECTION 9 - EXCLUSIONS FROM OFFICIAL TIME

A. Official time is not used for the following types of activities.

1. Matters pertaining to internal management of the Union.

2. Membership meetings.

3. Soliciting memberships.

4. Collection of dues or assessments.

5. Campaigning for Union office.

6. Distributing or posting of Union literature, notices, and authorization cards.

***

Article 38 of the master labor agreement governs disciplinary and adverse actions and, in relevant part, provides:

SECTION 1 - GENERAL

A. Maintaining discipline is not normally a problem in working environments where reasonable rules and standards of conduct and performance are clearly communicated and consistently

enforced; where supervisors set a good example; where aspects of conduct and performance needing improvement are identified in a way that respects the employee's dignity; where employees are treated fairly and are encouraged to improve; and where good performers are recognized. Constructive discipline is preventative in nature and seeks to develop, correct, and rehabilitate employees; to encourage their acceptance of appropriate responsibilities; and to prevent, if possible, situations where there is no alternative but to penalize. When there is an indication that the employee is experiencing social or personal problems, this possibility needs to be considered before deciding on disciplinary action. When penalties are appropriate, they are applied as consistently as possible considering the practical circumstances of the cause(s) for disciplinary action.

B. We agree that DFAS Regulation 1426.1 will be the primary framework used to administer discipline and adverse actions for bargaining unit members with the addition of the following mutually agreed upon provisions.

SECTION 2 - PROGRESSIVE DISCIIPLINE

A. In keeping with the concept of progressive discipline, actions should be the minimum, in the judgment of the disciplining official, that can reasonably be expected to correct and improve employee behavior and maintain discipline and morale among all employees. All circumstances being the same in a disciplinary or adverse action case, the concept of like remedies for like offenses will be applied throughout the Agency. This provision shall not prevent the Agency from taking any appropriate action but shall require a reasonable basis when there is a deviation from the concept of progressive discipline. All actions taken under this Article will be initiated in the most expeditious manner.

B. Alternatives to formal disciplinary actions include counseling and oral admonishments. Employees have the right to respond to any allegation or actions taken against them. When an oral admonishment is administered, it will be maintained in the Supervisor's record of Employee for nor more than 6 months.

SECTION 3 - INVESTIGATIONS

A. An employee who is to be questioned in connection with an investigation may request representation by the Union at any time that he or she reasonably believes that disciplinary action may result, If the employee requests representation, no questioning will take place until the Union has been given

a reasonable opportunity to be present. A copy of any written statements made by an employee will be provided to the employee or his or her designated representative. Supervisors, employees, Union representatives, and others involved in an investigation will not disclose any information gained through such investigation except in the performance of their official duties.

B. After any notice of proposed action is given to an employee, their Union representative will be provided the opportunity to investigate and interview the Parties to the incident.

SECTION 4- LETTERS OF WARNING

Letters of Warning are not disciplinary actions and are not filed in the Official Personnel Folder. Prior to consideration of issuing a Letter of Reprimand, A Letter of Warning is normally given to the employee unless the seriousness of the circumstances indicate otherwise. The warning provides the employee notice of potential consequences of certain behavior if such behavior continues.

SECTION 5 - DISCIPLINARY ACTION

A. Disciplinary actions are Letters of Reprimand and suspensions of 14 days or less under Subparts A and B, 5 C.F.R., Part 752. Such actions taken against an employee must be timely and supported by just cause, and are grievable by the employee through the negotiated Grievance Procedure Article.

B. Procedures for effecting disciplinary actions are as follows:

1. A Letter of Reprimand will state the reasons for its issuance and inform the employee of the right to grieve under the Grievance Procedure Article. A Letter of Reprimand will remain in the Employee's Official Personnel Folder for a period of not more than one year unless removed earlier as a result of a grievance or arbitration decision.

2. Suspensions of 14 days or less.

a. An employee will be given advance written notice stating the specific reasons for the proposed action. The employee will be given 10 workdays to present an oral and/or written reply to the proposal. The employee will be given a copy of the material, if any, relied on to support the reasons given in the notice.

b. An employee who has been issued an advance written notice of suspension may request an extension of time in which to reply to the notice. The official designated to receive any reply will make a decision on such a request.

c. Normally, an employee will be given a written decision within 10 workdays after the expiration of the time allowed for the employee's response. The decision notice will advise the employee of the specific reasons for the decision and of the right to grieve the action under the Grievance Procedure Article.

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Article 39 of the master contract contains a grievance procedure for the resolution of disputes and, in Section 2 A, defines a grievance as any complaint by an employee concerning any matter relating to his or her employment; by a labor organization concerning any matter relating to the employment of any employee or by any employee, labor organization or Agency concerning the effect, interpretation, or claimed breach of the agreement or claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment. This procedure, with limited exceptions, is the sole method for resolving differences between the parties.

Unresolved disputes may be submitted to arbitration pursuant to Article 40 of the master contract but the Arbitrator's authority is limited by Article 40, Section 4 which provides:

A. We agree that the jurisdiction and authority of the arbitrator's opinions will be confined exclusively to the interpretation and application of the provisions of this Agreement and Departmental regulations.

