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February 20, 2010

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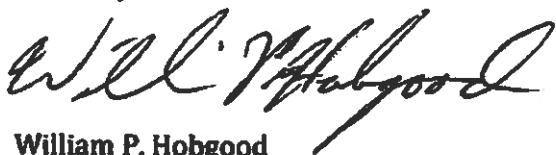
Hampton H. Stennis, Esq.  
4<sup>th</sup> District Legal Rights  
Office of the General Counsel  
80 F Street N.W.  
Washington, DC 20001

Re: FMCS Case no. 09-59044 Diana Kelly Removal From Service

Gentlemen:

Enclosed are my opinion and award as well as my invoice for fees and expenses in the above referenced matter.

Sincerely,



William P. Hobgood

Encl: (2)

**In the Matter of Arbitration Between:**

AFGE Local 1858 )  
(Union) )  
And )  
) FMCS Case No. 09-59044  
Aviation and Missile Research ) Diana Kelly  
Development and Engineering Center (AMRDEC) )  
(Agency) )

**Hearing: November 19, 2009**

**Location: Union Offices, Huntsville, Alabama**

**For the Agency: David C. Points, Esq.**

**For the Union: Hampton H. Stennis, Esq.**

**Post Hearing Briefs: January 22, 2010**

**Arbitrator: William P. Hobgood**

**Background**

Grievant has been an employee of the Agency since June 2001. Prior to joining the Agency she served in the military for sixteen years, both on active duty and in the reserves. Her essential duties for the Agency were in the Production Engineering Division as a contract administrator. As such, she received reports from technical monitors concerning verification of work performed by contractors. Once verified by these monitors, she reconciled the work done with payments due the contractors. Grievant has had no prior incidents of discipline and until her illness had received excellent performance appraisals. (Tr. p. 145)

Prior to joining the Agency, in 1999, Grievant underwent surgery for replacement of an aortic valve. Since that surgery, to avoid clot formation, Grievant has been required to take the drug Coumadin. In addition to a number of family issues involving her mother's health, the Grievant had a hysterectomy in 2006, and in 2007 contracted Lyme disease. During this time, Grievant experienced migraine

headaches. In addition to Coumadin, Grievant estimates that, until 2008, she had been taking as many as 16 different medications. (Tr. p. 165)

Because of these illnesses, principally her migraine headaches, Grievant, since 2005, has had the following attendance record: 2005-absent 36.5% of her work year; 2006: 62.9%; 2007: 49.5%; through July, 2008: 67%. (Tr. p 5)

In an April 29, 2005, memorandum, because of Grievant's attendance record, the Agency requested Grievant to provide detailed medical information. Another memorandum dated March 27, 2007, requested more detailed information including:

*a. The history of the specific medical condition (s), including references to findings from previous examinations, treatments, and responses to treatments. b. Summary of any clinical findings from the most recent medical evaluation, including any of the following which have been obtained: Findings of physical examinations; results of laboratory tests; X-rays; EKGs and other special evaluation or diagnostic procedures. c. Diagnosis, including current clinical status. d. Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery. e. An explanation of the impact of the medical condition on the attached listing of your job duties; and an explanation of the medical basis for any conclusion that you would likely harm yourself or others by carrying out the duties of your job. (Agency composite Ex. # 2)*

There is nothing in the record that the requested information was provided by the Grievant in the detail and specificity requested by the Agency. Specifically, Dr. Christopher Eckstein of the Department of Medical Affairs , VA Medical Center , Neurology Service in his letter dated June 25, 2007 stated:

*I am currently treating Ms. Diana Norman (aka Kelley) for her Migraines which are very severe. We are currently trying medication to prevent her headaches. It will require some time to find the appropriate medication. However, it (sic) likely that we will find a way to improve her condition.*

*The medication I prescribed most recently has helped but she is still experiencing headaches on a daily basis, though not as severely. It will take another two to three weeks to determine if the medication does prevent future headaches.*

*As far as full or partial improvement, I do not have a definitive answer, however, since she is improving with our current regiment (sic) I believe we will improve the frequency and severity of her headaches. (Agency Composite Ex. #2)*

Neither does it appear that there was significant Agency follow-up requesting more detailed information. Further, there is no indication that the Agency requested an independent physical examination to determine Grievant's fitness for duty.

On July 30, 2007, Grievant received a leave restriction memorandum detailing the procedures to be followed for all leave requests. The memorandum also referenced her unsatisfactory attendance in her annual performance review. This criticism was restated in writing in a May 29, 2007 memorandum. (Agency Ex. #3) On September 29, 2008, Grievant received a Notice of Proposed Removal. Grievant responded in a memorandum dated November 3, 2008, acknowledging her absences and asserting that the Agency had failed to offer her any alternatives in consideration of her health issues other than suggesting that she could work Fridays, her day off, to make up for her excessive absenteeism. She also contended that much of her work could be accomplished at home through telework. In addition to doing most of her work, she contended, she would also be given time to see if a revised medical routine might address her migraine headaches. She also contended that the Agency had not been diligent nor assertive in advising her of the availability of its Employee Assistance Program (EAP). On November 5, 2008, Grievant communicated with the Agency's Mike Lawrence detailing her most recent treatment by a physician at the Crown Comprehensive Headache Center in Huntsville, Alabama and requesting reconsideration of the Proposed Removal action until the results of this new treatment could be assessed. (Agency Composite Ex. # 2)

