IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2338, Union, and DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER POPLAR BLUFF, MISSOURI Employer.	FMCS NUMBER 241313-01915 GRIEVANCE (CONTRACT VIOLATION)

ARBITRATOR:	John F. Markuns
DATE OF AWARD:	August 13, 2024
HEARING SITE:	Video via Zoom
HEARING DATES:	March 11, March 12 and April 10, 2024
RECORD CLOSED:	June 14, 2024
REPRESENTING THE UNION:	Kevin Ellis, Local 2338 President Jacob Jordan Local 2338 2nd V.P. 1500 N. Westwood Blvd Poplar Bluff, MO 63901 Kiersten Snider Esq. (on the brief)
REPRESENTING THE EMPLOYER:	Scott Lawrence and Katherine Tank Day Staff Attorneys US. Dept. of Veterans Affairs Office of Chief Counsel One Veterans Drive, Bldg. 73 Minneapolis, MN 55417

INTRODUCTION AND JURISDICTION

The Employer is the U.S. Department of Veterans Affairs John J. Pershing Medical Center, Poplar Bluff, Missouri ("Agency") and the Union is the American Federation of Government Employees Local 2338 ("Union"). The subject grievance was filed on behalf of Keven Ellis, who currently holds the position of Voluntary Service Assistant. "Grievant"). Mr. Ellis is also Local 2338 President and serves 100% official time in connection with his Union responsibilities. The precipitating acts leading to the grievance were an admonishment and a reprimand. Grievant maintains that he has been targeted by his administrative supervisor Dale Garrett and Associate Medical Director Kimberly Adkins and that the subject disciplinary actions at issue were taken retaliation and reprisal for his union activities and whistleblowing.

The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of the Federal Mediation and Conciliation Service (FMCS). The hearing in this matter was held over three days via Zoom on March 11, March 12 and April 10, 2024.

Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimonies were subject to cross-examination. A transcript of testimony was taken. The parties submitted post-hearing briefs with numerous case law and awards filed by the June 14, 2024 deadline when the record closed.[1] All the material provided was reviewed and considered by the Arbitrator.

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1 On June 6, 2024 the Union by email proffered new evidence on the basis that this evidence was requested by the Arbitrator. The evidence was in the form of a posted audio Youtube link captioned "Kimberly Adkins, Associate Director for the John J. Pershing VAMC lies under oath as SES Mgr" The person posting was listed as "Keven Ellis Whistleblower and Local 2338 President," The Arbitrator found no basis to accept this late-filed evidence or to consider the accompanying argument. The record remained open for the limited purpose of filing post-hearing briefs. As reflected in the transcript, the Arbitrator did not request this proffered evidence. On cross examination the Agency representative asked Grievant whether he would provide a copy and Grievant responded that he was willing to provide it. See Tr. 683. However the Union made no request to offer this evidence before the record closed. Tr. 687. The parties were informed that they remained free to address Grievant's related testimony in their post

At hearing, a transcript was taken which the parties agreed would constitute the formal record of proceedings. As the grievance was based on two disciplinary actions the Agency presented its case first. Six witnesses were called; Dale Garrett, Chief of Voluntary Services; Austin Breiter, Human Resources Specialist; Kimberly Adkins, Associate Medical Director; Jacob Jordan, Advanced Medical Support Assistant and Second Vice President Local 2338, Sonia Ellis, Advanced Telehealth Clinical Technician, and Grievant.

Each party introduced documentary evidence. The parties agreed to 11 joint exhibits (J Ex.1 through 11). The Agency submitted 13 exhibits (Agency Ex. A through K, P and Q, R). The Union submitted 63 Exhibits (U Ex. A, E F, G, K,L,Q, R; U Ex.1 through 38, including 3A, 4A and 10A).

ISSUE

Each party offered its own issue statement. Hearing Transcript (Tr.) pages (pp) 9-12. The Agency's offered statement was:

Were the August 19th, 2021 admonishment and December 15, '21 Reprimand issued to the grievant for just and sufficient cause and if not, what shall be the appropriate remedy?

The Union offered:

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hearing briefs due June 14, 2024. The Agency submitted with its closing brief three additional exhibits: Brief 1, a Step 3 grievance filed by the Union dated March 17, 2024; Brief 2, a February 3, 2022 Regional dismissal of an ULP filed with the FLRA and Brief 3, January 13, 2023 exceptions to the award of Arbitrator Cyntia Stanley (Union Exhibit R). Brief Exhibit 1 reflects a pending separate grievance not before this Arbitrator. The remaining exhibits have been considered as further supporting argument.

Did the Agency, through its associates, failed to issue discipline for just and sufficient cause as required the parties' master collective bargaining agreement, Article 14, when they issued Mr. Ellis and admonishment and a reprimand. If so, what shall the remedy be?

Did the Agency, by and through its associates, engage in retaliation and reprisal against bargaining unit employee and Union President, Kevin Ellis, in violation of Article 17 of the Master Agreement as well as 5 U.S.C. §2302 and 5 U.S.C. §7116 when they conspired against the employee and then issued an admonishment and reprimand to Mr. Ellis. If so, what shall the remedy be?

Did the Agency, by and through its associates, fail to provide a timely response to the Union's Step Three grievance in violation of the parties' master collective bargaining agreement, Article 43. If so, what shall the remedy be?

The Agency raised no specific objection to the Union's expanded formulation. Consistent with Article 44, Section 2 F of the Master Agreement (hereinafter MCBA) the Arbitrator has accepted the Union's formulation as the issue to be decided.

RELEVANT CONTRACT PROVISIONS

Article 2 – Governing Laws and Regulations

Section 1 – Relationship to Laws and Regulations

> In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable federal statutes. They will also be governed by government-wide regulations in existence at the time this Agreement was approved.

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Article 14 - Discipline and Adverse Actions

Section 1 - General

> The Department and the Union recognize that the public interest requires the maintenance of high standards of conduct. No bargaining unit employees will be subject to disciplinary action except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will promote the efficiency of the service. Actions based upon substantively unacceptable performance should be taken in accordance with Title 5, Chapter 43 and will be covered in Article 27 - Performance Appraisal System.

Section 3 - Removal of Disciplinary Actions

Admonishments and reprimands may be removed from an employee's files after a six-month period. If an employee requests removal of such actions after six months, they should be removed if the purpose of the discipline has been served. In all cases, an admonishment should be removed from an employee's file after two years and a reprimand will be removed after three years.

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Section 5 - Alternative and Progressive Discipline

The parties agree to a concept of alternative discipline which shall be a subject for local negotiations. The parties also agree to the concept of progressive discipline, which is discipline designed primarily to correct and improve employee behavior, rather than punish.

Section 6 - Fairness and Timeliness

Disciplinary actions must be consistent with applicable laws, regulations, policy, and accepted practice within the Department. Discipline will be applied fairly and equitably and will not be used to harass employees. Disciplinary actions will be timely based upon the circumstances and complexity of each case.

Section 7 - Processing Admonishments and Reprimands

A. An employee against whom an admonishment or reprimand is proposed is entitled to a 14 day advance written notice, unless the crime provisions are invoked. The notice will state the specific reasons for the proposed action. The Department agrees that the employee shall be given up to eight hours of time to review the evidence on which the notice of disciplinary action is based and that is being relied on to support the proposed action. Additional time may be granted on a case by case basis. Upon request, one copy of any document(s) in the evidence file will be provided to the employee and/or his designated representative.

B. The employee or his representative may respond orally and/or in writing as soon as practical but no later than 10 calendars days from receipt of the proposed disciplinary action notice. The response may include written statements of persons having relevant information and/or appropriate evidence.

C. Extensions for replying to proposed disciplinary actions may be granted for good cause. The management official will issue a written decision at the earliest practicable date. The written decision shall include the reason for the disciplinary action and a statement of findings and

conclusions as to each charge. The decision shall also include a statement as to whether any sustained charges arose out of "professional conduct or competence," and a statement of the employee's appeal rights. In responding to a proposed disciplinary action, the employee will be entitled to local union representation.

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Section 9 - Notice of Disciplinary Actions

A. Notice of a final decision to take disciplinary action shall be in writing and shall inform the employee of appeal and grievance rights and his/her right to representation. The employee will be given two copies of the notice; one copy may be furnished to the local union by the employee. The Department will inform the local union when it takes a disciplinary action against a unit employee.

B. Notices shall explain in detail the reasons for the action taken and all evidence relied upon to support the decision. The notice will also advise the employee how long the action will be maintained in his/her file. The supervisor shall discuss the notice with the employee. If the employee elects to have a Union representative present, the discussion will be delayed until the local union has an opportunity to furnish a representative.

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Section 10 - Investigation of Disciplinary Actions

A. The Department will investigate an incident or situation as soon as possible to determine whether or not discipline is warranted. Ordinarily this inquiry will be made by the appropriate line supervisor. The employee who is the subject of the investigation will be informed of his/her right to representation before any questioning takes place or signed statements are obtained. Other employees questioned in connection with the incident who reasonably believe they may be subject to disciplinary action have the right to Union representation upon request.

B. Disciplinary investigations will be conducted fairly and impartially, and a reasonable effort will be made to reconcile conflicting statements by developing additional evidence. In all cases, the information obtained will be documented. Supervisory notes may be used to support an action detrimental to an employee only when the notes have been shown to the employee in a timely manner after the occurrence of the act and a copy provided to an employee as provided for in Article 24 – Official Records.

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Article 17 - Employee Rights
Section 1 - General

A, In an atmosphere of mutual respect, all employees shall be treated fairly and equitably and without discrimination in regard to their political affiliation, union activity, race, color, religion, national origin, gender, sexual orientation, marital status, age, or non-disqualifying handicapping conditions irrespective of the work performed or grade assigned. Employees will also be afforded proper regard for and protection of their privacy and constitutional rights. It is therefore agreed that the Department will endeavor to establish working conditions that are conducive to enhancing and improving employee morale and efficiency.

B. Instructions will be given in a reasonable and constructive manner. Such guidance will be provided in an atmosphere that will avoid public ridicule.

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D. No disciplinary, adverse or major adverse action will be taken against an employee upon an ill-founded basis such as unsubstantiated rumors or gossip.

E. No employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal or be used as an example to threaten other employees.

F. Recognizing that productivity is enhanced when employee morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity.

G. An employee who exercises any statutory or contractual right shall not be subjected to reprisal or retaliation, and shall be treated fairly and equitably.

H. All VA employees will, consistent with the Master Agreement and other collective bargaining agreements:

1. Be provided a healthy and safe environment;

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3.Be encouraged to enhance their work life and career development; and;
4. Be afforded assistance and told of expectations by the Department to enable them to perform their jobs.

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Section 10 - Whistle-Blower Protection Act

Consistent with the Whistleblower Protection Act, currently codified at 5 USC 2302(B)(8), employees shall be protected against reprisal of any nature for the disclosure of information not prohibited by law or Executive Order which the employee reasonably believes evidences a violation of law, rule or regulation, or evidences gross mismanagement, a gross waste of funds, an abuse of authority, or substantial and specific danger to public or employee health or safety. The Department will annually notify employees about their rights under the Whistle Blower Protection Act. If training on the Whistle Blower Protection Act is required, employees will be provided duty time to complete it.

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Section 16 - Counseling

Counseling shall be reasonable, fair, and used constructively to encourage an employee's improvement in areas of conduct and performance. It should not be viewed as disciplinary action. At any counseling session where an employee has the right to local union representation, the employee shall be advised of that right at the beginning of the session.

Oral Counseling

When it is determined that oral counseling is necessary, the counseling will be accomplished during a private interview with the concerned employee and local union representative if requested and appropriate. If after such a meeting, the employee is dissatisfied and wishes to pursue a grievance, the employee may proceed to either Step 1 or to Step 2 of the grievance procedure. If there is to be more than one Department official involved in a counseling session with an employee, the employee will be so notified in advance and the employee may have a local union representative at the session.

B. Written Counseling

1. Written counseling will be accomplished in the same manner as specified above, except that two copies of a written statement will be given to the employee.

2. A written counseling for misconduct may only be kept or used to support other personnel actions for up to six months unless additional related misconduct occurs, and then it may be retained up to one year

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Article 21 - Hours of Work and Overtime.

Section 2 - Work Schedule Options (AWS and Credit Hours)

General

This section sets forth the procedures to be followed for Alternative Work Schedule (AWS) including flextime, compressed work schedules, and credit hours. This section also provides a menu of options that employees may request. AWS means a schedule other than the traditional eight hours fixed shift.

Flexible work schedules, compressed work schedules, and credit hours are included in the definition of alternative work schedule. When an employee(s) makes a request supervisors must consider operational needs, including the employee's work unit(s) and the interests of the employee(s) before making a decision. The Department shall apply AWS in a fair and equitable manner.AWS is a subject for local bargaining consistent with this Agreement. AWS programs will not require the Department to extend the operating hours of the facility.

Flexitime

1."Flexible work schedule" means an eight hour workday in which the employee may vary the time of arrival and/or departure. A flexible work schedule includes core time and a flexible band. "Flexible time" and "flexible bands" mean the specific periods of the workday during which employees may opt to vary their arrival and departure times. Whenever possible, the flexible bands shall be 6:00 am to 6:00 pm.

2."Modified Flex-tour" is a type of flextime where an employee selects a starting time within the established flexible time band. This establishes the employee's assigned schedule; however, the employee is allowed 15 minutes flexibility on either side of the selected arrival time. For example, an employee selecting 7:30 am as a starting time under modified flex-tour may report for work any time between 7:15 am and 7:45 am. Changes in starting time must be approved by the supervisor.

3. "Flex-in/flex-out" - Employees working a flexible schedule will be allowed to flex out and in during the workday, subject to supervisory approval. If a combination of an employee's starting time and the amount of time the employee is away from the worksite precludes the completion of a full workday prior to 6:00 pm, the employee will be placed in the appropriate leave category at his/her request or allowed the use of approved credit hours, as appropriate.

4. "Core hours" means that period of time when employees on a particular shift are expected to be at work.

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Article 27 – Performance Appraisal

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D. Union officials who are granted official time for representational activities under Article 48 - Official Time, will not be penalized in their performance appraisals for such use of official time. Their performance of duties shall be evaluated against assigned elements and performance standards for the time they were available to perform their duties. The use of official time, in accordance with this Agreement, shall not influence an employee's performance evaluation in any way. If an employee union official spends 100% on official time or does not spend a sufficient amount of time in the performance of regular duties during a performance period to be fairly rated against the performance standards, the employee's performance evaluation for the appraisal period will reflect that they were not given a rating for that performance appraisal period. For the purposes of personnel actions where a rating of record is necessary the last rating of record will be used.

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Article 43 – Grievance Procedure

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Section 6 - Informal Resolutions

Most grievances arise from misunderstandings or disputes, which can be settled promptly and satisfactorily on an informal basis. The use of ADR is encouraged. The parties agree that every effort will be made to settle grievances at the lowest possible level. Inasmuch as dissatisfactions and disagreements arise occasionally among people in any work situation, the filing of a grievance shall not be construed as reflecting unfavorably on an employee's good standing, performance, loyalty, or desirability to the Department. Reasonable time during work hours will be allowed for employees and Union representatives to discuss, prepare for, and present grievances including attendance at meetings with management officials concerning the grievances, consistent with Article 48 - Official Time and local supplemental agreements.

Section 7 – Procedure

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Step 3.