B. The arbitrator will have no authority to add to, subtract from, alter, Amend, or modify any provision of this Agreement.

C. The arbitrator will have the authority to make an aggrieved employee whole to the extent such remedy is not prohibited by statute, higher-

level regulations, decisions of appropriate higher authority, or this Agreement.

D. The arbitrator's decision will be final and binding. However, the parties reserve the right to take exceptions to any award to the Federal Labor Relations Authority in accordance with its rules and regulations.

The grievant, William Roach, has been a federal employee for twenty-five years and works as an Accounting Technician in the Charleston Operating Location. Roach, who has held a number of union positions since being hired in 1995, is the union's president and the secretary of the AFGE DEFAS Council, which is an intermediate body made up of representatives from the affiliates of the national union.[1]

On February 19, 2002, Teresa Briley, a Labor Relations Specialist, notified a number of union officials that a meeting of the DFAS/AFGE bargaining team would be held at headquarters in Arlington, Virginia on Wednesday, February 27th to discuss a variety of initiatives. Travel to the meeting was to begin on Tuesday afternoon unless transportation arrangements dictated otherwise and union representatives were told they should return by the first available flight following the meeting on Wednesday or on Thursday morning depending on the arrangements they could make. Roach was one of the labor representatives who received Briley's e-mail.

Roach submitted an Alternate Work Schedule to his immediate supervisor, Sharon Arnold, after being advised of the labor relations meeting and asked for eight hours administrative leave on February 26, 27 and 28, 2002 to travel to Arlington.[2] Arnold, approved the request on February 25th. A Travel Order dated the same day but given to Roach at headquarters authorized

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[1] Roach was not the union's president at the time of the incident giving rise to the within discipline, however.

[2] A representational function should be expensed as official time according to the master agreement but Arnold erroneously charged it as administrative leave instead.

him to leave Charleston on February 26, 2002 for three days and return on February 28th. The order also allowed him to vary his itinerary. Prior to leaving, Roach told Arnold he was doing so and that he would see her on Friday, March 1, 2002. Arnold was not aware of Briley's e-mail and did not object but simply told Roach to have a safe trip.

Roach did not report to work on February 26, 2002 but went directly to the airport and caught an 11:00 AM flight to Washington, DC. He was scheduled to return on February 28th aboard U. S. Airways flight 3497 which left Reagan National Airport at 8:45 AM. Roach attended the conference with management on February 27th and, during the course of the meeting, was told that union officials would assemble afterwards to discuss negotiating strategy. They were also told their planning session would last into the "wee hours of the morning". Consequently, Roach phoned his wife, Debra, and asked her to look into the possibility of returning to Charleston on a later flight.[3] Debra was unable to discuss her efforts with him but left a message telling Roach she had cancelled the earlier flight and reserved space for him on U. S. Airways flight 3467 which was to leave Reagan National at 2:35 PM. Roach attended the union meeting which ended at 1:30 in the morning but subsequently changed his mind about returning to Charleston on the later flight. He called the airline to obtain a seat on his original flight but was told it was filled. Roach, therefore, returned on flight 3467, arriving in Charleston at approximately 6:00 PM, and went directly home.

Roach reported to work as scheduled on March 1, 2002 and Arnold asked him about his trip but said nothing about his failure to return to work the previous afternoon. Charles Warlick, the union president who attended the meeting with Roach, called him later in the morning and told

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[3] Roach's wife, who is also employed by the agency, makes his arrangements when he travels on union business.

Roach his supervisor, David Kaskin, threatened to charge Warlick with being AWOL unless he took leave because he had not returned to work by noon on February 28th. Warlick, acting under protest, elected to take the leave. Arnold subsequently talked to Roach about his trip and told him he should have returned on an earlier flight. She offered Roach the same choice. He would have to take leave or be charged AWOL because he had not returned to work the previous afternoon as expected. Roach asked Arnold if she had discussed the matter with Kaskin and if he had suggested the discipline to be consistent with the punishment threatened against Warlick? Arnold admitted Kaskin told her about Warlick but denied that his action influenced her decision. Roach explained that the union meeting ended early on the morning of February 28th but Arnold refused to change her position and Roach would not take leave to avoid discipline. As a result, he was charged with four hours AWOL.

Arnold refused to change her mind about the AWOL charge and, while discussing smoking policy and a survey being sent to bargaining unit employees with Director, David Gates on March 18, 2002, Roach complained about the AWOL accusation. He told Gates the flight leaving Washington on the morning of February 28th was fully booked. Gates asked Roach for the flight number and exact time of departure and told Roach he would have the AWOL rescinded if he could verify the fact that the early flight was fully booked. U. S. Airways subsequently advised management that Roach had been confirmed on Flight 3497 which left Reagan National at 8:45 AM on February 28, 2002 but had, on February 27th,changed the reservation to Flight 3467 which departed Washington at 2:35 PM. Gates met Roach on March 21, 2002 and, in the presence of President, Charles Warlick and Personnel Management Specialist, Susan Nolan, accused Roach of misleading him by failing to mention he had changed his reservation on the earlier flight. Roach explained that he had tried to change his reservation again and secure passage on the earlier flight

but was unable to do so because it was completely booked. Gates refused to accept Roach's explanation and would not revoke the AWOL charge.

