PERMANENT PANEL

In the Matter of the Arbitration between **Office of Personnel Management (OPM)** **and** **American Federation of Government Employees (AFGE), AFL-CIO, Local 32**	**GRIEVANT** **Eugene F. Polite**

OPINION AND AWARD: Dr. Andrée Y. McKissick, ARBITRATOR
APPEARANCES:

FOR EMPLOYER:
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DATE AND PLACE OF HEARING:
August 3, 2004
Office of Personnel Management
1900 E Street, N.W., Suite 7353
Washington, D.C. 20415

POST-HEARING BRIEFS:
September 30, 2004

AWARD: **This Arbitrator finds that this grievance is arbitrable and is sustained. The Reprimand was not fairly and equitably applied as required. Procedural due process safeguards, the absence of specific dates for its conclusion and its midpoint review, were omitted at the issuance of the Leave Restriction and its subsequent extensions, as set forth in the Agreement. This Arbitrator further finds that this Grievant comes within coverage of The Americans with Disabilities Act (ADA). Based on all of the above, the Reprimand and Leave Restriction shall be expunged. Accordingly, the Grievant shall be made whole with back pay plus interest, compensatory damages and attorneys fees, as the Agency was violative of the Agreement and the ADA.**

DATE OF AWARD:
December 6, 2004

ARBITRATOR

BACKGROUND

This is an arbitration proceeding pursuant to the grievance and arbitration provisions of the Collective Bargaining Agreement between the American Federation of Government Employees (AFGE), Local 32 (herein after "Union") and the U. S. Office of Personnel Management, Central Office (OPM) (herein after "Agency"), effective April 1999. The hearing was held August 3, 2004 at the Office of Personnel Management located at 1900 E Street, N.W., Suite 7353, in Washington, D.C. At the hearing, exhibits were offered and made part of the record and oral arguments were heard. Post-Hearing Briefs were received on or about September 30, 2004.

PERTINENT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions in the aforementioned Collective Bargaining Agreement (CBA-Joint Exhibit I) between the Agency and Union, effective April 1999, and other applicable statutory and regulatory provisions.

LABOR AGREEMENT
(CBA - Joint Exhibit 1)

ARTICLE 15
LEAVE

Section 8 – Leave Restriction

(a) When the supervisor gives the employee a leave restriction memorandum, the memorandum will clearly state the length of the leave restriction (up to 180 calendar days) and the effective date for review which will be no longer than midway through the restriction period.

(b) During the review, the employee will be notified of the decision or the continuation of the leave restriction. If the employee's leave is not reviewed at the end of the leave restriction period, the employee may request a review of the leave restriction. The supervisor will respond to the employee's request within 10 workdays.

Section 1 – Annual Leave

(c) Whenever possible, the approval of annual leave must be obtained in advance. In cases, where advance approval is not possible, the employee, whenever possible, will request annual leave by contacting the employee's supervisor as soon as possible on the day the leave is needed.

Section 2 – Sick Leave

(a) Employees will be required to notify their supervisors prior to using sick leave, except cases of emergency. It is understood, however, that the exercise of the right to use sick leave is used for the purposes specified in appropriate regulations.

Section 4 – Absence Without Leave (AWOL)

(a) An employee may be charged with absence without leave, (AWOL) when the employee fails to report for duty or has an unauthorized absence from the workplace during his or her workday, without prior approval. AWOL may be used as a basis for a disciplinary or adverse action.

ARTICLE 17
COUNSELING AND REPRIMANDS

Section 4 – Written Reprimands

(a) Written reprimands are disciplinary actions and as such must be fair and equitable. They must be given to the employee. The reprimand will specify the reasons for the action and advise the employee that the action is grievable under Article 22 of the Collective Bargaining Agreement. An employee will be informed of his/her right to union representation prior to commencement of any meeting concerning the written reprimand.

(b) A written reprimand is retained in the official Personnel Folder. (OPF) for up to two (2) years. However, the employee may request that it be removed from the OPF after one year, provided that there are no further instances of same or similar misconduct. Denial of this request is grievable.