In a memorandum dated November 25, 2008, Grievant was informed that her November 3, 2008, memorandum had been reviewed and that her removal would be sustained. On February 5, 2009, The Grievant received a Notice of Decision-Removal from the Agency's Director, Engineering Directorate. (Agency Composite Ex. # 1)

On March 18, 2009, Grievant submitted her third step grievance in writing requesting to be reinstated in her former position and to be made whole. The

Agency responded, in an undated memorandum, denying the grievance and stating that Grievant could request consideration for arbitration under the collective bargaining agreement. (Jt. Ex. # 1)

On March 30, 2009, the Union responded to the Agency's action asserting that the Agency had made no effort to consider alternate accommodations for the Grievant and had not sufficiently informed her of the resources available to her such as the Employee Assistance Program (EAP). (Agency Composite Ex. #1)

On the day following her removal from service Grievant collapsed at her home and was hospitalized. During her hospitalization, it was determined by her VA physician that she was overmedicated. (Tr. p. 169) He removed the Grievant from all medications, with the exception of Coumadin. (Tr. p. 166)

Grievant currently works as a full time mental health counselor. As of the hearing date she had not missed any days from work. (Tr. p. 194)

## **ISSUE**

Was Grievant discharged for just cause? If not, what is the appropriate remedy?

### **Relevant Contract Language**

#### **Article 9**

#### **Rights and Obligations**

...

#### **Section 4. Employer Rights and Obligations**

The Employer retains all Management rights provided by the Civil Service Reform Act of 1978 (PL 95-454). Nothing in this agreement shall be interpreted to affect the authority of any management official to exercise such rights.

**Section 5. Union Rights and Obligations**

The AFGE Local 1858 retains all Union rights provided by the Civil Service Reform Act of 1978 (PL 95-454). Nothing in this agreement shall be interpreted to affect the authority of any Union representative to exercise such rights.

**ARTICLE 52**

**Discipline - Adverse Actions**

**Section 1. Definition**

Disciplinary actions under this article include written reprimands, suspensions, demotions, or removals taken for disciplinary reasons. This article does not apply to performance-based actions taken under Title 5 USC, Chapter 43.

...

**Section 5. Fairness**

The Employer agrees that disciplinary procedures shall be administered in a fair and impartial manner, and that no employee will be disciplined except as provided by law and regulation. Disciplinary actions, in order to be effective, should be timely.

**Section 6. Administration**

Disciplinary action shall be administered against offending employee for corrective or punitive reasons, depending upon the nature of the misconduct. Unless inconsistent with established agency policy, the Employer may consider progressive discipline.

**Section 7. Selection of Penalties**

The Employer agrees to consider using the Agency Table of Penalties and relevant mitigating, extenuating, and aggravating factors in selecting penalties.

**Section 8. Notifications**

The Employer agrees to the following:

...

d. The Employer shall notify employees of their discipline-related rights, to include the right to Union representation and the right to grieve and appeal IAW applicable laws and regulations. The Employer also agrees to include in decision letters, a statement that future incidents of misconduct may result in more severe discipline.

e. If a decision is made as a result of an appeal or grievance to modify or reverse an adverse action or disciplinary action against an employee, the activity shall initiate actions to restore the employee's lost pay and benefits, in a reasonable timeframe.

f. Unless inconsistent with established agency policy, oral and written counseling may be considered the first steps toward progressive discipline.

## **ARTICLE 51**

### **GRIEVANCE AND ARBITRATION PROCEDURE**

#### **Section 1. General**

a. The purpose of this article is to provide a mutually acceptable method for the prompt and equitable settlement of grievances, This is the exclusive procedure available to the Employer and the Union and employees in the bargaining unit for resolving such grievances. This procedure provides a means of resolving grievances at the lowest level of both the Employer and the Union.

...

#### **Section 6. Arbitration**

...

f. The arbitrator shall be requested to render a decision as soon as possible, but no later than 20 workdays, after the hearing unless the parties agree otherwise. The arbitrator shall have the authority to interpret this agreement but not to change, alter, amend, or modify the agreement. The arbitrator's decision will be binding, include a statement of the basis for the decision, and provided concurrently to both parties.

g. Either party may file an exception to the arbitrator's decision with the FLRA or Federal court as appropriate. In the event one of the parties files an exception, the arbitrator's decision will be held in abeyance until the FLRA or Federal Court issues a decision.