On June 18, 2002, Roach was accused of unsatisfactory performance, lack of candor and absence without leave and notified of the agency's intent to suspend him for fourteen calendar days. The charge of unsatisfactory performance was withdrawn in the grievance procedure but the length of the penalty was not changed. Roach was suspended from August 24th through September 6, 2002 and was not allowed on the premises during his suspension.

On September 5, 2002, a union grievance was filed protesting Roach's suspension; the action barring him from the Charleston Operating Location and management's refusal to furnish requested information as required by 5 U.S.C. Section 7114(b)(4) and Article 4 of the master agreement which provides:

> SECTION 3 - PRODUCTION OF DOCUMENT AND DATA
>
> Section 7114(b) of 5 U.S.C. states:
>
> > (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation --
> >
> > (4) in the case of an agency, to furnish the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --
> >
> > > (A) which is normally maintained by the agency in the regular course of business;
> > >
> > > (B) which is reasonably available and necessary for the full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> > >
> > > (C) which does not constitute guidance, advice, counsel, or training provided for management

officials or supervisors, relating to collective bargaining.

Management's conduct was protested as a separate unfair labor practice as well as a contract grievance. All attempts at settlement failed and the Arbitrator was chosen from a panel provided by the Federal Mediation and Conciliation Service. A hearing, conducted under its auspices, began in Charleston, South Carolina on March 8, 2003, at which time the parties stipulated the matter was properly before the Arbitrator for resolution on the merits and were given full opportunity to present testimony, evidence and argument in support of their respective positions. The hearing continued on March 9th and was adjourned until May 28, 2003. It resumed on that date and concluded on May 30th . The record was closed on July 2, 2003 after post-hearing briefs were received from the parties.

OPINION

The agency, in part, maintains Roach was suspended for just cause because he was AWOL on the afternoon of February 28, 2002. It recognizes he is an elected union official and, as such, was attending a union-management conference in Arlington, Virginia between February 26th and 28th. It calls attention to the February 19, 2002 email of Teresa Briley, however, which it believes directed conference attendees to return to their permanent duty stations on the first available flight following the conclusion of the conference on Wednesday or Thursday morning depending on the arrangements that could be made. Agency labor relations officer, Darryl Roberts repeated the directive at the conference. Briley and Roberts, moreover, were merely restating the policy expressed in Joint Travel Regulation C1059 which compels civilian employees to leave their temporary duty stations " ***on the earliest available transportation accommodations the day after completing ***" their temporary duty assignments. Roach could have returned from

Washington on the 8:45 AM flight and, had he done so, could have worked a half day on February 28th. He chose not to and, therefore, was AWOL that afternoon.

Roach also misrepresented the facts when he complained to Director, David Gates about the AWOL charge. He told Gates he was unable to get on the early morning flight because it was completely booked but neglected to tell him he cancelled a confirmed reservation on that flight and bought a ticket on an afternoon flight, instead. Gates promised to cancel the AWOL charge if he could confirm the truth of Roaches claim. Gates checked Roach's statement with the airline and learned his reservation on the earlier flight had been changed. Gates believed Roach lied to him and charged him with lack of candor. A fourteen day suspension is reasonable under all the circumstances and the grievance should be denied.

The union, on the other hand, argues the agency has not carried the burden of proving just cause for discipline in this case. Arnold knew Roach was traveling to Headquarter on union business between February 26 and 28, 2002 and, at his request, approved eight hours administrative leave on each of those days. Roach testified without contradiction that he told Arnold of his travel plans before departing and that he would see her on Friday, March 1st. He submitted the "Form for Billing Data" on February 25th indicating eight hours of "other productive time worked" for February 26th through 28th and his entry was never questioned, countermanded or disputed. Roach's Travel Order authorized him to depart Charleston on February 26th for a period of three days and return on February 28, 2002. The order specifically authorized travel on the 1st and last days and a variation in itinerary. Briley's memorandum was not an order or directive regarding travel arrangements but was no more than guidance offered to union officials. Briley and other witnesses, moreover, admitted a full day may be used for travel and this was confirmed by five other vouchers issued to Roach for union related travel during

2001 and 2002. Roach simply was not AWOL on the afternoon of February 28, 2002.

The conversation forming the basis of the "lack of candor' charge is not a formal or recognized investigation but a brief, casual, talk that occurred while Roach was representing bargaining unit employees. Gates approached him some time after the travel was completed to discuss a survey being sent to employees and also met with him on occasion to discuss smoking policy. Roach believed the imposition of AWOL was unfair and told Gates the earlier flight was fully booked. Gates asked for the flight number and exact scheduled time of departure and said he would have the action reversed if he could verify the information. Gates learned Roach had been confirmed on the earlier flight but had voluntarily changed his reservation. Roach explained that he changed his mind about returning on the later flight and had tried to book a seat on the earlier one but was unable to do so because it was filled. Gates did not want to listen but told Roach, "you lied to me when you said you couldn't get on the flight" and charged him with lack of candor. Lack of candor is a generic term, however, meaning lack of forthrightness or truthfulness and requires a showing of intent to deceive or misrepresent according to the union. The agency has not made such a showing under the circumstances and, when this flaw is considered together with its failure to prove AWOL, the suspension should be set aside as being without just cause.