(c) If a reprimand is not removed under (b), above, it will be purged from the Official Personnel Folder (OPF) two years after issuance.

ARTICLE 4
EQUAL EMPLOYMENT OPPORTUNITY

Section 10 – Reasonable Accommodation

(a) The Employer shall make reasonable accommodation to the known physical or mental limitations of a qualified disabled employee unless the Employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include, but shall not be limited to:
   (1) making facilities readily accessible to and usable by disabled persons; and

(2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters and other similar actions including reassignment.

(c) In determining, pursuant to subsection (a) above, whether an accommodation would impose an undue hardship on the operation of the Employer, factors to be considered include: (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) the type of agency operation, including the composition and structure of the agency's workforce; and (3) the nature and cost of the accommodation.

(d) The parties recognize that individual accommodations will be determined on a case-by-case basis, taking into consideration the employee's specific disability, existing limitations, the work environment and any undue hardship imposed on the operation of OPM's programs, as defined above. Qualified employees with disabilities may request specific accommodation.

Section 11 – Prohibited Discrimination

The Employer will continue to provide a program to assure nondiscrimination on the basis of physical or mental disability, and further, the Employer will process complaints of discrimination based on physical or mental disability.

ARTICLE 22
GRIEVANCE PROCEDURE

Section 8 – Time Limit Extension

(a) The time limits specified in this Article, except where otherwise noted, may be extended by mutual agreement of the Employer and the Union when extenuating circumstances are found to exist.

ARTICLE 23
ARBITRATION

Section 2 – Selecting Arbitrators

(a) The Employer and the Union shall jointly select five arbitrators from the Washington, DC, Metropolitan Area for a permanent panel for this Agreement. Cases will be assigned to each on a rotating basis with the date of the original grievance determining the order of the cases, and the originally agreed upon position of the arbitrator on the permanent list determining the corresponding order.

STATEMENT OF FACTS

Grievant, Eugene Polite, is a laborer, employed for six (6) years at the Office of Personnel Management (OPM), who received "exceeds fully successful" on his performance appraisal. (TR – 50) Findings (Joint Exhibit III) by Director Rinder of Contracting, Facilities, and Administrative Services Group, reflect the following information, dated August 8, 2003:

1. Grievant was counseled on several occasions regarding his Absence Without Leave (AWOL) and failure to follow proper leave request procedures.
2. On March 25, 2003, Grievant received one (1) disciplinary action, an Official Reprimand.
3. On March 25, 2003, Grievant also received a memo that placed him on Leave Restriction, a non-disciplinary action.
4. On June 12, 2003, a seven (7) day suspension was rescinded.

Such findings were adopted by Director Crawford on October 6, 2003 at the second step Grievance.

The Official Reprimand, Joint Exhibit VII, dated March 25, 2003, outlines the Grievant's excessive absences without leave charges, the basis for this disciplinary action. It reveals that on January 23, February 11, 13 and 14, 2003, the Grievant did not report to work and failed to call in to request leave. Thus, he was placed on AWOL status. In sum, the Grievant was charged with sixty-six (66) hours of AWOL since February 1, 2002. In addition, this document reflects that on January 22 and 24, and February 10, 2003, the Grievant failed to request leave before the 9:30 A.M. deadline. (Joint Exhibit VII)

The notification regarding Leave Restriction (Joint Exhibit VIII) was also on the same day. This document placed the Grievant on this restriction for six (6) months, dated March 25, 2003. In summary, this document states that since February 1, 2002 to February 26, 2003, the Grievant has used one hundred, ninety-three (193) hours of Annual Leave, seventy-seven and one-half (77 ½) hours of Sick Leave, thirty-three and one-seventh (33 1/7) hours of Leave Without Pay, and Absence Without Leave (AWOL) for sixty-six (66) hours.