If no mutually satisfactory settlement is reached as a result of the second step, the aggrieved party or the Union shall submit the grievance to the Director within seven calendar days of receipt of the decision of Step 2. The recipient of the grievance shall date and sign the grievance. The Step 3 grievance must state, in detail, the basis for the grievance and the corrective action desired. The Director or designee shall meet with the aggrieved employee(s) and their Union representative(s) within seven calendar days from receipt of the Step 3 grievance to discuss the grievance. The Director or designee will render a written decision letter to the aggrieved employee(s) and the Union within 10 calendar days after the meeting.

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Article 44 – Arbitration

Section 1 – Notice to Invoke Arbitration

Only the Union or the Department may refer to arbitration any grievance that remains unresolved after the final step under the procedures of Article 43 – Grievance Procedures. A notice to invoke arbitration shall be made in writing to the opposite party within 30 calendar days after receipt of the written decision rendered in the final step of the grievance procedure.

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Article 48 – Official Time

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Section 10 - Local

A . Every local union will receive an allotment of hours equal to 4 .25 hours per year for each bargaining unit position represented by that local union . Each VHA and VBA local union is entitled to a minimum of 50% official time . Each NCA local union is entitled to a minimum of 25% official time. Where a local represents employees at a CBOC, Consolidated Mail Out Pharmacy (CMOP), clinic, service center, or successor, at a duty station greater than 50 miles from the facility, that local union will be allotted 25% official time at that duty station .

B . There shall be no reduction in the official time allocation due to a merger . When mergers occur, the official time carried over from the local union's allocation shall not be less than the combined total of the local union's allocation prior to the merger .

C . For local unions already above the minimum amount of official time described above, existing local agreements and past practices regarding official time on the effective date of this Master Agreement shall continue in full force and effect .

1 . Local unions that are above the 4 .25 will not be able to receive an increase in official time until the number of bargaining unit employees has increased to the level where they are entitled to have an allocation equal to the 4 .25 per bargaining unit employee

2 . Local unions that are below the 4 .25 minimum shall receive their increase in official time allocation no later than 60 days after this Agreement is effective. The allocation shall be based on the number of bargaining unit employees represented by the local union on the date this Agreement is effective.

3 . The calculation period to determine the number of bargaining unit members represented by a local union is every six months after this Agreement is in effect .

D . The minimum amounts of official time described in Paragraph A in this Section are not intended to limit the amount of official time that can be negotiated by the parties locally .

E . Where arrangements for transfers of official time among Union representatives are not in effect, they can be negotiated locally,

Joint Exhibit (J Ex.1).

RELEVANT STATUORY PROVISIONS

5 U.S.C. § 2302 Prohibited Personnel Practices

a)

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section --

(A) "personnel action" is:

….

An action under 5 USC Chapter 75 or other disciplinary or corrective action.

….

(D) A "disclosure" is a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences any violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

….

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i)

any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences— (i) any violation (other than a violation of this section) of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i)

not classified; or

(ii) if classified—

(I)

has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II)

does not reveal intelligence sources and methods

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5 U.S.C. § 7102 Employees Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7116 – Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an

Agency –

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

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5 U,S,C, §7131—Official Time

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(d) Except as provided in the preceding subsections of this section –

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

FINDINGS OF FACT

Grievant is employed at the John J. Pershing VA Medical Center, which also includes six satellite clinics in Missouri and Arkansas. AFGE Local 3228 represents bargaining unit employees at this facility and the satellite clinics. In addition to

Grievant's current position as Voluntary Service Assistant, he held the position of Housekeeper for three years from 2003-2006 and from 2006-2007 worked as a secretary for Associate Director of Patient Care Sydney Wertenberger. He is currently Local 2338 Union President and has served the Union in various capacities, including at the council and national level for over 19 years. He has been a steward and a chief steward. He has been Vice President of Council 226 twice. And he has served as a representative of other employees within the consolidated unit throughout the nation, which means he assists employees currently and has throughout the nation. He has helped employees in Seattle, Washington; Leavenworth, Kansas; Marion, Illinois; Little Rock, Arkansas; Iron Mountain, Virginia; and Louisville, Kentucky. Tr. 362-63. He often works outside the facility, in a park, from 'smart space", from any private location in town – McDonald's, Burger King or the library. He explained that some employees do not want to be seen talking to a union representative out of fear of retaliation. Tr. 528.

On November 4, 2013 Grievant reached the following agreement with then Voluntary Service Chief Donna Reynolds regarding his flextime schedule.

> Purpose**:** To better enable the Union President to meet and confer with more bargaining unit employees.
>
> In accordance with Article 21 Hours of Work and Overtime, Section 2, Work Schedule Options (AWS/Credit Hours) paragraph B. The union president is requesting to work the flextime schedule. The flexible bands shall be 6:00 AM to 6:00 PM, Monday thru Friday. The employee will work in accordance with this section of the contract meeting the core hours, the flex-out schedules and use of leave to cover when the employee is unable to work a full 8 hours during the work day.
>
> **Impact:** There is no impact, No other department or service is impacted.

U Ex. 13; Tr. 380.

In his capacity as Union President, in 2017 he represented Dr. Dale Klein who made protected disclosures that ultimately resulted in the October 1, 2019 suspension of then Medical Center Director Patricia Hall. Tr. 384-85; 576-77; U. Ex. 1.

On March 16, 2018, Grievant emailed then Chief of Police Dale Garrett asking if he had notified the U.S, attorney that a certain Agency employee had outside of work hours provided her niece with a Veteran's drug screen to receive illegal drugs from a provider. Grievant copied VA Medical Director Hall, a local news station, and congressional representatives on this email U Ex. 2. Chief Garrett acknowledged receiving the email. Tr. 102-03.

Chief Garrett testified that he had interactions with the Union and with Grievant regarding some grievances and demands to bargain "things going on in the police service." He testified that they had met a few times. Tr. 146-47

On May 28, 2018, Chief Garrett moved from his position as Chief of Police to Voluntary Services Chief and became Grievant's direct supervisor. The circumstances of this move are not reflected in this record.

As recounted by Chief Garrett, Grievant, who had been performing representational duties 100% of the time, was required to return to work in Voluntary Service sometime in 2018 based on an executive order issued by then-President Trump requiring employees receiving official time to work 75% of the time in their position of record. Tr. 103.

On June 6, 2018, Grievant sent Chief Garrett the following email with the subject line "Meeting":

> Dale, I am on a flex schedule, for 6:00 a.m. to 6:00 p.m. My core hours are 10:00 a.m. to 2:00 p.m., that is the time, I am required to be present on station, all other is flexible as I have done since being on a flex tour. If you want to meet, it will need to be during these tours.

Ag, Ex. C. Grievant explained that this memorandum was a mistake. At hearing he offered the following:

> A. Yes. Yes. The one e-mail that Mr. Garrett
> 3 referenced I said was my -- was my core hours, that
> 4 was a mistake. In the eleven years I have worked
> 5 off that schedule, at no time does anyone at all
> 6 have any e-mails from me saying I have core hours.
> 7 That particular day I was helping an employee I
> 8 believe by the name of, oh, God, what was her name.

9 Liz Johnson who was trying to put on a flex tour and
10 a flex schedule. And she wanted her core hours to
11 be 10 to 2.
12 I was actually doing two things at
13 one time when I was working with her to try to get
14 her schedule set. That's where that 10 to 12 came
15 from. That was put in there purely by mistake. Out
16 of my eleven years of working that schedule from
17 2013 up to this timeframe, there had never, ever,
18 ever been any core time that I've been on station.
19 Matter of fact, most at 10:00, I'm not on station
20 and I'm not working. And I'm not required to be on
21 station. Never have been since I became 100 percent
22 Union president. I work all over -- all over the
23 state.

Tr, 507.

Chief Garrett recounted that soon after taking his new position, he had what he hoped would be an open and frank conversation with Grievant "to try to facilitate starting a better working relationship." He told him that he didn't want him in Voluntary Service because he's known to be resistant and hard to work with, because he had heard from a couple of people that Grievant's bullying tactics had driven his predecessor to go out on a medical retirement. He also told Grievant that he knew that Grievant did not want to come and work in Voluntary Service because he wanted to work in the union. Tr. 103-04; 144.

Grievant in his testimony largely confirmed these details. In addition, he testified that he told Chief Garrett that her retirement had nothing to do with him. He said he explained that in 2006 he had been detailed to cover Voluntary Services because that supervisor had taken 90-day medical sabbatical. He told Chief Garrett that he did not even know the supervisor at the time and had never spoken to her. He testified that this was particularly upsetting to him that there might be people and managers throughout the facility blaming him for something he had nothing to do with. Tr. 353-54; 359-60.

Grievant testified that the meeting took place on June 20, 2018 but it appears he may have been mistaken on the date and that it occurred on July 20, 2018. Chief Garrett provided no date when the meeting took place.

During this meeting, Chief Garrett presented Grievant with a memorandum with a subject line "Expectations." In this detailed memorandum, dated July 19, 2018 he first explained that the purpose of the memorandum was "to give some general information pertaining to [Grievant's] transition back into Voluntary Service and some expectations."

He set the hours of Grievant's tour of duty, requiring a leave request for "reporting/returning to work late" and requiring Grievant when he needed to go somewhere in the facility to conduct Voluntary Service business to "let us know where you are going, why you are going, and how long you expect to be gone." Grievant was also expressly forbidden to perform any union work while on duty time. He directed Grievant to complete "TMS or other training requirements" by their due dates and needed to be completed by July 27, 2018.

He stated that he had "a new/returning Employee checklist" that he had developed that needed to be completed within 30 days, unless he modified it, in which case he would extend the timeframe if needed. He cautioned Grievant that when he needed to take leave to put in his leave request at the earliest possible time. He stated that regardless if it was short notice or not, to talk to him about needing to take leave. He emphasized in capital letters that any leave other than sick leave must be approved before he was gone. He reiterated that if short notice it was "imperative" that Grievant speak to him so that he could give him a verbal approval or denial.

He required that union time be requested on the first day of the pay period and "until further notice only statutory time will be approved." He said that the vast majority of the time he could be reached on his cell phone, "which he had already given [Grievant]."He provided the names of two alternate "approvers" who could be reached if he was not available.

He included a caution that conduct should always be professional, noting that he would always treat Grievant with dignity and respect, that he expected others to do the

same (and if not he would address it), and that "it should go without saying, I expect you to treat everyone with dignity and respect." Chief Garrett also set a dress code as business casual: "no jeans of any color unless previously approved. No T shirts except on Fridays in support of Wounded Warriors red or previously approved." Finally he offered, if Grievant was struggling with any aspect of his job," to let him know at the earlier possible time so that he may ensure he get the best we can possibly be at your job." U Ex. 3A.

Grievant signed the memorandum on July 20, 2018. He testified about some handwritten notes on the memorandum that he made for himself documenting his response to various items as he spoke with Chief Garrett.

He first took issue with Chief Garrett's characterization of Grievant's "transition back into Voluntary Service" because he had never left voluntary Service. He noted that Chief Garrett had said that on "labor mapping" he was assigned to the director bot was on Chief Garrett's "T-A." Next to the tour of duty assignment he had written " I am on a Flex schedule." Next to the directive to take trainings, he noted that Chief Garrett estimated 3 hours each on July 24 and 25, 2018, but did not say which trainings were mandatory. Grievant made note that Chief Garrett's cell phone was not a VA cell phone. He wrote that "we have no dress code." At the bottom he wrote "discussed a rumors [sic] about [the previous supervisor]." Finally about his signature of receipt he wrote "Not in agreement as some .. inaccurate." Id; Tr. 353-61.

Grievant's spouse, Sonia Ellis, who is currently employed by the Agency as an Advanced Telework Clinical Technician and serves as Secretary for Local 2138, testified that this meeting with Chief Garrett had a profound effect on Grievant. She has been employed with the Agency since 2015. She testified that right after he met with him, Grievant was crying and visibly upset as he recounted the meeting. Tr. 334-37.

Ms. Ellis testified that she has been concerned about Grievant's employment since August of 2017, and had her own difficulties with the Agency and Chief Garrett. She that while in a neighboring room she overheard comments made during a mediation that "they were trying to find a way to terminate [Grievant] by going around the Union and Making

it Agency issue." She testified that she reported this to her husband and Mr. Jordan, who was steward at the time, as well the Medical Center EEO manager. As result of that report she was terminated but brought back to work on August 25, 2018 after an arbitrator found she had been illegally terminated her. Tr. 331-32.

At hearing Chief Garrett was asked whether he had ever made a comment that he "could not "wait to walk [Grievant's] black ass." He denied making that comment testifying that while he was still Chief of Police, he stated that during a mediation with the Union he made the comment that he "could not wait to walk Sonia Ellis out of the facility." He explained that there was a lot of in-fighting among Union members and a lot of petty complaints filed by both sides on the other, and they were calling the police quite often to try to get each other in trouble. And it seemed most of them centered around Ms. Ellis. Tr. 660-61. He also noted that at the time there was an investigation going on, he thought, alleging that Ms. Ellis had engaged in some kind of listening in or sharing meeting information that she was not supposed to, and he was going on the assumption that she was going to be terminated. Tr. 661.

Chief Garrett testified that in the first two or three months after Grievant came under his supervision, he found him to be obstinate. He testified that he would make threats to him about reporting him "for this or that," but he was not really concerned about it. He testified that he would give him instructions on doing certain things and he was always resistant and questioned, like, every little thing. Tr. 145.

He said it was predominantly surrounding the implementation of VATAS[2] "as our time keeping system here. He said he was trying to get him to enter information into the system." He testified that he had met with Grievant, coached him several times on how to do it and how to do it right. Id.

The record reveals that there continued to be tension between Grievant and agency officials, including Chief Garrett. Grievant testified that he faced voluminous removal charges that initially resulted in a five-day suspension. The suspension was subsequently

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[2]/ VA Time and Attendance System.

overturned by an arbitrator. The award included a finding that he had been retaliated against for making protected disclosures as a whistleblower. Tr. 486-88.

The Union submitted the following doctor's note signed by Donald S, Piland, M.D.

> To Whom It May Concern:
>
> Kevin Ellis was seen in my office on 08/14/2023. In 2019, Mr Kevin Ellis became a patient of mine. Mr Ellis has been seeking treatment due stress and anxiety related to his employer's (John J Pershing Veterans Administrative Medical Center) actions towards him as the Union President. Mr Ellis has complained of the agency's abuse of power, whistle blower retaliation, bullying, harassment and anti-union animus towards him and his family.
>
> Mr Ellis's chain of command has caused him to suffer a diminished quality of life, low self- esteem and sense of worthlessness. Mr Ellis suffers from major depression and anxiety disorder liked to his toxic work environment. The combination of the agency's continual behavior causes physical, psychological, and emotional harm. The agency's actions cause Mr. Ellis to withdraw from friends, family and social gatherings, and some of his favorite hobbies.
>
> Mr. Ellis continues to complain of forgetfulness, memory loss and recalling major life-changing events related to his depressive disorder. The toxic work environment created by Mr Ellis's employer has directly contributed to his major depression and anxiety disorder. Mr. Ellis continues to be prescribed Escitalopram as part of his treatment plan, which will require lifetime management.

U Ex. 14; Tr. 382-83.

The TMS program generates automatic reminders of trainings due or overdue with the caption "Nudge." A Ex. K; Tr. 29. Grievant testified that he has routinely been behind in completing TMS courses since 2012. Tr. 401. In June 2018, Chief Garrett emailed grievant a list of 8 TMS courses (some of which were intended for nurses) but simply asked him to 'work on getting caught up on these" suggesting one a week would be a great plan. U. Ex. 3; Tr. 399.