Roach is accused of being absent without leave for four hours on February 28, 2002 because he did not return from Arlington, Virginia in time to work a half day. The agency, having taken the initiative in imposing discipline, must bear the burden of proving this charge by a preponderance of credible evidence. The phrase, "Absence Without Leave" or "AWOL", is defined in the Supervisor's Handbook as "*** time away from the work site that has not been approved or for which a request for leave has been denied ***". This definition is consistent with decisions of The Merit Systems Protection Board which have held an agency must show the

employee was absent and that the absence was unauthorized or that a request for leave was properly denied before a charge of AWOL is established. *Charles Robb, Jr. v Department of Defense*, 77 M.S.P.R. 130 (1998) and *Gwendolyn Patterson v Department of the Air Force*. 74 M.S.P.R. 648 (1997).

The plausible evidence in this case does not, in my opinion, lend itself to the belief that Roach was AWOL on February 28, 2002. He was a local union officer and Secretary of the AFGE/DFAS Council at the time and was called to headquarters by the agency for a meeting of the DFAS/AFGE bargaining team that was to be held on February 27th. He was entitled to use official time to attend this management initiated meeting called for the purpose of informing union officials of anticipated changes in working conditions pursuant to Article 9, Section 2 (A), (3) & (11) of the master labor agreement. Indeed, the agency was required to give him adequate time to do so pursuant to Article 9. Section 1. No one disputes that Roach requested eight hours administrative leave on February 26th, 27th and 28th or that his immediate supervisor, Sharon Arnold, approved it on February 25, 2002. Arnold never questioned Roach about the trip or his plans and, in keeping with Article 9, Section 3 B of the master agreement, Roach told Arnold he would see her on Friday, March 1st before leaving the facility on February 25th. His travel order authorized him to leave Charleston, South Carolina on February 26, 2002 and return on February 28th but was silent about his departure and return times. It did, however, authorize a change in itinerary. It seems obvious to me that Roach's absence was approved at the time he left the facility on February 25th and at the time he returned on March 1st. It could not, therefore, be considered an absence without leave as that term is defined and commonly understood.

What is evident to me is that Arnold changed her mind sometime on March 1, 2002 after talking with David Kaskin and learning he threatened union president, Charles Warlick, with

AWOL because Warlick failed to return to work on February 28th.[4] Arnold became aware of the E-mail sent by Teresa Briley informing union officials of a labor management meeting to be held on February 27th and advising them that arrangements for return travel "*** should be made for the first available flight following the conclusion of the meeting on Wednesday *** or Thursday morning depending on the arrangements that can be made ***". Arnold considered this a directive that compelled Roach to return on Thursday morning and report to work that afternoon. Since he did not, Arnold concluded he was absent without leave and charged him with four hours AWOL after Roach refused to take annual leave instead. Whether Roach was AWOL, however, depends upon the circumstances surrounding his absence. In this case, his absence was authorized for three full days. He might be subject to other charges if the agency honestly believed his failure to return breached some rule warranting discipline but management was not at liberty to withdraw its approval in order to retroactively punish an absence that was otherwise excused. Such discipline has an ex post facto quality to it that is capricious and offends the notion of fundamental fairness that is just cause.

Briley's E-mail. did advise recipients they should return by the first available flight following the conclusion of the meeting on Wednesday or Thursday morning and, on its face, would appear to support the agency's belief that it was an order to do so but this conviction was not confirmed by Briley or Labor Relations Officer, Darryl Roberts. On the contrary, Briley conceded her memo was neither an order nor a directive but was merely guidance for union representatives concerning their travel arrangements. Roberts recognized he was not in the officials' chain of supervision and could not remember if union leaders responded when he

[4] Warlick avoided the charge by taking annual leave although he did so under protest.

suggested they leave earlier than planned. What's more, he frankly didn't care if they did or didn't. No support for the assertion that Roach was required to return to work on the afternoon of February 28, 2002 under pain of discipline can, therefore, be drawn from the testimony of Briley or Roberts.

Nor is the agency's position bolstered by Section C1059 of the travel regulations, in my opinion. The rule must be read together with other sections that address travel during hours of rest, rest stops en route and a rest period at a TDY point after arrival. Section A, 2. provides:

> Travel between 0600 and 2400, Travel should be scheduled between 0600 - 2400. To prevent travel between 2400 - 0600, it is reasonable for a traveler to:
>
> > a. depart the PDS early enough to prevent having to travel between 2400 - 0600, or
> >
> > b. *depart the TDY station on the earliest available transportation accommodations the day after completing a TDY assignment, provided the traveler is not required to be at the PDS the morning after TDY completion.*

The language of subsection "b" must be interpreted in light of the regulation's purpose and, when this is done, it is clear to me the provision is intended to tell administrators there is nothing unreasonable about an employee returning by the earliest transportation available the day after completing a TDY assignment in order to avoid traveling between the hours of 2400 and 0600. The regulation, moreover, governs the computation of per diem and travel allowances. Nothing in it is intended to compel employees to travel by the first available means of transportation and, if possible, return to work the day after completing a TDY assignment to avoid being AWOL.