On October 2, 2003, the record reveals that the Leave Restriction was extended for an additional six (6) months. (Joint Exhibit IX) As with the initial restrictions, there were several additional conditions required such as:

1. Annual Leave requests must be at least twenty-four (24) hours in advance - this leave is discretionary.
2. A physician's certificate is now required; and
3. Leave Without Pay must be requested both orally and in writing - this leave is also discretionary.

The record also reflects that the Grievant claims a disability, which was precipitated by a robbery from which he suffered an open-head trauma. Thereafter, evidence reveals that he suffered memory loss, equilibrium difficulties, as well as suffered from migraine headaches, and the effects of medication from all of the above. Thus, the Union asserts coverage under ADA. Due to an alleged racial comment from his supervisor, the Union also claims coverage under Title VII for racial discrimination. The Agency and the Union were unable to resolve these issues, thus Article 23 of the Agreement was invoked. This named Arbitrator was selected to hear this dispute.

ISSUES

AGENCY'S ISSUES:

Is the grievance procedurally arbitrable? That is, was the second-step grievance filed in a timely manner?

Was the issuance of the Reprimand fair and equitable?

Was the issuance of the Leave Restriction, and subsequent extensions, consistent with the terms of the parties' collective bargaining agreement?

UNION'S ISSUES:

Did the Agency have just cause to place the Grievant on a Leave Restriction and to issue him a Reprimand?

Was the Agency's placement of the Grievant on a Leave Restriction and issuance of a Reprimand discriminatory?

Was the Agency's placement of the Grievant on a Leave Restriction and issuance of a Reprimand arbitrary and capricious?

Was the Agency's placement of the Grievant on a leave Restriction and issuance of a Reprimand otherwise violative of the CBA, law rule and/or regulation?

If so, what is the remedy?

POSITIONS OF PARTIES

It is the position of the Agency that this grievance is untimely and procedurally unarbitrable. As to the merits of the grievance, the Agency asserts that the Reprimand was more than fair and equitable. Simply put, the Agency maintains that the Reprimand was issued with just cause due to the Grievant's tardiness, absenteeism, as well as failure to follow leave procedures. That is, the Agency contends, that the issuance of the Leave Restriction, and subsequent extensions, was consistent with the Agreement because of the Grievant's egregious

pattern of conduct. Moreover, the Agency adds that there is nothing in the Agreement that precludes it from issuing a Leave Restriction in conjunction with a disciplinary action of a Reprimand. In addition, the Agency contends that the Leave Restriction is designed to provide additional conditions that the Grievant must follow due to his widespread pattern of abuse. One (1) condition of the Leave Restriction is the production of medical documentation for Sick Leave; the other condition is that the Grievant is required to request Annual Leave at least twenty-four (24) hours in advance, absent exigent circumstances. The Agency points out that the Leave Restriction was reviewed and renewed on four (4) separate occasions. In sum, the Grievant has been charged with multiple hours of AWOL, and has continued to engage in a pattern of leave abuse through the tenure of three (3) supervisors.

In response to the Union's argument that the Grievant was discriminated against based on a disability, the Agency counters that the Grievant failed to establish a prima facie case, as he failed to show that he was disabled. Besides, the Agency asserts that there is no evidence and no medical documentation that shows the Grievant was "substantially limited" in his ability to work. In addition, the Agency notes that there is also no record of impairment. It is important to note, the Agency points out, that it has articulated legitimate, non-discriminatory reasons for the Reprimand and Leave Restriction against the Grievant for repeated and excessive tardiness, AWOLs, and failure to follow leave procedures. Thus, the Agency sums up that the Union cannot show the Agency's action was a pretext for discrimination, as required.

