In The Matter Of The

A R B I T R A T I O N

Between

AMERICAN FESERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, LOCAL 3652,	)	**Union Grievance FMCS No. 15-51305**
and	)	
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS,	)	

OPINION AND AWARD
of
ROBERT COSTELLO, ARBITRATOR

This matter was heard in Chicago, Illinois on November 4, 2015. The Employer, Federal Bureau of Prisons ("Employer" or "Agency"), was represented at the hearing by:

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The Union, American Federation of Government Employees, Local 3652 ("Union"), was represented by:

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The parties' respective post-hearing briefs were received on January 8, 2016, at which time the record was closed.

Statement of the Case

The present dispute arises under a master labor agreement between the Agency and the AFGE Council of Prison Locals, having an effective term of July 21, 2014 through July 20, 2017 ("Agreement" or "Master Agreement"). The Union alleges in its grievance a violation of Article 27, Health and Safety, and it seeks make-whole relief and hazard pay for employees whom it alleges were exposed to unsafe working conditions, particularly mold, in August 2014, on the ninth floor of the Metropolitan Correctional Center ("MCC"), which is located in Chicago, Illinois. The Agency responds, first, by challenging the arbitrability of the grievance, on procedural grounds, and also asserting, as to the merits, that it took prompt and appropriate remedial action to remove all mold found on the ninth floor, and that its own testing demonstrated that the ninth floor was clear of any significant airborne mold problem, and certainly not to the extent of creating a hazard for employees or causing any illness. The Agency also challenges the Arbitrator's authority to award the Union's requested relief.

Statement of the Facts

The MCC is a 26-floor structure, with a population of detainees in the neighborhood of 600. The ninth floor of the facility houses the offices of educational services and religious services, and a law library. Immediately above, on the tenth floor, are housed the heating and cooling units for the entire building.

The units are around 40 years old, and the pans on which they sit leak on occasion, which results in water dripping from the ceiling of the ninth floor. The evidence shows that such dripping had been an occasional problem at the facility for some time, dating back to at least May 2014. Typically, the problem has been addressed by placing a few empty pails under the dripping points on the ninth floor to collect the water until the tenth floor is cleaned up. The record further reveals that the dripping on the ninth floor became fairly steady during the first two to three weeks in August 2014, which apparently led Lisa Marsh, the education manager of the facility, to write to Matthew Frisk, the facility manager, on August 19, 2014, to report the following:

> "Matt, I am concerned about the toxins in the air on the 9th floor. It has been leaking and it smells really bad, I have been notified that the air duct that leads to the law library may have mold. Is there any way you can have someone check it out for us. The floor has been leaking for a couple of weeks now.
>
> It is beginning to cause headaches on the floor."

The record reveals that conditions on the ninth floor deteriorated over the ensuing days to the point that on August 25, 2014, according to several witnesses, anyone stepping onto the floor was immediately struck by a strong and unbearable odor, described variously as mildewy or musty – one witness testified that he visited the floor and became "teary eyed" from the odor. Witnesses also noticed the presence of many more pails than usual about the floor, some overflowing; and saw ceiling tiles coming down, and paint peeling and bubbling; large sections of

the carpet were saturated; and desks and shelving were soaked. Witnesses also reported seeing what appeared to be mold on pipes and ceiling tiles - several photographs were submitted at the hearing, which show ceiling tiles with darkened spots, suggestive of mold. On August 26, 2014, Marsh sent another email to Frisk, to wit:

> "Matt, again we are dripping on the 9th floor and the smell in itself is bad, I had some drip on me today and it is disgusting. I have staff leaving early due to the poor conditions of the floor. Please help!"

Antoinette Reese, an education technician whose office is located on the ninth floor, testified that she reported the issue to Marsh, her supervisor, on August 25, 2014, after noticing that the bottoms of her pant legs had become wet from walking. Reese described the experience of working that day as "totally uncomfortable." She developed a headache and was unable to eat her lunch, but worked the whole day, she added. The next day, she arrived at work to find that the conditions on the floor had not improved from the day before, and she again asked Marsh to call facilities. She also called assistant wardens Melvin Barbee and Thomas Watson to report the problem. She tried to work through the day, but her head was hurting, she felt unusually thirsty, and she was coughing and sneezing. She left that day, sometime around noon, after reporting to Marsh that she could no longer stand the conditions on the floor. She called Marsh each of the following two days, who told her each time that conditions on the floor had not changed, and she advised Marsh that she was calling in sick. On the second of these two days,

August 28, 2014, Reese again spoke with AW Watson, who told her that she would be moved to a new location the next day.