Indeed, Section C1059, A, of the travel regulations governs the starting and ending of travel and in subsection 1, (a) makes clear the "***travel order establishes when travel status starts and ends ***". Roach's travel order authorized him to depart Charleston on February 26,

2002 but did not say what time he was to leave. Nor did it specify when he was to return on February 28th. It simply said he was to be gone for three days. The term, "day" is understood to mean a period of twenty-four hours and, when this definition is used, it would allow Roach to travel at any time between 12:01 AM and 12:00 Midnight on February 25th and 28th. The agency, however, points out that Section C1052 A of Chapter 1 of the general rules promulgated by the Department of Defense Employee Travel Administration provides that " [a]n employee's pay and leave status during official travel are subject to the hours of duty, pay, and leave regulations of the separate departments". Article 11 of the local supplement to the master agreement defines the standard work week as one having an average starting time of 0800 and completion time of 1630 for five days, Monday through Friday. Hence, the term, "day" is limited to the hours of duty as required by the rule and local supplement. This may be so but it is of no help to the agency because, when Roach's travel order is measured by his normal duty hours, it is still reasonable, in my opinion, to infer that his travel status started at 0800 on February 26th at the very latest. Likewise, when the same measure is applied to his return, it is not unreasonable, in my judgment, to conclude that Roach's travel status ended on February 28th at 1630 at the very earliest.[5] He was entitled to one full day of travel to and from Arlington, Virginia and, indeed, this conclusion is supported by Section T4030 H of Appendix O of the Joint Travel Regulations which specifically

[5] The agency argues the standard work week in the local supplement and general travel rules required Roach to return on the first available flight on the morning of February 28th and report to work that afternoon. It asserts that, somehow, his travel status and leave ended at approximately noon when he was expected to arrive in Charleston. Neither article, whether read separately or together, supports this supposition, in my view, and, in the absence of a regulation compelling employees to report for work immediately upon returning from TDY during their regular work day, provides no foundation for the conclusion that Roach was AWOL.

states that "***[f]or travel by commercial air, one day is allowed in CONUS ***".[6] What's more, Roach was allowed one full day for travel when attending conferences both before and after February 28th. There is simply no basis, in my judgment, for concluding that Roach's travel order required him to return to work on the afternoon of February 28, 2002 or that he was AWOL when he failed to do so.[7]

The agency also charged Roach with lack of candor and this accusation rests entirely upon a statement made during a labor-management meeting with Director, David Gates on March 18, 2002. Roach and Gates were discussing the agency's smoking policy and a survey that was being sent to bargaining unit employees. During the conversation, Roach told Gates he thought the AWOL charge was unfair because he was unable to return on the earlier flight on February 28th since it was full. Gates didn't inquire into the facts but simply asked Roach for the flight numbers and exact departure times. He assured Roach the charge would be withdrawn if he could verify the fact that the early flight was completely booked. Roach gave him the information and nothing more was said about the matter. Gates asked Charlene Johnson to look into the problem and, after contacting U. S. Airways, she learned Roach had originally been scheduled to leave Washington aboard the 8:45 AM flight from Regan National Airport on February 28th. His reservation was changed the day before and, as a result, he was booked on the 2:35 PM flight to Charleston. U.S.

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[6] CONUS is a government acronym for Continental United States. Contrary to the agency's assertion that Appendix O is not applicable to the Charleston facility, I find that it is to be considered with Section C1059 of the Joint Travel Regulations pursuant to Section T4025 A.

[7] The agency seems to suggest that Roach's itinerary was unauthorized because his travel arrangements were made by his wife instead of the local administrator as required by the Standard Operating Procedure for Travel Orders of April 26, 2001. It makes no difference who made the arrangements because the agency admittedly would have charged Roach with being AWOL even if they had been made by the local administrator. It was his failure to return that triggered the charge, not the method used in making the airline reservations.

Airways confirmed the earlier flight was completely booked, however. Gates meet with Roach, Charles Warlick and Susan Nolan on March 21, 2002 and accused Roach of lying because he failed to mention he changed flights. This accusation evolved into the lack of candor charge.

It is generally recognized that lack of candor and falsification are different, but related, types of misconduct. Falsification involves an affirmative misrepresentation and requires an intent to deceive. Lack of candor, on the other hand, is a broader and more flexible concept whose form and elements depend upon the particular context and conduct involved. It does not require a showing of intent to deceive and falsification is not one of its necessary elements. *Ludlum v. Department of Justice,* (CA Federal Circuit, 2002) 278 F3rd 1280. It may include the failure to respond truthfully or completely when questioned about matters. *Gootee v Veterans* Administration, 36 M.S.P.R. 526 (1988). Implicit in the charge of lack of candor, however, is the idea that the miscreant intentionally misrepresented or concealed material facts. *Boyd v Department of Justice,* 83 FMSR 5034 (1983) and *Friedrick v Department of Justice,* 92 FMASR 5739 (1991). Intent, of course, must be gleaned from the circumstances of the incident giving rise to the charge.