In response to the Union's argument that the Grievant was discriminated against because of race, the Agency retorts that this claim is without merit. That is, the Agency asserts that the Union made no showing of how he was afforded treatment different from that given to similarly

situated persons who are members of the protected class. Again, the Agency emphasizes that the Reprimand and Leave Restriction were justified and were fairly issued with just cause. Thus, the Agency concludes that no evidence was presented showing that Agency's reasons for its actions were pretextual. In summary, the Agency contends that the alleged racial comment was, at most, a misunderstanding, but certainly not evidence of intentional racial discrimination. Based on all of the above, the Agency requests that this Arbitrator dismiss this grievance, as it is not arbitrable. However, in the alternative, the Agency requests that this grievance be denied in its entirety, as the Reprimand and Leave Restriction were issued with just cause.

The Union counters that the issuance of the Reprimand as well as the Leave Restriction was without just cause. The Union asserts that the Agency failed to specify "the effective date of review", as required. In addition, the Union notes that the Agency also failed to conduct a "midway review", another mandatory requirement to validate compliance with the Agreement. The Union reasons that such deficiencies are fatal and thus requests that this Arbitrator expunge the Grievant's record of all resultant AWOL charges, and seeks to make the Grievant whole with resultant back pay, and interest.

Additionally, the Union points out that the Reprimand was not supported by evidence, as the Grievant did request leave in a timely manner, before 9:30 A.M., the cut-off deadline.

In response to the Agency's argument that the Grievant's absence interrupted the functioning of his unit and adversely affected the morale of the unit, the Union takes exception by pointing to the supportive testimony of two (2) of the Grievant's co-workers.

Besides, the Union maintains that several co-workers had three (3) or four (4) times more AWOLs than the Grievant, yet none of them received a Reprimand or a Leave Restriction. Therefore, the Union concludes that the Reprimand was not fair, nor equitably distributed, thus issued without just cause.

It is the position of the Union that the Grievant was discriminated against by the Agency's failure to grant reasonable accommodation to him, after he made known his physical impairment. The Union further contends that not only were his head injury, the onset of migraines, and the side effects known to the Agency, these conditions were also supported by medical documentation provided to the Grievant's supervisor on a regular basis. The Union argues that an interactive discussion was required after the Agency was made aware of the Grievant's handicap. However, the Union reasons that this omission was in violation of the Americans with Disabilities Act (ADA). In addition, the Union contends that the Agency should have subsequently offered the Grievant reasonable accommodation, such as a modified work schedule, to accommodate his handicap. Thus, the Union adds that the Grievant's AWOL hours, as exacerbated by the illegal Leave Restriction, were a direct result of the Agency's failure to accommodate.

Lastly, the Union points out that the Agency failed to rebut this ADA argument, as it failed to make a showing of undue hardship, as required.

Additionally, the Union maintains that the Grievant was also discriminated upon because of his race, as the supervisor made derogatory remarks concerning the Grievant, personally, as well as his living conditions and neighborhood.

Based on all the above, the Union requests that the Arbitrator sustains this grievance and makes this Grievant whole with back pay, interest, compensatory damages, attorneys fees, plus costs and expenses.

FINDINGS AND DISCUSSION

After a careful review of the record in its entirety and having had an opportunity to weigh and evaluate the testimony of the witnesses, this Arbitrator finds that this grievance is arbitrable for the following reasons.

First, the record reflects a long history of extensions and the parties have established an ongoing, give and take relationship on the issue of timeliness. (TR - 185) Moreover, evidence reveals the Agency has never mentioned the arbitrability issue until this hearing. (TR - 186) More importantly, the Agreement itself does not specifically preclude an untimely grievance. Still further, authorities in the labor arena concur on the presumption of arbitrabilty. (See Gateway Coal Co. v. Mine Workers, Dist. 4, Local 6330, 414 US 368, 377, 85 LRRM. 2049 (1974); Also See Nolde Bros. v. Bakery and Confectionery Workers, 430 US 243, 254, 94 LRRM 2733 (1977)) Thus, this Arbitrator finds this grievance to be arbitrable.