Reese and her fellow bargaining unit employees were moved the following day, August 29, 2014, from their work locations on the ninth floor to various locations throughout the MCC, where they remained for the entire month of September 2014, as remediation efforts proceeded on the ninth floor. Reese, who also served as the Union's treasurer, set up camp in the Union office, located on the fourth floor. She added, however, that she was forced to go to the ninth floor on a daily basis, to retrieve files and/or access necessary data bases that were not available to her through other computers, staying perhaps an hour each day. I also note that Reese spent the entire week of September 2 through 6, 2014, on official Union business, during which she did not take any time off.

Reese added that she continued to feel ill after the move to the fourth floor. She testified, and records support her in this, that she sought medical treatment on September 9, 2014, and was diagnosed with bronchitis. She was prescribed prednisone and, for the first time in her life, an inhaler. During pay period 17, which covered August 24 through September 6, 2014, Reese used 19 hours of her sick leave; and during pay period 18, which covered September 7 though 20, 2014, she used 32.25 hours of annual leave and 10.75 hours of sick leave, all to cover absences that she claimed were related to the bronchitis. She added that except for

some allergies, she is generally healthy. She did not have symptoms of any illness before being exposed to the conditions on the ninth floor, described herein.

Reese initially requested that she be granted administrative leave for the period she was absent that week, during her conversation with AW Watson on August 28, 2014. Watson denied her request and advised Reese to file a claim for compensation with the Office of Workers' Compensation programs ("OWCP"), which Reese did on September 18, 2014 - she submitted medical records relating to the bronchitis to support her claim. On January 27, 2015, the OWCP issued a Notice of Decision, in which it denied Reese's claim, finding, in relevant part:

> "The medical evidence submitted in your case does not contain a diagnosis. You were previously advised that the discharge instructions included diagnoses of bronchitis and acute bronchitis. It was also noted that these documents were not signed by a qualified provider. Additionally, the patient visit sheet authored by Dr. Jones did not include a diagnosis. Therefore, the medical reports on file were insufficient to satisfy this element of your claim.
>
> "Exposure alone is not sufficient to establish a work-related condition. §10.303 of the Code of Federal Regulations states that simple exposure to a workplace hazard, such as an infectious agent, does not constitute a work-related condition entitling an employee to medical treatment under the [Federal Employee Compensation Act]."

Reese did not appeal the denial, though she had a right to do so.

Tamara James, an education specialist whose office is located on the ninth floor, testified that she began sneezing and developed "a little cough" during the week of August 25, 2014. She recalled being moved off the floor, to the basement of the facility, about a week or two later. Like Reese, she was forced to return to

the ninth floor on a daily basis to retrieve supplies and files, and to access her computer. At some point, she was given a mask to wear when on the floor. Records show that she used 6.5 hours of sick leave and 8 hours of annual leave during pay period 17; and 8 hours of annual leave during pay period 18, all of which she claimed was taken due to the ill effects of working on the ninth floor. She conceded that she did not seek medical attention at the time. She also did not file a claim for compensation with the OWCP. In fact, it appears that Reese was the only employee from the ninth floor who did so with respect to the conditions at issue here. I also note that the Union did not submit evidence of any other employees taking time off as a result of those conditions. AW Barbee testified that he was not aware of any other employees, or detainees,[1] who complained of becoming ill as a result of the conditions on the ninth floor.

Regarding management's actions here, AW Barbee testified that Reese initially raised the possibility of mold being present on the ninth floor in May 2014. He did not visit the floor at the time, he conceded. He added that he assumed that the problem had been remediated because he heard nothing more about the issue until August 26, 2014, when Reese again called him. He went to the floor that day but, he added, he found nothing "unusual to me to indicate whether there was mold or not based on smell alone. . ." He noted that he has 11 years of experience as a regional safety manager.

[1] Detainees assisted in the cleanup of the ninth floor.