In January 2019, Chief Garrett forwarded to Grievant an email highlighting a large number of overdue TMS trainings, commenting that "I see you haven't followed supervisory instructions on these as well." The number of days overdue for these trainings ranged from 17 to 126 days overdue. Grievant replied asking Chief Garrett to provide him a "list of mandatories" asking which courses are mandatory and "when did the list change" explaining he needed time set aside to perform those courses. A Ex. K; Tr. 36.

Chief Garrett testified that in 2018, 2019 and even 2020 he continued to send things "such as this" to Human Resources for recommendations" and HR told him that they were going to put them in whatever they were working on related to Grievant. He did not know what they were referring to and never communicated it to him. He acknowledged that it seemed they were "building a file" against Grievant. Tr. 121.

As reflected in an e-mail exchange on February 11, 2019, Grievant notified Chief Garrett that he had entered "4 hours for TMS this week, but I can't make the change." Chief Garrett responded with suggested corrections to an official time request , He also provided an attached list of 8 TMS courses that had been completed by Grievant noting that the estimated time for completing all but one was 5 hours. He then followed two more emails, apparently after Grievant had modified his official time requests. The first email noted that the changes were still incorrect and requested that other changes be made. The second indicated that he was approving Grievant's requests but that corrections still had to be made.

Grievant provided the following response.

> This is why VATAS should have been bargained. However, VATAS for requesting, approving and tracking of Official time has just been overturned by an arbitrator. But, I will make the change this morning. This also means that pre-approval is not required, but, it was already determined by a federal judge not to be required and was struck down. But done for now…

A Ex. G.

In February 2020, Grievant sent the following email to Chief Garrett with copy to Interim Medical Director Desmond McMullen and Daniel Karr located in VISN[3] 15:

> Due to elevating anxiety, I am taking a sick day. Just being in the presence of a supervisor that made to the comment, "I Can't Wait to Walk His Black Ass" or something to this affect is causing my anxiety to rise. In addition to this comment, my supervisor informed face to face, his exact words "I don't want you in Voluntary Services, but, I was told by the director, I had to keep you." Then took further actions to solidify these actions over the next few months.
>
> As any reasonable person could imagine, this would cause anxiety levels to rise, chest pains to develop and the need for therapy and medication to increase. I await my meeting with the director, as I was informed I would have last Thursday or Friday.
>
> I spent the weekend doubling upon my medication and having anxiety, thinking about being placed into the physiological and mental cage.

U-34. Director McMullan responded:

> Mr. Ellis,
>
> Last week, I contacted Mr. Karr and asked Mr. Karr to provide you an opportunity to be detailed to the JJP Business Office without any loss of pay to you. This offer also made it possible for you to report to a service line other than Voluntary Services. Mr. Karr advised me that he made this good-faith offer to you; however, you declined this offer. In an attempt to show good faith and fair dealing, I have agreed to extend you discretionary privilege to reconsider this offer. Mr. Karr has or will extend this offer to you again to afford you the ability to report to the Business Office rather than Voluntary Services. Please advise Mr. Karr as soon as possible of your willingness to accept or decline this solidified offer to report to the Business Office.

Id. Grievant provided the following responses:

> Where do I report to for the file clerks.
>
> On Tuesday, February 4, 2020, 10:09:52 AM CST, Ellis, Kevin C <kevin.ellis@va.gov> wrote:
>
> The only issue with the File Clerk is we have grievance pending on the issue. Second, I believe Beth Minton works as a file clerk, not sure. Beth

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[3]/Veterans Integrated Services Network

> Minton is Shane Minton's wife who participated with the Libby Johnson as part of the protected disclosures and privacy issue.
>
> Trying to avoid that situation as much as possible. But, if that is the only temporary location for the moment, that will keep my anxiety and depression at least to a minimum.
>
> I removed Dale Garrett from this email chain, as, just seeing his name and photo on the outlook shoots my blood pressure up. I came in for a telephone call with the FLRA on behalf of Scotty White, I am heading back home on sick leave.
>
> I put my personal email address on so that I can keep track of this issue. Where is file clerk on campus, off campus, etc, etc. I am always reachable by cell phone..

Id.

On the same day, i.e., February 4, 2020 Grievant sent the following email to Chief Garrett, and three other VA employees: Ryan Wells, Libby Johnson and Robert Wilkie:

> This is to inform the agency that Ryan Well, Dale Garrett and Libby Johnson purposefully misstated and misrepresented the facts and took a personnel action that illegally charged me hundreds of unjustified and unwarranted hours of AWOL.
>
> This action caused me thousands of dollars in pay in violation of 5 USC 7131(d) and the violation of the Fair Labor Standards Act.
>
> These actions caused my credit to be damaged, late notices for financial obligations and needless pain and suffering. The agency did not maintain a record of hours worked and falsified my time and leave record.
>
> This was done in retaliation for making consistent protected disclosures over the past two years.
>
> The fact that I'm awake at 3:30 in the morning demonstrates these actions are affecting me physically, mentally and emotionally.

U Ex. 8; Tr. 409.

Grievant testified that he was subsequently detailed to the business office effective February 2020 until late November 2020. Tr. 367-71.

Associate Director Adkins came to Poplar Bluff VA Medical Center in February 2021. Tr. 219. On April 8, 2021, Grievant emailed Associate Director Adkins with copy

to Pamela Hoffman (MRN), Supervisor of Employee Relations Specialists for Poplar Bluffs VA Medical Center, among other facilities, the following:

> Mrs. Adkins, I have an Open EEO Complaint before a Judge that involves derogatory and adverse actions from Garrett and others towards me.
> I've also made a protected disclosures against Mr. Garrett, and have submitted 2 FMLA request due to the Hostile Work Environment created by Garrett and his cronies (Hall, Johnson, Minton, Ritter, Patterson, Karr, Shea and others) within his circle.
> The Whistleblower Complaint, the EEO Complaint, the Bullying and Harassment Complaint, and Prohibited Personnel Practice, all were found to have Merit.
> I have requested reassignment away from him due to medical reasons, and for some reason, they have been ignored. Hoffman and others have received my FMLA paperwork and request. I need your assistance and escaping from Garrett.
> I will No Longer respond to any of his emails, text messages,

U Ex. 33. Tr. 373.

There is no dispute that Grievant at the time of the disciplinary actions in question Grievant had returned to 100% official time in connection with his representational responsibilities as Union president. The record is not clear when exactly this occurred, but it appears that it took place sometime in March 2021. U Ex. 28. While Grievant served 100% official time, Chief Garrett was primarily responsible for making sure that Grievant's time was entered properly and accounted for and to make sure he completed required trainings. Tr. 22.

There is no indication in the record that during time leading up to the subject disciplinary actions that Grievant was routinely ignoring his responsibility to complete TMS courses. His Learning History reflects that from July 25, 2018 through April 28, 2021 he completed 60 TMS courses. A Ex. B.

As a supervisor Chief Garrett received autogenerated notification emails that his direct report employee, Grievant, was overdue on several Talent Management System (hereinafter "TMS") training requirements. Tr, 28. He instructed Grievant to complete overdue TMS training via email sent to Grievant's VA email address on June 2, 2021

with a suspense of June 11. J. Ex. 2; Tr. 34. Grievant did not at any point respond to Chief Garrett's June 2nd instruction email. Tr, 40. Chief Garrett checked the training status in TMS following the June 11th suspense and, as it hadn't been completed, he again instructed Grievant to complete overdue TMS training via email sent to Grievant's VA email address on June 15, 2021. J Ex. 2; Tr. 40.

The first course on the list was "Voluntary Services System (VsS) v.5.3 training" listed as 485 days overdue. Chief Garrett testified that this training was eventually removed from the list beginning FY 22 because, among other reasons, a new data base system was going to be implemented. He cited as another reason that he "knew [Grievant] was, based on his history, past behavior, not going to return to work in voluntary service,. He would refuse to do so." The other courses on the list ranged from 3 to 15 days overdue. And Chief Garrett acknowledged that two of the courses relating to Travel and travel card usage would likely not be necessary and that Grievant could arrange to have them removed from the autogenerated list by contacting TMS coordinator Robbie Wells. Tr, 76.

Grievant did not respond directly to the June 15 email. Chief Garrett, however, on June 21, 2021 again emailed Grievant noting that he saw that Grievant had completed two of the delinquent TMS courses and thanked him. He extended the deadline for the remaining delinquent course, Infection Prevention, to the close of business the following day. J-2. On June 23, 2021, at 7:45 a,m., Chief Garrett sent Grievant another email simply stating, "Mr. Ellis, You failed to compete your delinquent TMS by close of business yesterday." Id. 5 minutes later, he wrote the following to HR Specialist Austin Breiter:

> Mr. Ellis just this month, has knowingly and willingly failed to follow supervisory instructions to complete his delinquent TMS. I am requesting a recommendation action. I will also be sending another email chain requesting a recommendation for action. Thank you.

Id.

The other email chain Chief Garrett referred to related to an issue involving Grievant that arose that same week. Chief Garrett was told by two or three employees

that on June 16, 2021, they saw Mr. Ellis attending the funeral of a former employee. Tr. 59, 113. Chief Garrett testified that based on this information he concluded that grievant attended the funeral on official time. He explained that Grievant was required to keep core hours at the facility based on the June 6, 2018 email he had previously received from Grievant and that to attend the funeral Grievant should have followed leave procedures by entering a leave request into the time and attendance system. Tr. 59; J Ex. 2.

Chief Garrett instructed Grievant to provide a statement concerning his absence and enter a leave request via email sent to Grievant's VA email address on June 17, 2021. Id.

Grievant responded to Chief Garrett's June 21st email by addressing his response to other management officials, removing Chief Garrett from the response, and stating:

> I flexed again today, just as I did the day of Teddy's funeral. I don't know what kind of a game sick Garrett is playing, he can get his statement, from whom ever whispered in his ear. Unless Garrett gets a statement from every employee who attended, stop harassing me. I will not answer any of his emails, that should be apparent. Today, I worked starting at 6:00 am, the same as the day of Teddy's funeral. Considering the agency has not had any idea of how to track my flex hours, because they changed to VATAS and failed to bargain, Garrett has an issue. Have a good day.

Id. At hearing, Grievant explained:

> 12 I didn't leave my home until 10:15. It's
> 13 about a 15 minute drive to the funeral. That would
> 14 put me there about 10:30. I have a lunch break that
> 15 I could have taken as well. Never took a lunch
> 16 break, but the fact that I flexed and began work
> 17 that morning at 6 a.m. means that from 10 to 12 or
> 18 10 to 2, whatever timeframe was, I was not required
> 19 to be at work. I already got four hours of work in
> 20 in the morning. I just have to get four hours of
> 21 work in before 6 p.m. in the afternoon. And that
> 22 would have been from 2 to 6 p.m. 10 to 12 was my
> free time to do whatever I wanted to do

Tr, 508. Based on Grievant's failure to provide a statement concerning his funeral attendance, Chief Garrett coded Grievant as AWOL for two hours. Tr. 74.

Chief Garrett testified that he communicated with Grievant by various methods. He testified that he predominantly used e-mail, some instant messaging. He said he had tried calling, and he believe he may have text messaged him. Tr. 25. He testified that at some point he had used Grievant's personal yahoo email but that around the time of these disciplinary actions he was informed by the Agency's security officer that personal emails were not to be used for conducting agency business. He also noted that Grievant had previously told him that union business was agency business. Tr, 644-45.

He further explained that he communicated primarily via email because it was about the only system available for tracking purpose and for verification and because "he would claim that he had not received communication from me. And quite often, I would get no responses from him through whatever methods I tried to communicate with him." Tr. 35-26.

With respect to the TMS and funeral attendance instruction emails Chief Garrett utilized email delivery receipts. A Exs. A and C. Chief Garrett also testified that his use of VA email to communicate, or attempt to communicate, with Grievant was consistent with how he communicated with other employees. Tr, 26.

Chief Garrett sought to take disciplinary action. Human Resources Specialist, Austin Breiter assisted Mr. Garrett in composing the proposed admonishment and related evidence file. Tr. 171-72.

The charges were as follows:

> **CHARGE 1**: Failure to follow supervisor instructions
>
> **SPECIFICATION:** On or around, June 2, 2021, I instructed you to complete any overdue Talent Management System (TMS). I continued to grant extensions for completion. On June 21, 2021, I sent you an email requesting that all overdue items be completed by close of business on June 22, 2021. You failed to complete the task.
>
> **CHARGE 2**: Failure to follow instructions
>
> **SPECIFICATION:** On or around June 23, 2021, it was founded that you attended the funeral of Teddy McComb. I requested a statement from you regarding your hours worked the day of the funeral. You failed to provide me with a statement.

CHARGE 3: Absent without leave

SPECIFICATION: On or around June 16, 2021, it was founded that you attended the funeral of Teddy McComb. Your tour of duty was 8:00 am to 4:30 pm. You were absent between 10:00 am and 12:00 pm, without authority, from the John J. Pershing VAMC, your required duty station. You were required to be at your duty station during that period of time. You did not call and request leave and your absence was not authorized. You were absent without leave (AWOL) for two hours.

RIGHT TO REPLY: This admonishment is being proposed due to simple tasks. I am still your supervisor, especially when it comes to approving your duty time, leave time, and completion of TMS courses. These are simple, daily tasks. I'm willing to approve any time you submit but the time must be requested appropriately. This is a requirement for all employees. Talent Management System (TMS), is a requirement for employees to complete in order to stay compliant with courses that relate to their job duties and courses that all employees are required to be aware of. I receive alerts when you are out of
compliance. I asked for your on multiple occasions to complete them, and you have failed to do so.

I also asked questions related to the funeral of Mr. McComb. I simply requested for a statement regarding your whereabouts during the funeral. You responded to the Associate Director in email but you failed to provide me with a statement as requested. You did however state that your core hours are between 10:00 am and 2:00 pm. You were absent during a portion of that time and did not request leave, placing you as being absent from your duties, without approved time.

J Ex. 2.

Chief Garrett sent Grievant multiple Outlook calendar meeting requests to attempt to serve the proposed admonishment noting the matter as high importance. His first attempts only indicated a meeting. In subsequent attempts he wrote:

Mr. Ellis**,**
Again, I need to meet with you briefly. I reviewed your Outlook calendar and this day/time works for us. This is a required meeting. Feel free to bring a union representative. However, I am not planning to have a discussion. I will be on leave next week.
Respectfully,
J. Dale Garrett

A Ex. D. Tr. 76-78. Grievant responded to the initial meeting invite, four days after the meeting date had passed, stating "You don't review my calendar for me, and determine what I'm available for at all. A Ex. D.

Chief Garrett subsequently sent another meeting invite and received no response from Grievant resulting in Chief Garrett emailing Grievant the proposed admonishment. The email was sent "high" importance and the VA email system confirmed delivery. A Ex, E; Tr. 80-81. No response to the email containing the proposed admonishment was received by Chief Garrett. Tr. 81. Mr. Breiter coordinated the delivery of the proposed admonishment and related evidence file to Grievant's home address via the United Parcel Service (UPS). Tr. 175. According to UPS records, the proposed admonishment and related evidence file were delivered to Grievant's front door at his home address on August 4, 2021. J Ex. 4.

Both Grievant and Ms. Ellis denied receiving the mailed package. Ms. Ellis testified that she was the one who mostly gets the mail and she would have seen something like that and brought it to the Grievant. Tr. 340. Grievant confirmed his mailing address but denied receiving the package. He offered Facebook postings from his Home Owners Association group showing ongoing delivery problems, including complaints in July and early August 2021. U Ex. 32; Tr. 476-78; 529-30.