Second, although the Grievant received sixty-six AWOLs, it is important to scrutinize the totality of circumstances. Looking at this amount of AWOLs in isolation, this Arbitrator would concur that this is an egregious violation. However, evidence is replete that many employees were habitually late, but did not receive a Reprimand or a Leave Restriction, as did the Grievant. The record points out that some employees have received three (3) or four (4) times as many AWOLs as the Grievant. (TR - 168 - 169) That is, some employees were issued as many as four

hundred (400) or five hundred (500) AWOLs. (TR - 215) Specifically, these employees were identified as "DW" and "DG". (TR - 171 - 172) The Union Steward further testified that the same deciding officials, Team Leader Carr and Chief Horn, chose instead to settle these grievances. (TR - 172) Additionally, Co-worker Scroggins testified that notwithstanding a large number of AWOLs, he did not receive a Reprimand or a Leave Restriction, neither did "DW" nor "DG". (TR - 215) Another determinant is the fact that this Grievant was never issued a warning that AWOLs would be forthcoming. Chief Horn reluctantly admitted to this omission as well. (TR - 108) It is also significant to note that the Reprimand was issued on the same day, March 25, 2003, as the Leave Restriction. Inherent in this Restriction, are more stringent requirements. These requirements are as follows:

(a) A physician's certificate is now required.
(b) Leave is now discretionary for Chief Horn to determine its validity.
(c) Annual Leave must be requested 24 hours in advance.
(d) Leave Without Pay (LWOP) must be requested both orally and in writing.

Based on the above, the Union has established that disparate treatment occurred. In sum, it would appear that this grievant was unfairly singled out. Therefore, this Arbitrator is compelled to conclude that the issuance of this Reprimand was without just cause and violative of Article 17, Section 4 of the Agreement.

Third, focusing on the requisites of Article 15, Section 8, Leave Restriction, of the Agreement, it is clear that the parties agreed to a specific date as to its length of this restriction, but no longer than "180 calendar days". Another requisite of that provision requires a specific date for a review. This Arbitrator finds an omission to specifically state a specific date for the ending of this Leave Restriction and an omission to state and give a midpoint review, as

required. Implicit in this provision is the requirement of procedural due process, giving such safeguards, such as: notice and right to a discussion regarding this restriction with the Grievant. The record reveals that such safeguards were not done in accordance with this provision of the Agreement. Based upon all of the above, this Arbitrator must expunge this Leave Restriction and its numerous unlawful extensions, as the Agency did not comply with the Agreement.

Fourth, the Americans with Disabilities Act (ADA) requires that the Agency have knowledge of one's disability. Here, the record reflects that Chief Horn physically saw the Grievant's "swollen" head evidencing multiple stitches. (TR - 136) He admits to seeing the result of an open-head trauma resulting from the robbery. (TR - 136) However, Chief Horn also testified that he was without knowledge of the side effects of the injury. (TR - 137) This Arbitrator finds it difficult to believe that Chief Horn did not know the concurrent side effects, known to both, the Union Steward and the Employee Assistance Program (EAP) Counselor, Vena Darling. (TR - 178) Still further, there was apparently a great deal of medical documentation, dated September 5, 2002, stating the presence of migraine headaches and the effects of such medications. (U - 4) Evidence further reveals that this medication made the Grievant drowsy and caused an upset stomach, as well as diarrhea. (TR - 253)

Fifth, in addition to migraines, the Grievant persuasively testified that he had long-term debilitating mental side effects from his excessive bleeding and hemorrhaging due to the head trauma necessitating a cat scan and cognitive testing. (TR - 232) Thus, he has experienced memory loss and equilibrium difficulties. (TR - 232) The record also reflects that Chief Horn called the Grievant "slow" because of these deficiencies. He suggested that the Grievant should "let someone else have his job". (TR - 242) Both the Union Steward and the Grievant testified