Roach's statement of March 18th does not support the lack of candor charge when it is considered in context and all circumstances are taken into account. The meeting with Gates was not called to investigate the AWOL charge brought against Roach and was not part of the grievance procedure. Nor was Roach being questioned about his reason for not taking an earlier flight. On the contrary, the meeting was called to discuss other matters of importance to the agency and union. Roach's statement was simply part of a chance discussion and both men recognized it as such. What's more, Roach's comment, although not complete, was true. He was not placed in the position of having to explain himself until the meeting of March 21st when Gates

accused him of lying about his ability to return on the morning flight. At that time, Roach readily admitted he was originally scheduled to return on the morning flight but his wife changed the reservation after he told her union officials were getting-together to discuss strategy after the conference with management on February 27th and that their meeting was expected to last into the "wee hours of the morning".[8] He tried to book a seat on his original flight after the union meeting but was unable to do so because the plane was full. Indeed, Gates admitted Roach told him he tried to book a seat on the 8:45 AM flight out of Washington. Nothing, therefore, suggests Roach intentionally misrepresented material facts or tried to conceal them during the March 21st meeting. Gates simply didn't want to believe them and never conducted an investigation to learn whether they were true. Lack of candor is not established, in my view, by considering one statement in a vacuum.[9]

The discipline imposed upon Roach in this case is, in large measure, the product of a contentious relationship between himself and Gates and management's belief that union officials should be held to a higher standard of conduct. This idea, however, is a misconception. Union officers are obliged to respect the terms and conditions of the labor agreement and obey reasonable rules and regulations, to be sure, but their obligation, in this regard, is no greater than that of rank and file employees. Furthermore, the official is entitled to limited immunity from discipline while representing his constituents and comes to the bargaining table as a equal, not as a

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[8] The union does not argue Roach should be exonerated because his wife cancelled the earlier flight without his knowledge or permission and this fact was not considered in reaching my decision.

[9] Having found Roach not guilty of the charges lodged against him, it is not necessary to discuss discriminatory application of discipline or other elements of just cause. Nor is it necessary to consider charges of racial discrimination because the union did not pursue this claim at hearing or in brief.

supplicant begging favors. He should refrain from violence, threats or unnecessary profanity, of course, but he is protected so long as his demeanor and language are comparable to that of his management adversary under the circumstances.

The agency's view, on the other hand, interferes with the official's right to represent bargaining unit employees and may have a chilling influence on the quality of representation afforded them. It does, therefore, infringe upon employee rights guaranteed by Article 3, Section 1 of the master agreement which provides:

> Each employee has the right freely and without fear of penalty or reprisal to form, join, or assist the Union or to refrain from any such activity. The right to assist the Union extends to participation in the management of the Union and to *acting in the capacity of a Union representative including presentations of its views to officials of the Agency, the Executive Branch, the Congress, or other appropriate authority.* We agree to assure that employees are apprised of their rights under this Article and that no interference, restraint, coercion or discrimination is practiced to encourage or discourage membership in the Union.[10]

Holding representatives to a higher standard of conduct can discourage competent and assertive individuals from seeking union office and does restrain employees' in the exercise of their right to assist the union, in my judgment. The idea contravenes the promises made in Article 3, Section 1 as well as the obligations imposed upon the agency by law and cannot be upheld.

The grievance also asks the Arbitrator to review conduct that is arguably an unfair labor practice, as well as a breach of the collective bargaining agreement and fashion a remedy in accordance with federal law. Arbitrators do have authority to determine whether a Federal agency committed an unfair labor practice and, indeed, 5 USC Section 7103 (a) (9) (C) (ii) defines the

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[10] Holding union officials to an higher standard of conduct when acting in their official capacity may also breach 5 USC Section 7102 (1) & (2) because it infringes upon the individual's right to act as a representative of a labor organization and engage in collective bargaining.

term grievance broadly to include any claimed violation of law, rule or regulation affecting conditions of employment. *U.S. Department of Commerce Patent And Trademark Office and Patent Office Professional Association,* 37 F.L.R.A. 1204 (1990), and *Overseas Education Association v FLRA,* (DC Cir. 1987), 824 F2d 61. The Arbitrator must apply the same standards and burdens that an administrative law judge would apply when a grievance involves an alleged unfair labor practice. If the grievance alleges an agency committed the offense, the union bears the burden of proving the elements of the charge by a preponderance of the evidence. *AFGE Council of HUD and Locals 222 v U.S. Department of Housing and Urban Development,* 54 FLRA 1267 (1998). Remedies for unfair labor practices should be designed to restore, as far as possible, the status quo that would have obtained but for the wrongful act. *U.S. Department of Health and Human Services, Region V and National Treasury Employees Union Chapter 210,* 45 F.L.R.A. 737 (1992). Union claims must be measured in light of these guidelines.