Mr. Breiter also assisted Chief Garrett in composing the admonishment decision letter. Tr. 176-77. He coordinated the delivery of the admonishment decision letter to Grievant's home address via UPS. Tr, 179. The admonishment decision letter was delivered to Grievant's home address on August 24, 2021. J Ex. 4. Grievant denied receiving this letter as well. Tr. 529.

Following Grievant's failure to respond to instructions, his refusal to respond to or attend either two meeting requests, his non-response to the emailed and mailed proposed admonishments, Mr. Garrett sustained the charges to promote the efficiency of the service. Tr. 82- 83.

Mr. Garrett again instructed Mr. Ellis complete overdue TMS training via email sent to Mr. Ellis' VA email address on September 3, 2021. J. Ex. 4; At this time, Mr.

Ellis had become delinquent on an additional mandatory TMS training, integrity and compliance, in addition to the continued delinquency for infection prevention. J-4; Tr. 88.

No response to Chief Garrett's September 3rd email instruction was received. Tr. 89.

Chief Garrett subsequently instructed Grievant to digitally sign his FY22 performance plan, functional categories, and competency assessment checklist via email sent to Grievant's VA email address on October 20, 2021. J Ex. 4. None of these documents are part of the record. Chief Garrett received no response. Tr. 92. Mr. Breiter assisted Chief Garrett in composing the proposed reprimand. Tr. 180.

The charges were as follows:

> **CHARGE: FAILURE TO FOLLOW SUPERVISORY INSTRUCTIONS.**
>
> **SPECIFICATION 1:** On Friday, September 3, 2021, I instructed you to work on TMS completion due to overdue TMS alert I have been receiving. I instructed you to complete delinquent courses by close of business on September 15, 2021. You failed to complete delinquent courses.
>
> **SPECIFICATION 2:** On Wednesday, October 20, 2021, I instructed you to review and to sign your Employee Performance Plan, Functional Categories, and your Competency Assessment Check List. You failed to complete these items as instructed.

J Ex. 4.

Chief Garrett testified that he elected to have his supervisor, Ms. Adkins, serve as the deciding official for the reprimand in order to be as impartial as possible. Tr. 94. Prior to the admonishment and reprimand proposed and issued in late 2021, Chief Garrett had never previously proposed or issued discipline for Grievant. Tr.615. Grievant originally thought he received it by email but then testified he received the proposed reprimand through delivery. Tr. 513. Grievant testified that he did not receive the proposed reprimand mailed to his home address Tr. 530. In his capacity as a union representative, Mr. Jacob Jordan responded to the proposed reprimand on behalf of Grievant. J Ex. 5.

Associate Director Adkins was the final decisionmaker on whether to sustain

Grievant's proposed reprimand. Tr. 206. She testified that prior to making her decision on the proposed reprimand, she reviewed and considered the information contained within the proposal letter, the related evidence file, and Mr. Jordan's response to the proposed reprimand. Tr. 207; 209. Ultimately, Ms. Adkins decided to sustain the reprimand. J Ex.6.

In making her decision, she testified that she considered the importance of TMS coursework to the daily operation of the facility, and Grievant's continued refusal to follow his supervisor's instruction related thereto. She further considered the consequences of refusing to read supervisor emails, and how it may lead to incomplete employee files where an employee fails to return necessary acknowledgments. Tr. 210-214. Human Resources Specialist Breiter assisted Associate Director Adkins in composing the reprimand decision letter. Tr. 181-82. Mr. Breiter emailed the reprimand decision letter to Grievant and Mr. Jordan on December 17, 2021. Tr. 184; A Ex. I.

On January 5, 2022, the Union grieved both the admonishment and the reprimand at Step 2. The grievance included detailed allegations of retaliation and reprisal. J Ex. 7. On January 19, 2022 the Agency provided a detailed response. J. Ex. 8. The Union elevated the grievance to Step 3 on January 21, 2022. J Ex. 9,

As reflected in the Agency's Step 3 response again denying the grievance, a grievance meeting was held on February 1, 2022. Tr. 215-17. The Agency raised arbitrability issues in the grievance response.[4] The record is not clear when this response was ultimately received by the Union.

Additional grievance meetings were apparently held. Tr. 225. Another meeting was subsequently scheduled and held on February 17, 2022 via Teams. The meeting included the Grievant. As reflected in related documentation, the meeting included not only discussion of the instant grievance but also the possible reopening of an

[4]/ The Agency raised arbitrability issues in this response but did not place these issues before the Arbitrator at hearing nor otherwise argued them and they will not be further addressed.

administratively closed reasonable accommodation request filed in late November 2019, other pending grievances and EEEO complaint. The parties explored the possibility of a global settlement and all parties including Grievant agreed to pursue mediation using an FMCS mediator. U Ex. 38. The mediation was scheduled for March 24, 2022 with the grievance held in abeyance. Associate Director Adkins subsequently sought on March 16, 2022 to reschedule due to her need to attend a "VISN ELC" meeting.The Union responded by taking the grievance out of abeyance and invoking arbitration. J Ex. 11; Tr. 224.

There is no dispute that Grievant faced a Hatch Act complaint brought before the Merit Systems Protection Board by the Hatch Act Unit of the Office of Special Counsel (OSC). The record contains a series of exhibits from September 14, 2020 and continuing through July 7, 2022 obtained by Grievant through a discovery request made in connection with his defense of the Hatch Act complaint. Tr. 430-31. This material reflects efforts by OSC to obtain any prior disciplinary actions that had been taken against Grievant. A Exs. 15 through 31. This material includes emails reflecting contact between Sherri Borman, an OSC attorney, and Chief Garrett in January and February 2021.

On January 25, 2021, Attorney Borman emailed Chief Garrett thanking him for speaking with her about their open investigation that Grievant had violated the Hatch Act. She asked him to pass on her contact information to Grievant and asked him to let her know if his office decides to take disciplinary action against Grievant. U Ex. 23. On February 5, 2021, Chief Garrett emailed Attorney Borman asking whether she had spoken to Grievant yet. She emailed in reply that she was able to speak to Grievant the prior week and schedule a Hatch Act interview with him for February 17, 2021. She further explained that she asked Grievant to confirm receipt of her emails and a calendar appointment but had not heard from him. She said that she was waiting for receipt from Grievant before she contacted him (Chief Garrett). She stated that she left a voicemail to follow up and that she planned to move forward with their interview the following week. She told Chief Garrett he would let him know if she heard from him again. She

concluded by asking him "Do you have any update on his potential discipline for being AWOL." U Ex. 24; Tr. 447. He emailed the following response:

> All I know is a recommendation is still being worked on. Do you recall what day last week you were able to speak to him? I am tracking failures to follow supervisory instructions to immediately contact you and do not want to cite him for days after your communication.

U Ex. 25.

On February 16, 2021, Attorney Borman again emailed Chief Garrett asking, "Did Mr. Ellis serve the suspension referenced in the attachment?" Chief Garrett responded "Yes. This was for his actions during the time he was on a temporary detail to the Business Office in early 2020=November 21, 2020." U Ex. 26.

On February 17, 2021 Attorney Borman again wrote to Chief Garrett. She informed him that Grievant did not appear for a scheduled interview, explaining her scheduling efforts.. She then asked Chief Garrett if he had any update on potential discipline through the VA or whether he had corresponded with grievant within the past few weeks. The record does not include any further response from Chief Garrett. Id.

On April 28, 2021, Charles Peterman, Senior Strategic Business Partner VISN 15 Human Resources, Pershing VA Medical Center, emailed Attorney Borman alleging that Grievant had invited a political candidate to speak at a rally that was livestreamed on Facebook, providing a video link. He asked whether this matter could be included in her ongoing Hatch Act investigation of grievant or whether agency leadership need to submit a separate referral to OSC. Attorney Borman thanked him saying that OSC would include the allegation in this investigation. She also informed Mr. Peterman that she had still not been able to contact Grievant about the allegations, asking him if grievant had been back to work or had leadership been able to contact him. U Ex. 27.

On March 3, 2021 Attorney Borman emailed VISN 15 employee Patrick Shea notifying him that she had not been able to reach Grievant for the past month, that she had been unable to schedule an interview and that she understood that Grievant had not been in contact with his supervisor. She again asked for an update on the Agency's proposed discipline. Mr. Shea forward the inquiry to Mr. Peterman who wrote:

> Post closure of an investigation into an allegation by Grievant of hostile work environment/fear to return to work, Grievant was issued another return to duty letter. He remains AWOL and the HR specialist is working with the supervisor on a proposed 14 day suspension.

U Ex. 29.

On May 14, 2021, Mr. Peterman reached out again to Attorney to alert her that a congressman had filed a Hatch Act complaint against Grievant as well to assist her in coordinating the complaints. Attorney Borman responded by asking Mr. Peterman to confirm that Grievant has been in an AWOL status since November 2020. He responded that Grievant was no longer in an AWOL status and that as of March 26, 2021 he was placed back in 100% official time. He further explained that there was currently consideration being given to moving that back to March 3 due to a notification out of the Agency's labor relations office. There then followed an exchange trying to clarify Grievant's past disciplinary record. U. Ex. 28.

Two more email exchanges followed. Ob April 22, 2022 Michael Ramsey of the Agency's Office of General Counsel wrote to OSC Attorney Jacob Land seeking a brief meeting to correct some background information related to Grievant's previous discipline. U Ex. 30. On May 22, 2022, Pamela Hoffman forwarded to Mr. Land a 14-day suspension, an admonishment and reprimand for Grievant. U Ex. 31.

Grievant testified at hearing that to his knowledge gained as Union president he was the only employee at Poplar Bluff who had ever been disciplined for failure to complete TMS courses on time, and also the only employee to have been disciplined for 2 hours of AWOL, or for failure to sign a performance plan. Tr. 510-20; U Exs. 10A and 36.

THE AGENCY'S POSITION

The evidence supports finding that the admonishment issued to Grievant is supported by just and sufficient cause as provided in Article 14, section 1 of the MCBA, the appropriate standard of review. Grievant was admonished for: 1. Failure to follow instructions that he complete required TMS training, 2. Failure to follow instructions concerning attendance at a funeral and hours worked relating to the funeral attendance,

and Absence without leave. Prior to consulting human resources and proposing the admonishment, Chief Garrett instructed Grievant to complete the overdue, mandatory TMS trainings via email to his VA email address on four occasions spanning June 2, 2021 through June 23, 2021.

Grievant failed not only to comply with the email instructions and complete the delinquent trainings within the original and extended timeframes provided, but he further failed to provide any response to his supervisor's instructions. The required TMS training Chief Garrett instructed Grievant to complete included a training mandated for all Medical Center staff, a training assigned to Grievant by Chief Garrett, as well as other trainings Chief Garrett questioned whether it was necessary and appropriate for Grievant. Mandatory training for Medical Center staff, including but not limited to infection prevention, inherently promotes the efficiency of the service. So too, the principle of expecting and requiring employees comply with lawful instructions of supervisors promotes the efficiency of the service.

In communicating with Grievant concerning the delinquent trainings, Chief Garrett thanked Grievant for completing one of the trainings. Chief Garrett further provided guidance to Grievant on how to remove potentially unnecessary trainings. His email concerning the delinquent trainings were professional in their tone, consistent with his practice for other employees, and objectively routine instructions. Additionally, his action in instructing Grievant to complete overdue training was not a new development, as Chief Garrett had done since he had assumed the Chief of Voluntary services position in 2018. The difference thus was not a change in instruction, expectation, or mode of communication by Chief Garrett, but rather Grievant's failure to follow the instructions and further his complete unwillingness to respond.

Grievant confirmed that the email address used by Chief Garrett was his correct VA email and further noted that his VA email has always been available. Grievant explained that he uses a second yahoo email address in addition to his VA email, describing his rationale and practice of using each as "I would pick and choose when I want to and when I don't based upon where I'm working and what I'm working on."

Grievant denied having seen the four emails instructing him to complete delinquent TMS training relevant to the admonishment, testifying "I don't think I even saw that e-mail address. Some of these messages I didn't find them until yesterday or this week preparing for the arbitration. And they were dark blue, which mean they had not been opened. I'm like, oh, okay." Grievant later testified that he was unable to say whether or not he saw other email instructions. "I have no idea. More likely than not I did not." The Union appears to argue, in stark contrast to near every other employee operating in the modern workforce, that Grievant should not reasonably be expected to receive, review, or respond to emails from his supervisor.

During the same timeframe that Chief Garrett emailed Grievant regarding the overdue mandatory TMS trainings, it was reported to him that Grievant was observed off campus during his core hours in attendance at a former employee's funeral. The following day he emailed Grievant requesting he provide a statement concerning his absence and enter a leave request. When he did not receive a response to the June 17th email, Chief Garrett sent two follow up emails on June 21, 2021 attempting to get a response prior to timecard certification and further attempted to resolve the effort through instant message in addition to the multiple emails in an effort to resolve the issue before the end of the pay period.

At the time of the funeral, Grievant was on a flexible schedule. Chief Garrett's request for a statement concerning his absence from the medical center was rooted in communication he had with Grievant in 2018 wherein Grievant communicated to Chief Garrett via email indicating that he was on a flexible schedule with core hours of 10 am to 2 pm. Core hours, as defined under the Collective Bargaining Agreement Article 21 Section 2b are: "That period of time when employees on a particular shift are expected to be at work." Grievant's initial email to Chief Garrett on the subject acknowledged his understanding not only that he had core hours, but also that he understood his core hours to be "the time, I am required to be present on station, all other is flexible as I have done since being on a flex tour."

The additional documentary evidence concerning Grievant's approved schedule was a 2013 memo between Grievant and the former Chief of Voluntary Services which states: "The employee will work in accordance with this section [referring to Article 21] of the contract meeting the core hours, the flex-out schedules and use of leave to cover when the employee is unable to work a full 8 hours during the work day."

At the hearing, Grievant was asked to explain why he believed that the flextime agreement reflected at Union Exhibit 13 supported his position that he did not in fact have core hours as expressly provided under the agreement reflected in Union Exhibit 13, and further why he communicated that as being his understanding 5 years later when communicating with Chief Garrett in 2018 at Agency Exhibit C page 2. Grievant testified generally that he's never had core hours, that Union Exhibit 13 should not be read in plain meaning to show that he did have core hours, and that the communication from him to his new supervisor in Agency Exhibit C reflecting that he did have core hours was a mistake.

Grievant instead contended that he verbally corrected his mistake during a meeting with Chief Garrett and that he neglected to annotate that correction amongst the other corrections he annotated on the meeting memo at Union Exhibit 3A or anywhere else in writing. In addition to the fact that all documentary evidence presented by the Agency and Union supports finding that Grievant did in fact have core hours, confirmed that Grievant ever communicated to him at any point that he did not have core hours.

Grievant never provided Chief Garrett with a statement in response to the instruction. Grievant never responded directly to Chief Garrett. Instead, he responded to Ms. Adkins, removing Chief Garrett, and stating, among other colorful comments, "…Unless Garrett gets a statement from every employee who attended, stop harassing me. I will not answer any of his emails, that should be apparent."

In contrast to the TMS instructions, Grievant's email response reflects that he indisputably was aware of the instruction and willfully declined to follow it. Chief Garrett asked an appropriate question relating to his subordinate's compliance with time and attendance laws, rules, regulations and contract provisions. He asked the question in the

form of an instruction, as he'd become accustomed to not receiving a response. He did not receive a response to any of his instructions, except for one directed to his supervisor reflecting Grievant's blatant unwillingness to respond to any emails from his supervisor. In addition to not receiving a response to his instructions, Chief Garrett did not receive a response to the proposed admonishment which had been emailed and mailed to Grievant. Thus, he effected the discipline to promote the efficiency of the service.