## **DISCUSSION**

The Agency does not refute the state and nature of the Grievant's health and the legitimate impact on her attendance. However, it contends that the Grievant's protracted history of frequent and unscheduled absences from 2005 until her removal from service had an adverse impact on the agency's operational

performance and the morale of her colleagues. Her work had to be spread among higher graded employees taking them away from their normal duties. Morale was adversely affected among those employees who consistently reported to work. It insists that it made extraordinary efforts to accommodate Grievant's medical condition by offering to let her work on Friday, her normal day off and referring her to the Employee Assistance Program (EAP). It did not offer Grievant the option of telework out of concern over the Grievant's unreliable performance and inconclusive medical prognosis. It also expressed concern over the impact on her ability to perform the work at home and contended that her work required face-to-face contact with her colleagues.

The Agency argues that it gave Grievant due consideration to her situation by, on many occasions, converting absences without leave (AWOL) to leave without pay and on, one occasion, granting retroactive approval to absences without leave (AWOL) to leave under the Family Medical Leave Act (FMLA). Ultimately, the Agency the agency concluded that: *"This action is necessary to maintain discipline, improve morale, and stabilize the organization. Ms. Kelly has regularly been in a leave without pay status since Feb (sic) 2005. She has been afforded a significant period of time to work through her difficulties with no improvement, therefore I do not feel a lesser penalty would be effective."* (Agency Composite Ex. # 2)

The Agency argues that its efforts to assist the Grievant were hampered by the Grievant's lack of cooperation in acquiring the medical information it needed to ascertain her condition and to determine the likelihood of her return to a normal work schedule. Accordingly, after considering the impact Grievant's uncertain and unreliable attendance had on the Agency, removal from service was the most appropriate course of action.

The Union contends that Grievant's removal from service was without just cause, had no basis in promoting the efficiency of the service and that it violated the Master Agreement as well as 5 U.S.C. 75. It argues further that the Agency failed to consider

alternatives allowing Grievant to meet her Agency obligations and continue her service. It also contends that the Agency's actions were punitive rather than corrective, which is the essential objective of progressive discipline.

The Union points to the Agency's failure to offer telework from Grievant's home as an alternative to removal from service. Grievant lived over twenty miles from work. The multiple medications prescribed by her physicians made it difficult, if not dangerous, to drive long distances. However, the Union asserts, and the Grievant testified, that there were periods during the day when she was well enough to perform her work. Contrary to the Agency's contention, the Union contends that Grievant's work required little face-to-face interaction with other employees.

The Union, in their post hearing brief cited the "Douglas Factors" which it contends must be considered in determining the reasonableness of the Agency's discipline.<sup>1</sup> These same factors were evidently considered by the Agency when considering its course of action in the instant case. (Agency Composite Ex. # 2) Regardless of these factors, the Union asserts that this is not an exclusive list and that an arbitrator must have *great freedom to use reasoned judgment and experience to assess the reasonableness penalties of agency...*<sup>2</sup>

## DECISION

The Grievant's unchallenged attendance record clearly had an impact on the Agency's operations. It is clear, however that the neither Grievant nor the Agency did all that they could to address the problem. For example, alternatives to Grievant's presence at the work site were not addressed by either party until the latter stages of her employment. The Agency made requests for medical records and which were not provided by the Grievant or, if provided, were incomplete or

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<sup>1</sup> Douglas v. VeteransAdministration, 5 M.S.P.R. 280 (at 305-6), 1981 MSPB Lexis 886 ) at \*38-9)

<sup>2</sup> Union Post Hearing Brief, p. 18

**inconclusive. However, the Agency did not pursue these requests and did not acquire independent assessments of the records she provided. There is nothing in the record that the Agency sought an independent examination of the Grievant for fitness for duty. (Tr. p. 112)**

**The Agency did notify the Grievant of the availability of the Employee Assistance Program but was clearly not assertive in getting the Grievant to avail herself of the service. Not until the last stage of her employment did the Union, the Agency and the Grievant focus attention on remedies or corrective measures to deal with the Grievant's illness and attendance. Only after a crisis involving hospitalization and a complete reassessment of her health and medication protocol was a solution to her health problem evidently determined. By that time Grievant had been separated from the Agency.**

**The Grievant's absence from the work place clearly had an adverse impact on Agency performance. Her fellow employees could not count on her presence and some of her work had to be assumed by higher pay grade colleagues. However, The Agency did not explore or experiment with alternatives which might address that impact. Instead, over an almost four year period, it focused more on personnel processes and procedures leading to separation rather than on solving the Grievant's health issue or solving operational issues. Conversely, the Grievant could have been more assertive in exploring operational alternatives and, although difficult in any patient/physician relationship, more assertive with her physicians in acquiring requested information.**

**Based on the above, and consistent with Article 52 Section 6, of the Collective Bargaining Agreement, I must conclude that the Agency's action in separating Grievant from service was punitive and not corrective. Progressive discipline, however, such as a suspension, particularly in an attendance case, would not have been appropriate or effective. The Agency did not pursue alternative sanctions or processes to correct the Grievant's behavior. A more assertive role by the Agency in**

addressing the Grievant's illness was needed but not provided. Grievant is to be reinstated. However, considering the protracted and erratic nature of the Grievant's attendance, even though tolerated by the Agency, back pay is not warranted.

**AWARD**

Grievance sustained in part. Grievant is to be reinstated but without back pay.

  
William P. Hobgood

February 20, 2010