The union asserts the agency improperly interfered with its activities by barring Roach from the Charleston Operating Location during his suspension. The agency does not deny it banned Roach from the building but argues it acted in keeping with establish practice that excludes suspended employees from the property. Furthermore, the ban was necessary to prevent disruption in the work environment. Any inconvenience to the union was minimal because the agency provided Roach with a lap top computer to assist in representing employees and allowed him to take care of union business on the phone. Employees were not denied representation, moreover, because other union officials on site were able to process their complaints. No evidence was offered, however, to explain why Roach's presence would be disruptive and his background certainly does not suggests he would intentionally sabotage the agency or its business. Nor was any rule or regulation introduced supporting the notion that suspended employees are kept out of

the facility. Only one such example was given and that employee was excluded because he specifically threatened the agency and its employees with physical harm. One exclusion does not a custom or practice make. Nor does it support the agency's behavior concerning Roach, especially when the facts of each case are so different.

There is no denying Roach was treated differently than other employees and I am convinced his union office was the reason. The unequal treatment of union officials certainly undermines the organization and has a chilling affect upon its ability to attract members.[11] Employees will certainly think twice before joining a labor organization if they suspect membership will subject them to unfair treatment. What's more, management has no right telling Roach where or how to perform his union duties and has no business insisting employees seek representation from other officers. Roach has every right to enter the location and work from the union office so long as he observes proper decorum.[12] Management, moreover, has no more business selecting the union's representative than the union has of determining who will represent the agency. It is for the union to pick its own representatives. The agency's behavior in this case sends a clear message to the bargaining unit that the union is impotent and that management will choose the union representatives it deals with. Interference with protected rights, in contravention of Article 3, Section 1 of the master agreement, 5 USC Section 7102 (1), (2) and 5 USC Section 7116 (a) (1) and (5), is implicit in the agency's conduct and cannot be endorsed.

The union also contends the agency improperly withheld information from it in violation of

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[11] Unlike the private sector where employees may be compelled to join the union as a condition of employment, 5 USC Section 7114 (a) (1) makes clear that federal employees are not required to become union members even though the organization is obligated to represent their interests.

[12] The agency always retains the right to call authorities and have Roach removed from the location if he disrupts the operation or engages in inappropriate behavior.

5 USC Section 7114 (b) (4) and Article 4 Section 3 of the master agreement.[13] It points out that 5 USC 7503(c) requires the agency to "***furnish the answer of the employee if written or a summary if made orally***" upon request. Agency regulation 1426.1 compels the supervisor designated as the deciding official to prepare a memorandum for the record of any oral reply. That individual was Joyce N. Booth in this case. But, Booth never prepared or produced such a document, although it was requested in the union's letter of August 30, 2002. The agency obviously cannot produce a document that does not exist and, while Booth's failure to prepare it may be an unfair labor practice according to 5 USC 7503 (c), that issue is not before me. The failure to produce it is not, in my opinion, a violation of 5 USC Section 7114 (b) (4) or Article 4, Section 3 of the master agreement under the circumstances.

On the other hand, I believe the agency did withhold information improperly in several other respects. Regulations required Booth to prepare a narrative report explaining the factors she used in selecting the fourteen day suspension in this case. Booth prepared the document but it was never given to the union because the agency argued it constituted guidance, advice, counsel or training that need not be furnished pursuant to 5 USC Section 7114 (b)(4) or Article 4, Section 3 of the master agreement. Recommendations of supervisors or managers relating to discipline do not constitute guidance, advice or counsel relating to collective bargaining within the meaning of 5 USC Section 7114 (b)(4)(C), however. *National Park Service and Police Association of DC,* 38 FLRA 1027 (1990). A concurrence sheet regarding proposed discipline and distributed to managers, including agency counsel, did not constitute guidance, advice, counsel or training and should have been provided to the union. *Department of The Air Force, Sacramento ALC,*

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[13] I express no opinion on any delays in producing documents because they were, for the most part, caused by the unavailability of counsel and not an intentional effort to avoid compliance.

McClellan AFB and AFGE, Local 1857, 38 FLRA 965 (1990). Supervisory recommendations concerning a proposed adverse action were required to be produced in *Department of the Treasury, IRS and NTEU,* 40 FLRA 1070 (1991). The narrative report prepared by Booth is akin to a supervisory recommendation concerning discipline and, in my judgment, does not come within the guidance, advice, counsel or training exemption set forth in 5 USC 7114(b)(4) or Article 4, Section 3 of the master agreement.. It should have been provided to the union upon request.

Booth, moreover, did not render her decision in a timely manner but said the time to prepare it was extended. The document evincing the extension was not produced. Nor were the supervisory notes that Booth and Arnold said they reviewed when considering Roach's discipline. The only paper provided, in this regard, was a Memo For the Record prepared by Arnold. The agency does not claim the documents come within any exemption contained in 5 USC Section 7114(b)(4) or Article 4, Section 3 of the master agreement and they should have been provided to the union upon request.