The evidence further supports finding that the reprimand issued Grievant is supported by just and sufficient cause. He was reprimanded for: 1. Failure to follow instructions that he complete required TMS training, and 2. Failure to follow instructions concerning review and signature of employee performance plan, functional categories, and his competency assessment check list.

Prior to consulting with human resources and issuing the proposed reprimand on November 2, 2021, Chief Garrett instructed Grievant via email sent to his VA email address that he must complete the overdue required TMS training. At this time Grievant continued to be delinquent on the mandatory infection prevention training and had become overdue on a second mandatory TMS training, integrity and compliance. Grievant failed not only to comply with the email instruction and complete the delinquent training within the provided timeframe, but he further failed to supply any response to his supervisor's instruction. Grievant denied having received the September 3rd email instruction.

On October 20, 2021 Chief Garrett instructed Grievant via email to his VA email address to digitally sign his FY22 performance plan, functional categories, and competency assessment checklist. Grievant failed not only to comply with the email instruction and complete the performance plan signatures within the provided timeframe, but he further failed to provide any response to his supervisor's instructions. Grievant denied having received the September 3rd email instruction.

Chief Garrett elected to have his supervisor, Associate Director Adkins, serve as the deciding official for the reprimand in order to be as impartial as possible. The proposed reprimand was again emailed and mailed to Mr. Ellis. Grievant denies that the

reprimand and evidence file were delivered to his home residence but admitted to receiving it either through email or hand delivery. Mr. Jordan, in consultation with Grievant, provided a written response to the proposed reprimand.

The Union content of the Union's response to the proposed reprimand is noteworthy in many respects. The response contrasts with the Union's evolving explanations at hearing. The Union could have addressed the actual charges or factors contributing to the underlying the deficiencies similar to what was offered at hearing, i.e., he failed to see those email instructions because I get a lot of emails and can't keep up as was suggested during the hearing"; issues with remote access or resources; I can't presently complete these instructions due to workload, but I can and will do so at some date in the future; the requested tasks are not appropriate on official time" The response essentially said that Grievant, while on 100% official time, does not participate in Agency duties, such as completing Talent Management System (TMS) courses [or] receive annual performance appraisal, that Grievant never received the instructions; the Agency lacks proof of service of either the instructions or clandestine mail and "provided no proof that Chief Garrett provided any instructions to Grievant and the generalized claims that the Agency manipulated government forms of communication in a highly illegal and unethical manner.

At hearing, Grievant principally claimed he had not seen the emails due to the volume of work. In fact, Grievant testified that at the time of the hearing, he had 16,197 unread emails in his inbox. The explanation offered for why Grievant did not see and comply with the instructions and was wholly unaware of them until nearly two years later is difficult to reconcile with the fact that he and the Union allocated substantial time responding to the proposed reprimand, invoking arbitration, and in preparation for arbitration. At no point during the two years before the hearing did he bother to expend the effort to check whether he had in fact been sent email instructions, which date and time are clearly identified within the proposed admonishment and reprimand evidence files and thus extremely easy to locate, frankly defies logic and is not deserving of belief.

Grievant's explanation for failing to comply with the instruction or respond to his supervisor's emails oscillated between the claim that he was too busy to read all his emails to the claim that he purposefully avoided doing so because such emails amounted to bullying and harassment. This explanation does not square with fact that he read and responded to certain emails and other communications from Chief Garrett, such as his response to Chief Garrett to the effect that he does not have the authority to set meetings and his response to Chief Garrett's questioning concerning his leave usage directed to Ms. Adkins This explanation is further contravened by Grievant's testimony to the effect that, when he wished to avail himself to a benefit, such as leave or administrative absence, he would communicate with Chief Garrett.

The Union position, based on the proposed reprimand response and step III, was that Grievant could not be required to do any "Agency Duties" (Joint Exhibit 2 page 1) This clearly changed during the course of the hearing, with the Union eventually walking back the position where it acknowledged that Grievant could be required to complete TMS training but not on official time. The Union position thereafter evolved further to one where it was claimed that due to limits on official time and workload, Grievant could not be required to complete TMS training. Chief Garrett previously instructed Grievant to complete TMS training and in those instructions, it was explicit and clear that he would be doing so in duty time and not official time. Despite the clear language of the prior instructions,

Grievant contended that he did not understand what was reflected in the Agency Exhibit G wherein Chief Garrett directed that the training be completed in duty time. Review of page 3 of Agency Exhibit G reflects that Grievant was specifically asking to be credited for 4 hours for completing TMS training, which strongly contradicts his contention he did not know what was being discussed in the email chain and more broadly that he erroneously understood the instructions to require he complete TMS training on official time. When asked if the Union had raised the argument that they understood the instructions to reflect was an order that Grievant complete TMS training in official time, prior, Grievant testified that it was before arbitrators; when asked on

three occasions if that position was reflected anywhere in any documentation, he averred it was in all the communications declining to provide any documentation supporting the purported misunderstanding.

Associate Director Adkins reviewed and considered the information contained within the proposal letter, the related evidence file, and the Union's response and sustained the reprimand. Adkins considered the importance of TMS coursework to the daily operation of the facility, and Grievant's continued refusal to follow his supervisor's instruction related thereto. She further considered the consequences of refusing to read supervisor emails, and how it may lead to incomplete employee files where an employee fails to return necessary acknowledgments.

The evidence does not support finding either the admonishment or reprimand were the result of whistleblower retaliation by the responsible management officials or some manner of conspiracy. The Union, through Grievant and its representatives, alleged a vast conspiracy of officials were involved in some manner of orchestrated effort wherein whistleblower retaliation or anti-union animus were motivating factors to or otherwise contributed to him having received the admonishment and reprimand. The contention that a conspiracy of individuals influenced the decision to propose or issue the August 2021 admonishment or December 2021 reprimand is not supported by any evidence beyond bare assertion.

The record is replete with bold and unsubstantiated claims of motivation to engage in whistleblower retaliation, anti-union animus, and various other contract violation claims. What it is lacking in, is examination of the witnesses alleged to have been motivated by such impermissible considerations. When pressed for specifics on what protected disclosures were the basis of the whistleblower claims, Grievant identified three emails he asserted were protected disclosures: a March 2018 email involving a narcotic screening, a February 2020 email concerning AWOL, and an April 2021 email concerning recission of prior presidential executive orders.

Having alleged an unbridled conspiracy that permeates vast webs of the Agency, the Union elected not to call any witnesses that would corroborate or lend credence to the

claimed conspiracy beyond the grievant, whose self-serving testimony in support of the contention again amounts to bare assertion and selective citation to a very small subset of unrelated and often pending appeal arbitrations and unlawful labor practices.

Chief Garrett testified that his decision to propose and issue the 2021 admonishment and proposed the 2021 reprimand was not motivated by either any protected disclosures or anti-union animus. He testified that he never consulted with the alleged co-conspirators: Dr. Patricia Hall, Patrick Shea, Abner Martinez, Jennifer Jenkins, Pamela Hoffman, Keith Blackstone, Jacob Land, Sherry Borman, Charles Peterman, or Libby Johnson related to his decision to effect the proposed admonishment or to propose Grievant be reprimanded. The crux of the Union's argument appears to be that these individuals, acting in concert, influenced Chief Garrett to act with an imputed motivation of whistleblower retaliation. Evidence in support of that argument is frankly non-existent. The unrefuted testimony of Chief Garrett is that in connection with the proposed admonishment or reprimand, he did not consult with any other Agency representatives beyond human resources specialist Mr. Breiter.

The Union has raised these and related claims in this and numerous other arbitrations, ULPs, VA Office of Whistleblower Protection and Accountability and the U.S. Office of Special Counsel, and Equal Employment Opportunity Commission complaints, and had countless opportunities spanning years to obtain discovery to substantiate the allegations, yet none exists and none was offered in this arbitration.

Associate Director Adkins likewise never consulted with the alleged co-conspirators: Dr. Patricia Hall, Patrick Shea, Abner Martinez, Jennifer Jenkins, Pamela Hoffman, Keith Blackstone, Jacob Land, Sherry Borman, Charles Peterman, or Libby Johnson related to her decision on the proposed reprimand. Like that of Chief Garrett, Ms. Adkins testimony on this front is unrefuted. The Union presented no evidence, beyond bare assertion, that she collaborated, let alone conspired with, any of the individuals they attribute as having orchestrated or influenced the claimed conspiracy.

Grievant has lodged complaints against Chief Garrett in multiple venues including but not limited to the VA Office of Whistleblower Protection and Accountability, the

U.S. Office of Special Counsel, the U.S. Equal Employment Office resulting in multiple investigations and subsequent litigations none of which issued an adverse finding against the Agency or otherwise resulted in a finding of retaliatory or other impermissible motivation by Chief Garrett. While the Union has obtained adverse findings against other management officials, arguments and evidence about some other management official in years past having done something or failed to do something totally unrelated to the accepted issues in this arbitration should be given the weight deemed appropriate by the Arbitrator based on evidence supporting their relevance to this matter.

The singular instance in which an adjudicative body reviewed the litany of complaints lodged against Chief Garrett by the Union and reached a final determination that Chief Garrett acted improperly consists of an unlawful labor practice claim from 2018 wherein Chief Garrett attempted to speak with bargaining unit employees in his prior position as Chief of Police without providing union notification, which occurred more than five years prior to the matters at issue in this arbitration. Argument that the knowledge timing test should impute a presumed retaliatory animus for an unlawful labor practice complaint raised more than three years prior to the proposed admonishment or reprimand is non-meritorious.

So too is the claim of retaliatory intent based on Grievant's averred protected disclosures. As Chief Garrett testified, Grievant "made many disclosures of wrongdoing and e-mails sent out to many people. Exactly what the wrongdoing was, a lot of times I had trouble figuring out what it was." In addition to the 2018 unauthorized labor practice Arbitrator Gaba in 2013 concluded that Chief Garrett acted with anti-union animus for a selection decision which he was not, as a matter of fact, involved in as reflected in pending exceptions with the FLRA. Irrespective of the outcome of the pending appeal of the Arbitration award, the statement made by Chief Garrett in the Gaba arbitration concerned an initial dialogue Chief Garrett and Grievant had following Chief Garrett's appointment as Chief of Voluntary Services and thus Grievant's supervisor in mid-2018 and reflect Chief Garrett's understanding that Grievant had engaged in obstinate and bulling actions toward his prior supervisor. No evidence was offered in the Gaba

arbitration, or in this arbitration, that would support finding that exchange was based on whistleblower retaliation.

Prior to June and September 2021, Mr. Garratt had provided Grievant instructions to complete actions required of all Agency employees, be them union members, union representatives, wage grade, or senior executive service manage officials. Historically, Grievant complied with some for these prior instructions. Prior instances in which Grievant failed to follow instructions were forwarded by Chief Garrett to advising human resources staff. Human resources staff assisted Chief Garrett in the creation of the proposed admonishment at issue in this arbitration as well as with the delivery and service processes in this matter. Concerning the disciplinary actions at issue in this matter, Chief Garrett provided at least nine instructions to Grievant to complete required administrative actions and, for most response was ever provided. For those where a response was provided, the response can be summed up as 'I am not going to answer your emails and will not meet with you." The repeated disregard for instructions is of a nature and seriousness that does not support inferring retaliatory animus for years past alleged protected disclosures.

As it related to Associate Director Adkins, Grievant's attempts to connect a discipline issued to former medical director Patricia Hall in 2017 for whistleblower retaliation to Ms. Adkins. According to Mr. Ellis, "I was the – one of the persons that caused [Dr. Hall] to be disciplined because I represented Dr. Dale Klein. And this is evidence and fruits of that labor and that representation." While Associate Director Adkins played no role whatsoever in the circumstances relating to Dr. Hall's 2017 discipline (and in fact, she did not start her role as associate medical director in Poplar Bluff until February 2021), Grievant suggests that because she worked within Dr. Hall's chain of command in December 2021 when she issued the reprimand to Grievant, Dr. Hall must have exerted her influence over her such that any discipline he received by anyone within Dr. Hall's chain of command must have been the result of improper whistleblower retaliation arising from Grievant's protected disclosures from years prior. Once again, Grievant's own assertions that a vast conspiratorial scheme exists should be

rejected as mere conjecture. And, as stated above, any argument that the knowledge timing test should impute a presumed retaliatory animus for a protected disclosure occurring more than four years prior to the reprimand decision is non- meritorious. Chambers v. Department of Homeland Security, 122 LRP 14441 , 2022 MSPB 8 (MSPB 2022) Whatever connection the reprimand issued by Ms. Adkins in December 2021 has to Mr. Ellis' protected activities in 2017, if any, is far too attenuated to constitute evidence substantiating whistleblower retaliation.

The Union appears to argue that Chief Garrett's mode of communicating the instructions, via email, as well as the service via U.S. mail were evidence of an impermissible motive on the part of Chief Garrett or perhaps some broader conspiracy. The argument that Chief Garrett's communication with Grievant in some way violated the contract or is evidence of a pre-decision or design to drum up unwarranted discipline is wholly divorced from the fact that Chief Garrett communicated using the typical means used within the VA, means intended to ensure a record in light of past responses, and in which every single piece of evidence submitted in the arbitration reflects that Grievant's actions, or inactions, were the cause for his failure to follow instructions.

Chief Garrett communicated with Grievant via email to have a documentary record because of the history of incidents in which Grievant contended he did not receive a communication. That history and expectation bore true throughout the communicating underlying this discipline. Following Grievant's non-responsiveness to the TMS and funeral attendance instructions, Chief Garrett attempted on two occasions to set up meetings with Grievant to deliver the proposed admonishment and corresponding evidence file doing so via VA email. Grievant initially failed to respond to the initial meeting invitation until after the meeting date passed and responded consistent with his reply to the funeral instruction email reflecting "I will not answer any of his emails" by stating that Mr. Garrett could not direct that they meet. Grievant's response of objecting to having a meeting set did not include proposal of an alternate time nor did it inquire what the meeting invite concerned.

Following his refusal to meet, the proposed admonishment and evidence file were sent, by Chief Garrett, to Grievant via email to his VA email account. Grievant did not respond to the email proposed admonishment. Grievant testified that he did not receive the email with proposed admonishment. Additionally, the proposed admonishment and evidence file were mailed to Grievant's home address by human resources and delivered by the US Postal Service that address. Grievant testified that he did not receive the proposed admonishment and evidence file mailed to his home and appears to allege that the HR specialist lied about having mailed those materials. It is not entirely clear what the Union believes should be the required or appropriate mode of communicating with Grievant about instructions, disciplinary matters, or any other subject.

It appears that the Union position is that Chief Garrett could and should have communicated the instructions to Grievant in person and that his failure to do so, and the failure to communicate the proposed admonishment in person, ignoring the fact that Chief Garrett repeatedly requested in person meetings, should support finding reprisal or anti-union animus. Grievant testified to the effect "So, the only way he will tell me that is to tell me" saying they pass each other in the halls or could have called a meeting 540:9-12 clarifying that in order to call a meeting "he could reach out to me and hopefully I'd see it" or come down to the union office. Such an expectation, that Grievant randomly stop by the Union office and call until he happens upon Grievant is not a collective bargaining agreement requirement and borders on absurd if not disingenuous. Chief Garrett testified that he had previously attempted to speak with individuals at the Union office and no one was present.