that Chief Horn also said that the Grievant should move out of his "seedy-assed neighborhood". (TR - 240) Chief Horn did not deny making this derogatory comment in a meeting with the Grievant. (TR - 176) The Grievant testified that another derogatory comment made by Chief Horn was that he was "too disabled" and that "somebody else could do his job". (TR - 242) Considering the context of these remarks in light of the Grievant's particular disability, this Arbitrator finds that there is a ring of truth to these logically related comments. Thus, the Arbitrator credits the Grievant's version of events, corroborated by the Union Steward, in conjunction with the EAP Counselor participation with the Grievant's disability. (U - 10) That is, this Arbitrator finds that the Agency knew the full scope of the Grievant's disability, as well as the delineated permanent effects. Based upon these physical and mental limitations, this Arbitrator finds that the Grievant is an individual with a disability that substantially limits one (1) or more of his major life activities, which include his ability to take care of himself, and his performance of manual tasks, as well as learning and working. Accordingly, he comes within the ambit of the ADA, 29 CFR §1614.203(a)(3).

Sixth, facts reveal that the Agency knew not only of the head injury of the Grievant, but also knew of his debilitating permanent mental effects. (TR - 235) The Grievant, explaining his drowsiness and fatigue to Chief Horn, requested the following adjustment to his schedule:

> "[I]f I did come in…up to a half hour late some mornings, could I …stay a little later in the afternoons to kind of make up for this time?"
>
> (TR - 237)

This request was corroborated by the Union Steward. However, this request was denied by Chief Horn. (TR - 237) Cases support the fact that a verbal request for reasonable accommodation does not necessarily have to utilize the precise verbiage to make known one's

desire for an adjustment for legitimate reasons in one's work schedule. (See Schmidt v. Safeway, Inc., 864 F Supp. 991, 997, 3 AD Cas. (BNA) 1141, 1146-47.(D. Or. 1994); Also See Hendricks – Robinson v. Excel Corp., 154 F 3d 684, 695, 8 AD Cas. (BNA) 875, 885.(7th Cir. 1998)) However, it is important to note that, after receiving such a request from an individual with a disability, an interactive discussion is required so that the Agency can make an informed decision regarding such a request. (See 29 CFR. § 1630.2(O)(3) 1997; 29 CFR pt. 1630 app. §§1630.2(O), 1630.9 (1997); Also See Haschmann v. Time Warner Entertainment Co., 151 F 3d 591, 601, 8 AD Cas. (BNA) 692, 700.(7th Cir. 1998); Dalton v. Subaru-Isuzu, 141 F 3d 667, 677, 7 AD Cas. (BNA) 1872, 1880-81.(7th Cir. 1998)) The record reflects that no discussion was forthcoming from Chief Horn to the Grievant.

Seventh, the Grievant's originals of his medical documentation were supplied to the Agency. The record shows that the Union Steward as well as the EAP Counselor worked with the Grievant on these matters for one and a half (1 ½) years. This information was corroborated by the Grievant's testimony where he states that he gave permission to the EAP Counselor Darling to talk with Chief Horn. (TR - 244)

Eighth, in response to the Agency's argument that the Grievant's unscheduled absences or tardiness disrupts the department's ability to plan work, Co-worker Scroggins disputes this claim. Moreover, Scroggins further denies that these absences affected his morale. (TR - 221) Scroggins adds that the efficiency of his performance was unaffected by the Grievant's absences, as the Agency alleges. (TR - 215)

Ninth, specifically on the issue of early set-ups, the record is dispositive that such an adjustment could be a workable alternative. The Grievant testified that most of the "set-ups" would not occur until approximately "9:30 A.M." (TR - 263) However, he is scheduled to arrive at 7:30 A.M. every morning. (U - 4) Union Steward added that only two (2) persons were required and that setting up at night would not disrupt this unit and its work. Team Leader Carr even admits that the Grievant requested that the set up rooms at the end of the prior day, rather than in the early morning hours. (TR - 69) Evidence reveals that the Agency made no showing of undue hardship, which requires detailed and substantial financial data and the presentation of difficulty as to how the Agency would be disadvantaged. (See 42 USC 12111(10) (1994); 42 USC 12112(b)(5)(A) (1994)) This information was also testified to by Co-worker Scroggins. Based on the above, this Arbitrator finds that the refusal to allow for reasonable accommodations is violative of Article 4, Section 10 (a) – (d) of the Agreement.