There is no dispute that mold was in fact found on the floor, in early September 2014, in a wall of a closet located within the offices of religious services, situated behind a cabinet.[2] The evidence reveals that the agency promptly remediated the area, after the discovery of the mold, by first washing the wall with a bleach solution and then replacing the dry wall entirely, all as recommended by guidelines developed by the Centers for Disease Control. Although the evidence shows that the Agency also replaced sections of drywall along the base of one or more of the walls in the library, and apparently replaced some ceiling tiles, as well, the evidence in the record does not firmly establish that mold was the reason that these items were replaced,[3] although the testimony of witnesses and photos of the area strongly suggest that mold was present in several areas of the floor. More important perhaps, the Union provided no evidence to suggest elevated levels of airborne mold spores were ever present on the ninth floor.[4]

The record reveals that the Reese met informally with AW Barbee on September 25, 2014, to resolve the Union's claim that the Agency was in violation

[2] The record reveals that the mold developed as a result of a leaky drain pipe, and was not related to the dripping that affected the rest of the floor.

[3] Reese testified that a contractor brought in to test for airborne mold pointed out what he said was mold on baseboard in the library. Reese's testimony was clearly hearsay. Moreover, Flisk, who also witnessed the contractor's statement, testified that it appeared that the adhesive used to secure the baseboard had discolored. He added that he had "no problem" with replacing it.

[4] The Agency submitted air test result from air samples taken by a private contractor on September 23, 2014, which showed no significant elevation in aerosolized mold spores inside the ninth floor as compared to the outside air, according to the Agency's own expert. That expert did not conduct the test and, for that reason, I accepted the report and his testimony only for the limited purpose of assessing the reasonableness of the Agency's response, and not for the truth of the matters asserted.

of Article 27 of the Agreement relative to the conditions on the ninth floor, notably the mold, which resulted in staff becoming ill – AW Barbee testified that he and AW Thompson were, at the time, splitting time as acting warden, in place of Warden Kuta, who was on leave. On October 1, 2014, Reese filed the formal grievance with the Regional Director, Paul Laird. On October 31, 2014, the Agency responded, in a letter sent by the Regional Human Resources Administrator, Kelli Harpe, rejecting the grievance for what Harpe termed, "lack of specificity." Harpe did not suggest in her letter that the grievance was improperly filed with the Regional Director. On October 27, 2014, the Union gave notice of its intent to invoke arbitration in this matter. The evidence reveals no further responses from the Agency, and AW Barbee did not address the issue of the Agency's response to the grievance during his testimony.

RELEVANT CONTRACT PROVISIONS

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and
2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of

the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish the employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.
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Section e. Unsafe and unhealthful conditions reported to the Employer by the Union or employees will be promptly investigated. Any findings from said investigations relating to safety and health conditions will be provided to the Union, in writing, upon request. No employee will be subject to restraint, interference, coercion, discrimination, or reprisal for making a report and/or complaint to any outside health/safety organization and/or the Agency.

ARTICLE 31 – GRIEVANCE PROCEDURE
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Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility , if the grievance pertains to the action of a n individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;
2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director.

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ISSUES

The following issues are before me:

1. Is the Union procedurally barred from arbitrating the grievance?

2. If not, did the Agency violate Article 27 of the Master Agreement by its actions, or inactions, relative to the conditions on the ninth floor of the MCC in August and September 2014?

3. If so, what is the appropriate remedy?

THE POSITIONS OF THE PARTIES

The Position of the Union:

The Union first suggested, at the hearing, that the Agency's procedural objection was waived because it was not raised prior to the hearing. In its post-hearing brief, the Union adds that the Agency failed to support its objection with evidence. The Union points out that the Federal Labor relations Authority ("FLRA") has instructed arbitrators that they should resolve disputes between the parties on the merits and "rule that a certain matter is not arbitrable only if the agreement between the parties specifically" excludes it from arbitration. See, Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center and AFGE, Local 2206, No. 82K01987, LAIRS 13996 (1982); Wisconsin Army National Guard and Association of Civilian Technicians, No. 82K03336, LAIRS 14067 (1982).