Grievant testified that, beginning in February 2020 the Union began utilizing smart space, which was contract office space located out of the Medical Center and that the on-site Union office was "kind of put back together sometime in 2022." Grievant characterized his work responsibilities as being primarily outside the Medical Center and further testified "I haven't been required to be on campus since 2012, so I work in multiple locations. From the park, from smart space, from any private location in town. McDonald's Burger King, library."

It further appears that the Union contends that the fact that Union Exhibit 35, a fact finding conducted by Chief Garrett during which Grievant answered questions supports finding the absence of a meeting to discuss the discipline at issue in this arbitration is evidence of reprisal or anti-union animus. Review of the actual content of Union Exhibit 35; however, reflects Grievant was not responsive to the questions asked during the fact finding and conducted himself in a similar manner to these disciplinary actions by declaring he was not going to answer to Chief Garrett.

The Union advanced numerous arguments, many of which appear beyond the scope of the step III grievance as well as the accepted issues in this case. Such arguments include the contention that the discipline cannot stand due to perceived shortcomings in the investigations. Grievant was not issued an admonishment based on unsubstantiated rumors nor a contractually insufficient fact finding, as has been alleged. Nor was the admonishment issued solely for a brief period of absence without leave as an alleged disparate treatment.

The evidence clearly reflects that Grievant was admonished because his deliberate and repeated disregard of multiple valid instructions from his supervisor and his apparent unwillingness to be subject to any manner of administrative oversight whatsoever. Arguments that the admonishment or reprimand were deficient due to lack of fact finding or substantiation puts blinders on to the history of communication issues between Chief Garrett and Grievant, a history where Grievant declined to meet with or even respond to his supervisor or anyone attempting to exercise any degree of control over his actions. The extent to which Grievant refuses to be subjected to restraints relative to this arbitration, is perhaps best illustrated by Union Exhibits 24 and 26 as well as Grievant-related testimony wherein he was unable to provide anything resembling a coherent answer to why he would have scheduled a meeting to meet with Office of Special Counsel representatives charged with investigation allegations he violated the Hatch Act and thereafter failed to attend that meeting or respond to the months of subsequent Office of Special Counsel calls and emails.

The evidence does not support finding that the challenged disciplinary matters were the result of anti-union animus. In cases involving contract interpretation, the Union bears the burden of establishing by the preponderance of the evidence that the employer violated the terms of the collective bargaining agreement. As applied to the instant grievance, the Union bears the burden of proving that the Agency's behavior towards the Grievant was motivated by Grievant's' union-related activities.

In situations where a union claims anti-union animus, the union must show that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity, (2) that the agency knew of the employee's protected activity, and (3) that such activity was a motivating or contributing factor in the agency's treatment of the employee. Letterkenny Army Depot, 35 FLRA 113 (1990). The existence of a prima facie case is determined by considering the evidence in the record as a whole, not just the evidence presented by the union. Under this test, the employer then has the opportunity to rebut the evidence provided by the union, by showing that there was a legitimate justification for its action and that it would have taken the adverse action even in the absence of the employee's protected activity. Id.

The Agency's decision to issue the admonishment and reprimand to Grievant was not motivated by discrimination or retaliation based on Grievant's prior union activities. While the Agency does not dispute that Grievant's union-related activity was known to his supervisor and members of management, the Union cannot show that such protected activity was a motivating or contributing factor in the Agency's decision to issue discipline to Grievant in 2021. In its Step III grievance, the Union vaguely alleges that the admonishment and reprimand were issued to Grievant as "pretextual steps to punish the employee for his Union and whistleblowing activities" without citing any specific evidence connecting his years of protected activity to the disciplines he received in 2021. (During the hearing, Grievant cited to seemingly unrelated examples of "whistleblower" activity from March 2018, February 2020, and April 2021 to support his contention that the admonishment and reprimand issued to him were motivated by his protected activity.

The Union readily admits that Grievant is a zealous whistleblower. In fact, Grievant testified that in the past, when making protected disclosures by email, he intentionally included his supervisor, Chief Garrett, in those emails because "the law requires that in order for there to be a substantiated proof of retaliation… if anything was to come forward after that, and if I viewed it be retaliation and I can prove it, I can connect the dots back." While the Union suggests that the timing of the discipline issued to Grievant supports an inference that any protected activity by Grievant was a motivating factor in the discipline, the FLRA has previously concluded that where, as here, zealous union activity spans several years, timing is not particularly probative of unlawful motivation by the Agency. (Agency Brief Exhibit 2 – 2022 02-03 FLRA Decision on ULP 0474 (FLRA Case No. CH-CA-21-0474))

In an effort to compensate for the lack of direct evidence, the Union speculates that the Agency's whistleblower retaliation and anti-union animus is perhaps best evidenced by a vast conspiracy involving members of management (past and present), human resources, and others including multiple representatives from the Office of Special Counsel. While the Union offered no evidence supporting the existence of such a fictitious web of individuals scheming to harm bargaining unit employees beyond Grievant's own self-serving and speculative testimony, the individuals who made the decisions to issue the discipline against Grievant in 2021 (Chief Garrett and Ms. Adkins) testified credibly and unequivocally that they never consulted with any of the Agency representatives the Union accuses of perpetuating the alleged retaliation and anti-union animus.

In support of its argument that retaliation and anti-union animus was at play in the 2021 disciplines issued to Grievant for his protected activity, the Union offered the Arbitration Opinion and Second Interim Award of Arbitrator David Gaba (Union Exhibit L), wherein Arbitrator Gaba found that Chief Garrett's June 2018 decision against detailing Grievant to a Voluntary Services Specialist position was motivated by union animus. The Arbitrator in this matter correctly questioned the propriety and relevance of considering the pending appeal Gaba decision and further noted the matters at issue in

that arbitration were not matters raised in the grievance process. Similarly, to support its argument that the Agency generally acts in a retaliatory manner towards bargaining unit employees, the Union offered the decision of Arbitrator Cynthia Stanley issued on December 12, 2023 (Union Exhibit R) Related to Ms. Adkins, Arbitrator Stanley's decision found that Harold Lampley, Union Chief Steward, reported mold growth at his workplace to Ms. Adkins, among others, in late 2019 or early 2020. According to the Union, these awards, along with six others somehow support its argument that Mr. Ellis' protected activity was a motivating factor in the Agency's decision to issue him an admonishment in August 2021 and a reprimand in December 2021.

However, any consequence of these past awards on this proceeding is negligible and their relevance extremely attenuated. Arbitration awards are not precedential, and an arbitrator generally is not bound by the findings within another arbitrator's award. U.S. DOJ, Fed. BOP, 68 FLRA 311, 314 (2015). (Prisons); SSA, Office of Hearings & Appeals, Falls Church, Va., 55 FLRA 349, 352 (1999). The Union's presentation of previous cases where it, at least in-part, prevailed should be given little credence in the matter now under consideration, which involves a completely distinct set of facts, issues, and individuals. Those cases proceeded through the grievance process because it is the procedure that is in place for doing so. It is axiomatic that there will be differences between the Union and the Agency. Prevailing in one dispute must not be viewed as evidence of negative or malicious intentions in another.

Moreover, and specific to Arbitrator Gaba and Arbitrator Stanley's awards, the Agency has filed exceptions to these awards (see Agency Exhibit Q; Agency Brief Exhibit 3), which are still pending resolution by the FLRA. Accordingly, Arbitrator Gaba and Arbitrator Stanley's awards are not yet final or binding. 5 U.S.C. § 7122(b); U.S. Dep't of the Treasury, IRS, Wash., D.C., 59 FLRA 282, 287-88 (2003).

In short, while the Union was able to establish that Grievant engaged in protected activity, the Union failed to prove by the preponderance of the evidence that Grievant's union activities were a motivating or contributing factor in the Agency's actions. In fact, the evidence shows, that the Agency had a legitimate justification for its action, which

would have led the Agency to make the same decision regardless of Grievant's union-related activities.

The third accepted issue in this matter is whether the Agency failed to timely respond to the step III grievance. At some point, the Agency and Union met to discuss the step III grievance, although it is unclear on what date or dates that meeting occurred. What is clear, and not in dispute, is that following the meeting, from at least February 17, 2022 through March 16, 2022, the grievance was held in abeyance pending mediation. The Agency prepared a step III response. The Agency did not issue the step III response while the matter was in abeyance pending mediation. Grievant invoked arbitration on March 16, 2022 effectively terminating the grievance phase.

The Union conceded that it would not have expected the Agency issue a response after the Union invoked arbitration. The Union further asserted that they would not accept a late Agency response. The Union's contention that the Agency failed to comply with the collective bargaining agreement Article 43 section 7 provision that "The Director or designee will render a written decision letter to the aggrieved employee(s) and Union within 10 calendar days after the meeting" ignores the fact that the Parties mutually agreed to an abeyance to pursue mediation on the matters covered by the grievance.

The grievance process encourages resolution at the lowest possible level. The grievance and arbitration processes are designed to enable the Union and Agency to obtain expedited resolution of disputes that otherwise could take years to resolve in other forms of litigation. The argument that the Agency did not provide a timely response to the step III grievance should be viewed against the fact that the arbitration went dormant for 21 months. It should also be considered against the fact that the disciplinary matters at issue have a temporal component which has nearly lapsed. Collective Bargaining Agreement Article 14 Section 3 provides that admonishments and reprimands can be removed after 6 months, but "In all cases, an admonishment should be removed from an employee's file after two years and a reprimand will be removed after three years." Accordingly, the 21-month delay in requesting a FMCS panel means the admonishment was removed prior to beginning the hearing process and further that, regardless of the

content of the Award in this matter, the reprimand will be removed no later than December 2024.

In sum, the Agency respectfully requests the charges be sustained and August and December 2021 disciplinary actions affirmed

THE UNION'S POSITION

The American Federation of Government Employees, AFGE, and the Department of Veterans Affairs, DVA, agrees that no employee will face retaliation for reporting wrongdoing, misconduct and for making reports to protect veteran patients. This case is an outlier within the Department of Veterans Affairs and the evidence demonstrates a pattern of anti Union animus towards Grievant, The Agency's actions were coordinated by Grievant's chain of command, officials from Veterans Integrated Service Network, VISN 15, and officials from the Office of General Counsel, Midwest District.

According to Article 14, Section 1 of the Master Agreement, the department and the Union recognizes that the public interest requires the maintenance of high standards of conduct. No bargaining unit employee will be subject to disciplinary actions except for just and sufficient cause. Disciplinary actions will be taken only with such cause as to promote the efficiency of the service. The just and sufficient cause standard must be applied to all personnel actions to ensure that they are being initiated without stripping employees of their due process rights as guaranteed by the 14th Amendment of the US Constitution and as outlined in the Civil Service Reform Act, CSRA. According to footnote 7, in a Federal Service Impasse Panel Case, Department of Housing and Urban Development, 120 LRP 25296 (FSIP 2020) the just cause standard here, a byproduct of an arbitration case decided in 1966. In that case,

Arbitrator Carroll Daugherty was interpreting a labor agreement that stated that management could discipline discharge -- discipline or discharge employees for cause, but also that employee couldn't face discipline/discharge without proper cause. To bridge that gap between cause and proper cause, Daugherty created the seven tests of just cause to analyze an Agency evidence supporting its disciplinary charge. The seven items, or tests are: 1) Notice. Did the Agency put the employee on notice of the possible

disciplinary consequences of the employee's conduct; 2) Reasonable Rule and Order; Was the Agency's rule reasonably related to (a) the orderly, efficient and safe operation of the Agency's mission and (b) performances that the Agency might accept of the employee. 3) Did the Agency before disciplining the employee, conduct an investigation and discover whether the employee actually violated the Agency's rule or order; 4) Was the investigation conducted fairly and objectively; 5) Did the Agency obtain substantial evidence or proof that the employee was guilty; 6) Has the Agency applied its rules orders and penalties evenhandedly and without discrimination to all employees; 7) Was the disciplinary penalty reasonably related to (a) the seriousness of the proven offense and the employees service record and within the Agency. Arbitrator Philip A. LaPorte stated in Department of the Air Force, 120 LRP 14012 Federal Arbitration 2020, that according to Arbitrator Daugherty, just cause for discipline only existed if the answer to each question (emphasis added) was yes. The just and sufficient cause standard is explained in Article 14 of the MCBA Discipline and Adverse Action,

In this case, the Agency has failed in its burden and the answer to each question is no. In questioning Grievant during the Union's case-in-chief, he was asked about each of the seven items listed above with regards to the admonishment and reprimand. When asked about any notice of disciplinary consequences from Chief Garrett or any other Agency official regarding each of the three charges of the admonishment, the Grievant testified that "no", and his testimony went unrebutted. In a similar vein, the Union asked Grievant on direct as it related to the charges laid out in the reprimand. Again, his answers were "no" and his testimony again went unrebutted.

With regard to notice: not only was the Grievant not on notice about disciplinary consequences, but it is quite clear that he was permitted to be delinquent on TMS courses in the past, without any disciplinary actions taken. When asked if anyone had ever disciplined him for delinquent TMS courses, aside from Chief Garrett, Mr. Ellis answered, "no." And, not only was he never disciplined, but the Union has never been notified that any other employee has been disciplined for late TMS courses. This testimony also speaks to the Agency's lack of equal treatment and reasonable rule &

order. Chief Garrett also testified that he was unaware of any other employee who had been disciplined for the same or similar. Is Grievant being made an example of? It appears so, and this type of threat is contrary to the plan wording of the Parties' MCBA, Article 17, Section 1(E). Union Exhibits 15 through 31 demonstrate the agency created a disciplinary history against Mr. Ellis.

An agency is obligated to conform to the procedures it adopts, either in its regulations (*Vincent v. Department of Transportation*, 91 FMSR 5148, 47 MSPR 550 (MSPB 1991);*Humphrey v. Department of the Army*, 97 FMSR 5417, 76 MSPR 519 (MSPB 1997), or in nondiscretionary provisions in collective bargaining agreements (*Giesler v. Department of Transportation*, 80 FMSR 5110, 3 MSPR 277 (MSPB 1980)). The Parties' MCBA (J Ex. 1), Article 14, Section 10(A) states, "[t]he employee who is the subject of the investigation will be informed of his/her right to representation before any questioning takes places or signed statements are obtained" (*id*. at pgs. 52-53). The word "will" indicates that this provision is nondiscretionary. The word "may" would indicate a discretionary provision.

With regard to the admonishment, Chief Garrett agreed that his investigation consisted of reaching out to Mr. Ellis and asking him to provide a statement. He went on to say that Austin Breiter coached that Mr. Garrett "did not need to involve the Union in obtaining a statement" from Mr. Ellis. Had Chief Garrett informed Mr. Ellis of his right to Union representation before any questioning or signed statement was obtained, Mr. Ellis would have been properly put on notice of the seriousness of the situation and would have secured a Union representative. The Agency's error here deprived the Grievant of his contractual right to Union representation. This admonishment, secured by disregarding the Agreement, was used to support the reprimand against Mr. Ellis. The clear and unmistakable plain language of the MCBA must be upheld, or the Agency may wholly disregard the Agreement its superiors and partners have made.