The union also requested "copies of all disciplinary proposals, decisions, appeals, records of final outcomes, settlements, withdrawn or dismissed disciplinary decisions or proposals, decisions, appeals, settlements and last chance agreements at DFAS Charleston Operating Location against bargaining unit employees and supervisors for the last 3 years, involving AWOL and/or lack of candor charges". The agency provided a chart of all disciplines imposed during the three year period but its witnesses admitted the chart was incomplete. In any case, I do not believe the chart satisfied the agency's obligations under 5 USC Section 7114(b)(4) or Article 4, Section 3 of the master agreement. The union, under Section 7114(b) and Section 3, is entitled to information which will enable it to realistically assess the strengths or weaknesses of the

employee's position. *National Park Service and Police Association of DC,* 38 FLRA 1027 (1990). The documents being sought, in this case, would clearly enable the union to determine whether the agency was administering discipline consistently or whether Roach was the victim of disparate treatment. The notion that employees who engage in similar misconduct must be treated alike is one of the cornerstones of just cause and arbitrators customarily set aside penalties when employees are treated differently. The union is entitled to the records themselves when exploring the appropriateness of a penalty and trying to determine whether the employee has been treated fairly. *Border Patrol, Tucson Section and National Border Patrol Council, AFGE, Local 2544,* 47 FLRA 684 (1993), *IRS Austin District Office and NTEU Chapter 52,* 51 FLRA 1166 (1996), *Department of Treasury, IRS and NTEU,* 40 FLRA 303 (1991) and *Washington DC and INS, Twin Cities and National Border Patrol Council,* 5 FLRA 1467 (1996), aff'd 144 F3rd 90 (DC Cir. 1998). Information concerning the discipline of supervisors must also be provided in this regard. *Department of Transportation, FAA, New England Region and NAATS,* 38 FLRA 1623 (1991). Fear that disclosure may violate the Privacy Act is certainly legitimate but the parties should be able to reach some compromise that satisfies the union's need for information while protecting the employee's right to privacy through collective bargaining and that is where the decision should be made. It should not be foisted upon the union unilaterally by management.[14]

Roach was subjected to an unjustified personnel action within the meaning of the Back Pay Act, 5 USC Section 55960 and 5 CFR Section 550.804, and there is no doubt, in my mind,

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[14] The union also requested copies of all documents charging, notating or recording AWOL charges against employees and supervisors and travel vouchers, orders and leave requests of other employees who attended the labor-management conference on February 27, 2002. The same reasoning applies and there is no need to repeat it. The information should have been provided to the union and the agency violated 5 USC Section 7114(b)(4) and Article 4, Section 3 of the master agreement when it failed to do so.

the action resulted in his loosing fourteen days pay. He is, therefore, entitled to fourteen days back pay together with interest computed from August 24, 2002, the first day of his suspension, pursuant to 5 USC Section 5596(2)(A)(B)(i).

The union also seeks an award of attorney fees under 5 USC Section 5596(A)(ii) and at least two of the requirements set forth in the statute have been satisfied. Roach has been awarded back pay and certainly is the prevailing party. However, the fees being sought must have been incurred for the services of an attorney and must be reasonable. I have some doubt about whether union representation in this case fulfills these standards. The grievance was filed by the union and presented by its in house counsel who is an attorney. There is no evidence Roach retained an attorney or paid union counsel for his services, however, and, therefore, no showing of an attorney client relationship between the two. Similarly, while counsel is paid by the union, the relationship between him and the organization is that of employer and employee. I am not certain it would also be considered an attorney client relationship. Assuming for the sake of argument that it is, I am not certain the union would be entitled to claim fees measured by what an attorney in private practice would charge for the service. It seem to me that this might result in a windfall for the union. The union may only be entitled to recover the salary and benefit contributions attributable to the time spent representing it in these proceedings. I am not able to decide the issue of attorney fees because of these questions but will retain jurisdiction to allow the union to file an application for the same if it wishes and to allow both parties to address the concerns I have expressed.

AWARD

The disciplinary suspension of William Roach is without just case and is to be rescinded.

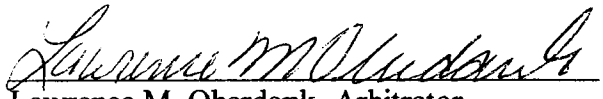
All references to the suspension, AWOL and lack of candor charges are to be expunged from his personnel file and he is to be paid fourteen days back pay together with interest from August 24, 2002 in accordance with 5 USC Section 5596 (2)(A)(b)(i).

The agency interfered, restrained, coerced and discriminated against William Roach to discourage membership in the union in violation of Article 2, Section 1 of the master labor agreement and 5 USC Section 7102 by denying him access to the facility to perform union duties during the time he was serving his suspension. It shall cease and desist from such conduct in the future and shall not deny Roach access to the facility so long as he observes proper decorum.

The agency interfered with the employees' right to assist a labor organization in violation of 5 USC Section 7102 and refused to bargain in good faith in violation of Article 4, Section 3 of the master labor agreement and 5 USC Section 7114 (b)(4) by refusing to provide the union with the information and documents it needed to assess the relative strengths and weakness of Roach's grievance. It shall cease and desist from such conduct in the future.

I will retain jurisdiction to permit the union to file an Application for Attorney Fees if it chooses to do so and to allow both parties an opportunity to address the issues I have raised in this regard.

Respectfully submitted,



Lawrence M. Oberdank, Arbitrator

This award made at Savannah, Georgia
This 30th day of July, 2003.