Tenth, applying the four-prong analysis of McDonnell Douglas v. Green (411 US 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed 2nd 668 (1973)), this Arbitrator finds that the Grievant has established that he has a disability, as set forth earlier, and that it was known by the Agency as early as July 11, 2002. (U - 4) The Grievant received "exceeds fully successful" on his performance appraisal, as well as a cash award. (U - 5 and U - 8) Thus, he was more than just qualified for his job, as required. The Grievant was the subject of adverse employment action, as evidenced by the issuance of the Reprimand and the Leave Restriction. Lastly, he was treated less favorably than non-disabled employees. That is, he was denied flexibility, a modification of his work schedule as a person with his particular disability. Now that a prima facie case of discrimination has been established, the Agency must "articulate some legitimate non-discriminatory reason" for its adverse employment decision. (See Texas Department of

Community Affairs v. Burdine (450 US 248, 253, 101 S. Ct. 1089, 1093 67 L. Ed 2nd 207 (1981)). Since the Reprimand was proven to be without just cause based upon disparate treatment and the Leave Restriction did not comply with the Agreement, as it failed significant procedurally due process safeguards, this requirement must accordingly fail. Moreover, it would seem to this Arbitrator that when the Agency disavowed knowledge of this disability and its long-term effects and also denied his request for an accommodation, the Agency intended to discriminate against the Grievant. Accordingly, this Arbitrator finds that the Agency used these adverse employment actions as a pretext to discriminate against this disabled employee.

Eleventh, in response to the Union claim for racial discrimination, under Title VII, this claim must fail. Although calling Grievant's neighborhood "seedy-ass" or "shady" is an inappropriate, derogatory comment, it is not necessarily a racial comment. Clearly, this comment reflected condemnation of the Grievant's economic status. Moreover, the record reveals that the Grievant submitted excuses several times, which related to his landlord's numerous housing violations, which included: the lack of hot water, a nonworking furnace and frequent electrical difficulties. Notwithstanding Chief Horn's knowledge of these existing problems, he did inquire why the Grievant did not just "stay out of those seedy-assed neighborhoods." (TR - 240) However, Chief Horn did not directly make a pejorative racial comment. Although the Grievant is a member of a protected class, the adverse employment actions, the Reprimand and the Leave Restriction, were not the result of racial discrimination. That is, he was not treated less favorably because of his race. Based upon all the above, this Arbitrator finds that Union failed to make a prima facie case, as set forth in the McDonnell Douglas case, of discrimination due to race.

Twelve, looking at the totality of the circumstances, this Arbitrator finds that the Union fully supports its claim for coverage under ADA. That is, had the Agency accommodated the Grievant as he requested with a modified work schedule, it is unlikely that he would have incurred repeated AWOLs resulting in a Reprimand and a subsequent Leave Restriction. In sum, but for his medical crisis and its concurrent enumerated effects, the Grievant might have avoided these disciplinary violations. Accordingly, damages shall include: back pay with interest, compensatory damages and attorneys fees, as the Agency violated the Agreement, as well as the ADA. (See 42 USC §1981(a)(3) (1994))

AWARD

This Arbitrator finds that this grievance is arbitrable and is sustained. The Reprimand was not fairly and equitably applied as required. Procedural due process safeguards, the absence of specific dates for its conclusion and its midpoint review, were omitted at the issuance of the Leave Restriction and its subsequent extensions, as set forth in the Agreement. This Arbitrator further finds that this Grievant comes within coverage of The Americans with Disabilities Act (ADA). Based on all of the above, the Reprimand and Leave Restriction shall be expunged. Accordingly, the Grievant shall be made whole with back pay plus interest, compensatory damages and attorneys fees, as the Agency was violative of the Agreement and the ADA.

DATE OF AWARD: **December 6, 2004**

ARBITRATOR

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