Regarding due process violations, Garrett relied upon statements (both written and spoken) from Tim Lowe and Chandra Miller This information was not included in the evidence file. Procedural due process guarantees are not met if the employee has notice

only of certain charges or portions of the evidence, and the deciding official considers new and material information. See *Stone v. Federal Deposit Insurance Corporation*, 99 FMSR 7010 , 179 F.3d 1368 (Fed. Cir. 1999); *Blank v. Department of the Army*, 101 FMSR 7029 , 247 F.3d 1225 (Fed. Cir. 2001). An employee's due process right to notice extends to both ex parte information provided to a deciding official and information known personally to the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. See *Singh v. U. S. Postal Service*, 122 LRP 18045 , 2022 MSPB 15 (MSPB 2022), *Mathis v. Department of State*, 115 LRP 24553 , 122 MSPR 507 (MSPB 2015), citing *Solis v. Department of Justice*, 112 LRP 10203 , 117 MSPR 458 (MSPB 2012). Grievant denies receiving the proposed or decision on the admonishment. However, the Agency deprived the Grievant of responding to information the deciding official consider when they excluded statements made by Lowe and Miller.

Concerning the reprimand, Chief Garrett admitted that he investigated the matter, but never reached out to Grievant, contrary to the procedures he used for the prior admonishment. Once again, Grievant was subjected to an investigation without being informed of his right to representation.

Additionally, Chief Garrett made no effort to reconcile conflicting statements by developing additional evidence. Had Grievant been informed of his rights to representation, he would have been properly put on notice of the seriousness of the situation and would have secured a Union representative. Had Chief Garrett sought a statement from Grievant, after notice of his rights, he would have been able to inform Chief Garrett why he was unable to respond to emails and unable to complete the tasks within the specified time frame.

Furthermore, a due process violation likely occurred where Associate Director Adkins made the conclusion that Grievant refused to read his emails. This accusation was formulated, not based upon anything in the evidence file, but based upon her perception (i.e., a way of regarding, understanding, or interpreting something; a mental impression) of Grievant. This notion that Grievant refuses to read his emails was not information

contained in the charge or evidence file, but it was clearly material to the deciding official. An employee's due process right to notice extends to both ex parte information provided to a deciding official and information known personally to the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. See *Singh v. U. S. Postal Service,* 122 LRP 18045 , 2022 MSPB 15 (MSPB 2022), *Mathis v. Department of State,* 115 LRP 24553 , 122 MSPR 507 (MSPB 2015), citing *Solis v. Department of Justice,* 112 LRP 10203 , 117 MSPR 458 (MSPB 2012).

Had Mr. Ellis been given notice of the notion that he refused to read his emails, he would have responded by saying that he was occupied representing bargaining unit employees, therefore unable to read such emails. Mr. Ellis would have said that any overlooking of the emails in question was unintentional.

With regard to investigation: Chief Garrett testified that he did not investigate the matters for which the Grievant was admonished Where there is no investigation, the employee was not provided with a fair investigation and opportunity to provide information which may reconcile thoughts or statements made against them. This opportunity must include a notice of rights to representation, per Article 14, Section 10(A). With the reprimand, Chief Garrett admitted his investigation was based upon his own internal thoughts. No efforts were made to reconcile conflicting statements by developing additional evidence. Once again, this is not a fair investigation because Grievant was not given the opportunity to be heard by an impartial fact-finder who is required to make a reasonable effort to reconcile conflicting statements by developing additional evidence, per Article 14, Section 10(B).

Concerning proof: in reference to the matters which lead to the admonishment, Chief Garrett admitted people told him that Grievant was at the funeral. The fact that someone told Chief Garrett that Grievant was at a funeral amounts to unsubstantiated rumor or gossip which is in direct violation of Article 17, Section 1(D). Additionally, this hearsay was never provided to Grievant, nor his representative, nor was it in the evidence file supposedly provided to the Grievant. It is clear that Grievant relied upon the hearsay to take action against him. However, the fact that any emails with these accusations or

reports of contact were never shared with Grievant speaks to the lack of proof and is contrary to Article 17, Section 6 and Article 24, Section 4.

As to penalty: Article 14, Section 5 requires the Parties to utilize progressive discipline. This means that the Agency does not start with the most severe punishment, just because they want to. Article 17, Section 16 outlines the counseling process (i.e., oral and then written). It is clear that Chief Garrett bypassed the counseling stage and opted for a more severe punishment. However, if Chief Garrett would have taken the time to build upon the relationship with his employees by properly counseling them, then perhaps they wouldn't feel alienated, like Grievant. The penalty in these two disciplinary actions were too severe. The admonishment should have been an oral counseling, and it would have been effective.

Prior to being on one-hundred (100) official time which started on or around 2012, Grievant worked in Voluntary Services. His tenure in Voluntary Services started in 2007, after he was promoted from the position of Secretary for the Associate Director of Patient Care Services. From 2007 to about 2012, the Grievant spent at least some of his time in Voluntary Services, as he was not on one-hundred (100) percent official time, at that point.

Grievant stated that he had not seen a performance appraisal since 2012 or 2013. Prior to 2012 or 2013, Grievant more likely than not received a performance appraisal as the Agency is required to issue them to employees yearly The performance policy is clear with regard to Union officials: "Union officials who are granted official time for representational activities under Article 48 - Official Time, will not be penalized in their performance appraisals for such use of official time. Their performance of duties shall be evaluated against assigned elements and performance standards for the time they were available to perform their duties. The use of official time, in accordance with this Agreement, shall not influence an employee's performance evaluation in any way.

Chief Garrett, whether he liked it or not, approved Mr. Ellis' one-hundred (100) percent official time. The Agreement is clear, the Grievant's performance of duties must be evaluated against assigned elements and performance standards for the time he was

available to perform his duties. Being on one-hundred (100) percent official time means that he was unavailable to perform the duties assigned by Chief Garrett. He could have assigned the Grievant duty time in order to complete the TMS courses, but he did not. In the MCBA covers Training and Career Development under Article 37. Section 5 requires the Agency to grant excused absence to attend. As was held by Arbitrators Rutzick and Kist in U Exs A and E, Official Time and authorized/excused absence are two different types of allocated time.

It has never been agreed that official time, time allotted to the Union to represent employees, would be used for training. In fact, the past practice and two Arbitrators' awards support that official time is not used for training. Jacob Jordan also testified about his understanding, as the Senior Chief Steward, of what type of time employees/representatives use to complete TMS training. The Agency did not rebut the Union's testimony regarding what type of time is used to complete TMS training. Had Garrett provided authorized/excused absence to Mr. Ellis in order to complete TMS courses, the courses would have been completed.

The Agency also provided the Grievant with an ineffective temporary accommodation of reassignment away from Chief Garrett in February of 2020 due to anxiety. On Monday, February 3rd, 2020, Grievant informed Chief Garrett, Desmond McMullan (Medical Center Director), and Daniel Karr (Human Resources) that he needed to take sick leave due to "elevating anxiety" which was caused by interactions with Grievant's first-line supervisor.

An employee only has a general responsibility to inform his employer that he needs accommodation for a medical condition. See Appendix to 29 CFR Part 1630; *Paris v. Department of the Treasury*, 106 LRP 72762 , 104 MSPR 331 (MSPB 2006). As a result of Grievant's email, HR and the Medical Center Director made an "offer" to Grievant which reassigned him and gave him a different supervisor. Grievant testified at hearing that he accepted the offer and was reassigned to the Business Office until November of 2020

An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. See 42 USC 12102 (3)(A). Grievant also raised that he had been requesting a reasonable accommodation after November of 2020. In reply, Associate Director Adkins stated that she would forward Grievant's request for an interim accommodation, but never specified to whom. Chief Garrett acknowledged his awareness of Grievant's reasonable accommodation request. Associate Director Adkins also acknowledged her awareness of Grievant's reasonable accommodation request. As captured in the Union's memorandum of record from the Step 3 grievance meeting, Mr. Ellis did not receive an interactive process, was not informed of who the deciding management official was, and never received an administrative closure from the Agency. The Agency presented no testimony or evidence to the contrary during the hearing, though they could have (i.e., have the Reasonable Accommodation Coordinator testify). Sonia Ellis testified about the effects Chief Garrett's behavior and the Agency failure/refusal to intervene had on her husband, the Grievant,

Additionally, Chief Garrett was aware of Grievant's request for accommodation He admitted that emails were not an effective way to communicate with Grievant. He also admitted that phone conversations were not an effective way to communicate with Mr. Ellis Mr. Garrett also admitted that Microsoft Teams was not an effective way to communicate with Grievant. However, Mr. Garrett has had conversations with Mr. Ellis face-to-face.

Grievant provided testimony for U Ex. 14 which was a doctor's note attributed to the Grievant. The Grievant testified that his provider, Dr. Piland, first began seeing the Grievant in 2019. Grievant stated that his provider found the Agency to be a direct cause of diminished quality of life. Additionally, the Agency was the cause of Grievant's diagnosis of major depression and anxiety disorder.

Upon the change in leadership, the Agency failed to transfer the accommodation to make it permanent, despite Grievant's follow-up with the new Associate Director. The Agency also failed to engage in the formal interactive process and offer a final determination on the Grievant's requested accommodation. There are many accommodations for those with depression and anxiety which include (but not limited to): allowing additional training time; providing disability awareness training to coworkers and supervisors; providing a self-paced workload and flexible hours; and allowing for open communication to managers and supervisors. Had the Agency provided an effective accommodation, Grievant would have been successful in completing TMS courses, and this volatile relationship between employee and supervisor would have been addressed appropriately before it became a hostile working environment which continues to fester.

Ultimately, this hearing had nothing to do with Just and Sufficient Cause. This hearing was only about Retaliation against the Union President. It is not normal for the agency to engage in Anti-Union Animus towards the Union President (Kevin Ellis) and members of his family. There are two additional cases involving the president's family, that were targeted by the agency, solely because of the president's union activity.

Katina Dudley is Grievant's disabled sister was denied a reasonable accommodation due to Union Animus and Race Discrimination. (Katina Dudley-Judicial Notice Union Exhibit O, FMCS # 231214-01818). Sonia Ellis is Grievant's spouse, and she was illegally terminating because she heard and reported the agency saying "Were Going to Find A Way to Terminate Kevin Ellis's Employment by Going Around the Union." (Sonia Ellis-Judicial Notice Union Exhibit C, FMCS # 18110- 00301).

Once the Agency was contacted by the Office Special Counsel, the Agency quickly developed a plan to "Create a Disciplinary History for the Office Special Counsel" (Union Exhibits 15 thru 31) Dale Garrett, Kimberly Adkins and members of the agency has been targeting Mr. Ellis since 2017, when he began representing Dr. Dale Klein, a whistleblower. Mr. Ellis's representation was a contributing factor in Patricia Hall, Medical Center Director being disciplined and suspended for 15 days in January 2018.

It is impossible to view the disciplinary action by the agency, in any other light except retaliation. The Agency is not allowed to target entire the Ellis family, and then claim Grievant deserved to be disciplined for just and sufficient cause, when no other employee suffered similar disciplined. The Agency issued two disciplinary actions to Grievant within weeks of one another, while conversing and planning with VISN-15 officials, Patrick Shea, Abner Martinez and others. (Union Exhibits 15 through 31).

The Agency issued Grievant an admonishment and reprimand for employment work that has never been imposed on another employee, demonstrated the agency was conspiring to "create a disciplinary history" to provide Jacob Land, so that Jacob could make a filing deadline. Union Exhibit 15 made it abundantly clear, President Ellis did not have any disciplinary history in September 2020. However, over the next several months, Garrett and others sent emails and had several telephone calls developing methods and processes to create a disciplinary history, where none existed.

The Agency's action was clearly taken in retaliation based on ant-union animus. In *Letterkenny Army Depot*, 35 FLRA No. 15 (1990), the Authority discussed the analytical framework to be applied in determining whether an agency improperly discriminated against employees because of their union activities. The Authority stated that [i]n all cases of alleged discrimination, whether 'pretext' or 'mixed motive,' the General Counsel must establish that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment." *Id*., slip op. at 6. In *Letterkenny*, the Authority held that an agency may seek to rebut a prima facie showing that it has improperly discriminated against an employee by establishing by a preponderance of the evidence that there was a legitimate justification for its action and the same action would have been taken even in the absence of protected activity.

In the Agency's case-in-chief, during the Union's cross of Chief Garrett, he admitted that he was aware of a disclosure made by Grievant regarding a Veteran's drug screening. In the Union's case-in-chief, during the Union's direct of Grievant, he testified

to Ux. 2 which outlined the disclosure made by him to Chief Garrett which took place on or around March 16th, 2018. Garrett testified that he began his tenure as Chief of Voluntary Services on May 27th, 2018, just weeks after Grievant's disclosure. When describing his work history at the Agency, Garrett stated,"….was promoted to Lieutenant." "….I was promoted to the Chief of Police." However, when it came to describing his move from Chief of Police to Chief of Voluntary Services (a lateral move), Chief Garrett stated, "And then after that, I came to this position."

The disclosure made by Grievant in Ux. 2 was made while he was acting in his capacity as the Union President, representing bargaining unit employees. Chief Garrett knew of the disclosure and had reason to retaliate because the disclosure directly implicated Garrett at a time when he was the Chief of Police. Shortly after the disclosure, Mr. Garrett "came to" the position of Chief of Voluntary Services over Mr. Ellis. The Union believes Grievant's protected activity in Ux. 2 is the reason why Mr. Garrett has and continues to engage in anti- Union animus.

Also, as Sonia Ellis testified, she recalled Chief Garrett told Grievant that he did not want Grievant in Voluntary Services. This is supported by Arbitrator Gaba's award in Ux. L. "Mr. Garrett credibly testified that he (Chief Garrett) did not " want" Grievant in the Department because Grievant was " a hundred percent Union President." Grievant corroborated Chief Garrett's testimony in that regard." Regardless of the exceptions to the award, Chief Garrett has already testified that he does not want Grievant in the Department because he was a hundred percent Union President which is a statement corroborated by Mr. and Ms. Ellis. It is important to note, the Authority dismissed the Agency's interlocutory exceptions on October 7th, 2021 which meant the matter before Arbitrator Gaba moved forward (Ux. L, "Procedural history"). Chief Garrett would have likely known about the progress of the Gaba interlocutory exceptions outcome as he was a key witness for the Agency during the arbitration.

Additionally, Chief Garrett admitted, during the Agency's rebuttal, that he had animus towards Sonia Ellis, the wife of Mr. Ellis. **"**I told Mr. Ellis that I did make the comment, I could not wait to walk Sonia Ellis of the facility, not Kevin**"** When asked

why he would have animosity towards Ms. Ellis, Garrett answered, "….there were a lot of petty complaints…. "….and it seemed that most of them would be centered around Sonia Ellis…." It is clear that Ms. Ellis' activities, which were found to be unfavorable by Garrett, were attributed to her Union role. In her role as a Union representative, Ms. Ellis carries out the duties assigned by the Union President, Kevin Ellis (Grievant).

So now, the record establishes that Chief Garrett has reason to retaliate (Ux. 2), does not want Grievant in the Department because he was "a hundred percent Union President", and has animus towards Ms. Ellis. The Union believes this set of facts does establish a prima facia case of anti-Union animus. But for Mr. Ellis' Union activities, Mr. Garrett would not have taken disciplinary action against him, nor would the Agency have upheld such discipline.

The Agency tries to offer legitimate reasons for their actions, but these reasons amount to nothing more than pretext. When it comes to the matter of TMS courses, Mr. Ellis, as a twenty year Union representative, testified that "….no other employee in the facility has ever been disciplined for any late TMS courses, not one." Additionally, Grievant was allowed to be delinquent on TMS courses in the past. Further, the contract, past practice, and multiple arbitration awards require the Agency to place employees in an authorized/excused absence status for training. The Agency was unable/unwilling to provide evidence and/or testimony to support any fair and equitable treatment or instance where any other employee was disciplined for not completing TMS courses. The Union requested information related to the names of employees who were disciplined for not completing TMS courses which the Agency didn't provide (Ux. 37). We respectfully request an adverse inference here. Grievant's testimony about the Agency's disciplinary practices with regard to delinquent TMS courses was unrebutted.

When it comes to absent without leave ("AWOL"), Grievant has a flex tour/schedule (Ux. 13) which does not specify core hours. Additionally, the Union presented Ux. 10a which was a Spreadsheet provided by the Agency which demonstrated the Agency was aware of other employees who were counted as AWOL. Even without names, it is clear that other employees were counted AWOL and the Agency was aware,

as the information came from the Agency. Grievant testified, as the Union President who represents bargaining unit employees at the facility, no other bargaining unit employees have been disciplined for two hours of AWOL. The Agency was unable/unwilling to provide evidence to support any fair and equitable treatment or instance where any other employee was disciplined for being AWOL. Even though the Agency was aware of the names, and they could have called any of the employees or their supervisors to testify, they didn't call anyone to support their position. Grievant's testimony about the Agency's disciplinary practices with regard to AWOL

5 USC § 2302(b)(8) makes it a prohibited personnel practice for a supervisor to take personnel action with respect to any employee because of any disclosure of information by an employee which the employee reasonably believes evidences any violation of law, rule, or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 USC § 7121(b)(2) allows the arbitrator to order– the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take. 38 U.S. Code § 731(a)(a) [i]n accordance with paragraph (2), the Secretary shall carry out the following adverse actions against supervisory employees (as defined in section 7103(a) of title 5) whom the Secretary, an administrative judge, the Merit Systems Protection Board, the Office of Special Counsel, an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the Department determines committed a prohibited personnel action described in subsection (c): (A)With respect to the first offense, an adverse action that is not less than a 12-day suspension and not more than removal. (B)With respect to the second offense, removal.

Chief Garrett testified that "….in 2018 and 2019 and even in 2020, I continued to send things such as this to HR requesting recommendations and HR would tell me, we're going to put this in the, whatever we're working on related to Mr. Ellis (emphasis added) and I don't know what that was, they never communicated with me. And I never knew whatever happened related to any of the things that I asked for recommendations on. When asked if they were building a file, Garrett stated, "[i]t seemed that way." During

Grievant's direct exam, he identified and testified to Ux. 19. Ux. 19 is an email from November 8th, 202 between Keith Blackstone (VISN 15 Human Resources) and a Ms. Borman. The subject of the email was, amongst other matters, an incident report, a supposed three (3) day suspension, and a document kept in a safe which was attributed to Grievant.

Ux. 24 was accepted into the record. Grievant identified it as an email dated February 8th, 2021 between Ms. Borman and Chief Garrett. The content of the email demonstrates that Chief Garrett was having a conversation with the Office of Special Counsel about potential discipline for Grievant's alleged AWOL on or before the date of the email. OSC has no authority over employees of the Agency. A few days later on February 16th – 17th, 2021, Ms. Borman follows up with Chief Garrett inquiring about Grievant's potential discipline (Ux. 26). On page one (1) of Ux. 26 Mr. Ellis identified Ms. Borman's inquiry about a "suspension served" which Mr. Ellis denies any knowledge of.

The Union then identified Ux. 27 which is an email dated April 27th – 28th, 2021. Mr. Ellis, in testifying to this email, describes a Facebook video mentioned in the email between Agency and OSC officials. "But it shocked me that they would take a Facebook live video about a unsafe working condition and give it to them to try to pad the file to terminate my employment. I was shocked by that." When asked about the mold situation at the facility, Mr. Ellis raised that the matter was raised before two (2) different arbitrators and was substantiated.

All emails in the Union's line of questions for Grievant comes to a pinnacle with Ux. 31. Ux. 31 is an email from Pamela Hoffman to OSC dated July 2022. The Agency, in the email, is appearing to turn over Mr. Grievant's admonishment, reprimand, and 14-day suspension documentation to support some type of action against Grievant. Keeping in mind, the Agency's communications with OSC spans from about September 2020 to July of 2022. In some cases, information that was supposedly from 2012 was conjured from a safe within the facility (Ux. 19). This brings us back to Ms. Ellis' testimony. Ms. Ellis testified that in August of 2017 she became concerned with her husband's

employment because she overheard a conversation between Agency officials where it was said the Agency would "find a way to terminate Kevin by going around the Union and making it an Agency issue."

Regarding the Ann Breen-Greco arbitration, the grievance was filed by Kevin Ellis on March 11th, 2020. In the grievance, the Union President contended that the Agency denied the subject grievant a safe work environment. The subject grievant has disabilities related to mold found in the work environment. The arbitration was held June 11th, June 12th, August 17th, August 18th, November 4th, November 5th, and November 23rd, 2020. These dates correlate with the dates in which the Agency was trying to find a way around the Union in drumming up charges against Grievant to support or enhance some type of action before OSC.

Regarding the Arbitrator Cynthia Stanley arbitration, the grievance was filed by Grievant Kevin Ellis on April 28, 2021. In the grievance, the Union President raised that the Agency failed to provide safe working conditions in their Laboratory, MRI Building, West Plains CBOC, and Fifth Floor Community Living Center. The arbitration was held November 12, 2021; December 7, 2021; December 10, 2021; January 4, 2022; January 24, 2022; January 26, 2022; February 15, 2022; February 16, 2022; March 18, 2022; March 28, 2022; May 18, 2022;

May 25, 2022; August 16, 2022; September 2, 2022; and September 19, 2022. In bringing awareness to the unsafe working conditions at the facility, Grievant held a rally in the local community which was broadcast over Facebook. When the Agency received this information, they twisted the narrative to make it about political activity. That's why, unsolicited, Charles Peterman contacted OSC about the video. Ux. 27 was an email sent by the Agency in the midst of a heated arbitration where the Agency was eventually found to have failed to provide safe working conditions and engaged in retaliation

For clarity, this argument is not about the Hatch Act complaint against Grievant. This argument is about Grievant raising substantial and specific danger to public health or safety (5 USC 2302(b)(8)) and then being targeted by the Agency through their collective piling on and fabrication of disciplinary actions. But for Mr. Ellis' advocacy

and pursuit of healthier working conditions, the Agency would not have created reasons for the OSC to pad their potential actions against the Grievant. If this is not addressed, the Agency will have successfully found a way to chill future challenges to their bad actions. Especially as this pertains to employee and patient health, enabling the Agency in this way could allow for serious injury. or even death. Arbitrator Cynthia Stanley ordered the Agency to remove all disciplinary actions and AWOLs from Grievant due to retaliation. The Union prays that the Arbitrator finds the Agency's actions constitute retaliation and respectfully request that you sustain the grievance and grant the following remedies:

> Find that the Agency violated the 2011 Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees (J Ex. 1);
>
> Find that the Agency violated the Federal Service Labor-Management Relations Statute when it committed acts of anti-union animus and retaliated against the Grievant for engaging in protected activities;
>
> Order the Agency to rescind the disciplinary actions taken against the Grievant and make the Grievant whole with all the applicable backpay, benefits, interest, and attorney's fees;
>
> Find the agency committed Prohibited Personnel Practices in creating a unjustified disciplinary history against Grievant as a Whistleblower.
>
> Order, in accordance with 5 United States Code, the Agency to take disciplinary action against Dale Garrett and Kimberly Adkins for Prohibited Personnel Practices; and
>
> Order the Agency to issue a remedial notice posting regarding its violation(s) of the Statute, and any and all other remedies the Arbitrator deems fit.

DISCUSSION AND ANALYSIS

The Arbitrator has reviewed the entire record including the numerous arbitral awards provided by both parties. The Arbitrator has considered the parties' respective arguments and offers the following.

The Arbitrator is generally of the view that where under a collective bargaining agreement, the employer may only discipline an employee for just cause, the burden of proof and persuasion is on the employer unless otherwise provided in the collective bargaining agreement, and the facts supporting its decision are generally to be established

by the preponderance of credible evidence except in certain situations not applicable here.

As recognized in the Impasse Panel proceeding and Arbitral award cited by the Union, in analyzing "just cause," perhaps the most widely recognized distillation of just cause principles has been the following "seven tests" set out by Arbitrator Carroll Daugherty: (1) Did the Employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? (2) Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business (3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? (4) Was the employer's investigation conducted fairly and objectively? (5) At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged? (6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? (7) Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the employer? *See also* Brand and Burren, Discipline and Discharge in Arbitration, Ch 2, I. A at pp. 33-34 (2nd Ed. 2008) (*citing Grief Bros. Cooperage Corp.* 42 LA 555, 558 (Daugherty, 1964).

Further, as aptly stated by Arbitrator Daugherty, albeit analogizing to a calculating tool from an earlier time, "[t]he answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with slide-rule precision." Id. (*quoting Grief* at 557). These principles of just cause are well recognized by the parties, are consistent with the Master Agreement, and are incorporated in their disciplinary processes.

The Agency failed to meet the first and most fundamental of the seven tests, i.e., did the Agency give Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct. The Agency fell far short of

demonstrating that it had any rules in place it was trying to enforce. The Agency failed to demonstrate that it was applying discipline to the charged conduct evenly and without discrimination. And to the extent that the facts underpinning the charges were supported, the Agency failed to establish that the imposed discipline was reasonably related to the seriousness of any of them.

The Agency has made no showing that Grievant was placed on notice that he might be disciplined for not completing TMS courses in a timely fashion. Grievant had routinely been behind in completing TMS courses since 2012. Chief Garrett had been similarly lenient in June 2018. Grievant's learning history reflects that he was not ignoring his responsibilities. He completed 60 courses in the 3 years prior to Chief Garrett taking disciplinary action.

With regard to the 2 hours of AWOL, the Agency provided no evidence that its time keeping system records how employees flex, particularly those who "FlexIn/Flex out." The Arbitrator credits Grievant's explanation that his reference to core hours in his 2018 response to Chief Garrett was simply a mistake.

No rebuttal was provided to Grievant's explanation of how he flexed and in particular how he flexed on the day of the funeral, The Arbitrator recognizes that the contract provides for flexing and out subject to supervisory approval. But absent any time system in place and with Grievant's recent return to 100 percent official time, if supervisory approval had now become a concern, the Agency had an obligation to put Grievant on notice, and certainly give notice if failure to obtain approval would lead to discipline.

As for Grievant's failure to provide a statement, the Agency made no showing that it effectively communicated this request to Grievant. Grievant made clear he was actively avoiding opening messages from Chief Garrett and placed higher level Agency officials on notice that was the case. Under the circumstances, it behooved the Agency to take immediate action to counsel Grievant on maintaining an effective line of communication with his supervisor. Particularly if the Agency felt, as Associate Director Adkins apparently did, that the consequences of refusing to read supervisor emails, and

how it may lead to incomplete employee files where an employee fails to return necessary acknowledgments, was of such import.

With regard to Grievant's failure to sign his performance plan, again, Grievant was not put on notice that failure to sign this plan could lead to discipline. The Agency also made no showing that Grievant's failure to sign this document would have any practical impact on the Agency or anyone assigned to supervise him. There is no dispute that as an Union official on 100% official time, he could not be rated under any such performance plan. The Arbitrator is unable to conclude that disciplinary action for such a minor transgression warrants anything stronger than oral counseling, the first logical disciplinary step for minor transgressions under the Master Agreement's scheme of progressive discipline.

In light of all the foregoing, the Arbitrator concludes that the Agency failed to prove any of its charges in relation to either the admonishment or reprimand. The disciplinary action must thus be rescinded.

With regard to the allegations of reprisal based on Union activities and protected disclosures, the Union bears the burden of proof. As both parties acknowledge, In situations where a union claims anti-union animus, the union must show that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity, (2) that the agency knew of the employee's protected activity, and (3) that such activity was a motivating or contributing factor in the agency's treatment of the employee. by establishing by a preponderance of the evidence that there was a legitimate justification for its action and the same action would have been taken even in the absence of protected activity. *Letterkenny Army Depot*, 35 FLRA 113 (1990). The statutory standard for determining whistleblower reprisal is similar in that the Union must establish that the protected disclosure was a contributing factor; the Agency however must demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure. 5 U.S.C § 1221.

The Arbitrator finds that this is the rare case where evidence of retaliation based on anti-union animus is both direct and circumstantial. Chief Garrett's

testimony reflects long standing anti-union animus, no more evident than how he treated Grievant upon his return to 75% duty in Voluntary Service. The Arbitrator cannot imagine a conversation with a supervisor that could be more chilling or threatening to one's career or livelihood. And his expressed desire to walk Grievant's spouse out of the facility speaks for itself. The timing of Grievant's return to 100% official time, back under the supervision by a supervisor who had expressed such animosity also logically suggests anti-union motives on the part of higher level officials. Chief Garrett's sudden concern about so quickly completing overdue TMS courses; questioning Grievant's leave status where other employees were also present; and his outsized concern about Grievant signing a performance plan that would never be applied to him all strongly suggest pretext. Moreover, there is strong evidence that Chief Garrett enthusiastically participated in a concerted effort to build a disciplinary record against Grievant that might be used in an ongoing Hatch Act proceeding or just generally against Grievant. In any event, the Arbitrator can find nowhere in this record preponderant evidence of a legitimate justification for either the admonishment or reprimand. Based on all the foregoing, the Arbitrator finds that the Agency's disciplinary actions were retaliatory and based on anti-union animus.

The Union's claims of whistleblower relation present another story. The Arbitrator has combed the voluminous record for evidence that any protected disclosure made by Grievant was a contributing factor in the imposition of either the admonishment or reprimand and can find none. While the Union has suggested that circumstantial evidence may lie in the timing of Grievant's disclosure just prior to Chief Garrett moving from Chief of police to his current position, no evidence was produced to show that this change of position was of a nature that would give rise to animus on Chief Garrett's part. And the Union has failed to establish the requisite connection between any protected disclosure and Associate Director Adkin's reprimand decision. And certainly the Agency has established no connection of any sort between any of the other many named agency

officials and these two actions. The Arbitrator thus concludes that the claim of retaliation based on whistleblowing fails.

Finally, to briefly address the third issue accepted for decision. The Agency failed to establish that it timely filed a Step 3 response. The Agency, however, did not pursue any arbitrability issue raised in that response at hearing, and the Arbitrator finds no remedy warranted for this contractual violation.

REMEDY.

The Arbitrator finds that the Union and Grievant is entitled to an order requiring the Agency to:

1. Rescind the admonishment and reprimand issued to Grievant and to purge these actions from his personnel and disciplinary record.
2. Abide by and post in all locations where information to bargaining unit employees is routinely posted the following Notice for a period of no less than one year from the date this award becomes final.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER SET FORTH IN FMCS CASE NO. 241313-01915

The Arbitrator in FMCS Case No. 241313-0915 has found that the Department of Veterans Affairs, VA Medical Center Poplar Bluffs violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

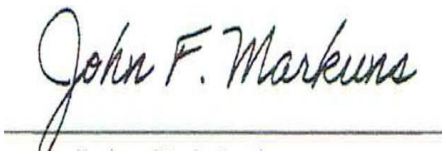
WE WILL NOT discriminate against Keven Ellis, or any other bargaining-unit employee, by subjecting him to investigations or disciplinary actions in reprisal for engaging in activities protected under § 7102 of the Statute.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining-unit employees in the exercise of the rights assured by the Statute

AWARD

The grievance is SUSTAINED. The Agency is ordered to provide the remedy set forth above. The Arbitrator will retain jurisdiction for at least 90 days after the date the award becomes final to resolve any questions that may arise over application and interpretation of this remedy.

Date: **August 13. 2024**



John F. Markuns
Arbitrator