Historically, Arbitrators who have interpreted Article 31, Section f, of this Agreement have recognized that it lacks clear definition, which renders efforts in distinguishing subparagraphs f(1) and f(2) difficult. They have recognized that the Section does not clearly define the appropriate level of management at which to file grievances, in any particular case. Past arbitrators have determined, therefore, to leave the matter determining the appropriate level for filing to the discretion of the union. Here, the Union elected to file at the Regional Director level because the grievance was essentially against the institution, or the warden. The essence of the Union's claim, a failure of the institution to remedy the conditions on the ninth floor, was chargeable to the two assistant wardens who were then acting in the warden's stead. It was appropriate then for the Union to file the grievance at the next level, the Regional Director.

As to the merits of the grievance itself, the Union points out that Article 27 of the Master Agreement expressly charges the Agency with a responsibility to "furnish the employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm . . ." Similar provisions have been held to require federal employers to prevent and/or abate mold. See, U.S. Dep't of Transportation FAA and NATCA, 64 FLRA no. 51 (Dec. 24, 2009). The evidence establishes, beyond dispute, that "moldy, filthy, unsafe, and deteriorated conditions existed" on the ninth floor of

this facility, at least as of late August 2014. The conditions, as such, are alone enough to establish the Agency's violation of the Agreement.

The Union's request for reinstatement to employees of their used leave time is not unprecedented, the Union suggests. In fact, the FLRA, in IRS Philadelphia and NTEU 71, 41 FLRA No. 67 (July 19, 1991), upheld Arbitrator Kinard Lang's award, in which, having found that employees had been exposed to toxic fumes, he ordered the employer to treat any leave that employees took as a result of the exposure as administrative leave. The FLRA, moreover, clearly held that such an award was permitted under the Back Pay Act, expressly finding:

> "Moreover, the Arbitrator in this case found a direct connection between the use of leave and the basis for a contract violation. Therefore, consistent with our decision in IRS, Wichita, we also conclude that the Arbitrator made the requisite findings under the Back Pay Act for an award ordering that employees' leave be treated as administrative leave."

The Union contends that an award directing the Agency to treat leave taken by employees as a result of the conditions on the ninth floor in this case, particularly in pay periods 17 and 18, is warranted.

The Union cites 5 U.S.C 5545 (d) and 5548 (b) as the statutory basis on which I might order some form relief relating to hazard pay, either directly awarding hazard pay to the affected employees or directing the Agency to apply for it. Under implementing regulations, found in 5 CFR §550.901 through 907, employees are entitled to hazard pay under the following circumstance:

> Exposure to Hazardous Agents, work with or in close proximity to: section (5) *Virulent biologicals*. Materials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection. . . .

In FAA and NATCA, supra., the FLRA upheld Arbitrator Daniel Winograd's award of hazard pay to employee exposed to mold in their work area, where such award was based on Arbitrator Winograd's finding that the employer failed to meet its contractual "obligation to abate mold contamination." The circumstances and the contractual mandates of this case are very similar to those found by Arbitrator Winograd.

The FLRA's own discussions of hazard pay are instructive, the Union suggests. In *US Dep't of VA San Diego and NAGE/SEIU,* 65 FLRA No. 13 (August 31, 2010), the FLRA held:

> Pursuant to 5 U.S.C. § 5545(d), a GS employee is entitled to a hazardous duty differential for any period in which "he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position." In *Adair v. United States*, the U.S. Court of Appeals for the Federal Circuit defined the term "usually involved in carrying out the duties of his position" as "inherent in a position, which regularly recurs, and which is performed for a substantial part of the working time." 497 F.3d 1244, 1253 (Fed. Cir. 2007).

The jobs of the bargaining unit employees affected by mold contamination in this case include education and recreation specialists, and religious services. These are not jobs that typically involve exposure to chemical or microbiological hazards. The employees should receive hazard pay, and I should direct the Agency to either pay it, if the Agency has authority to do so, or apply for it.

The Position of the Agency:

The Agency points out that the grievance procedure, specifically Article 31, Section f (1), mandates that a grievance "will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over." Filing with the Regional Director would have been appropriate, under Section f (2), only if the Union's grievance was directed "against the Chief Executive Officer of the institution/facility, . . ." Nothing in this grievance directly relates to any action of Warden Kuta. In fact, the Union suggests only that it filed the formal grievance with the Regional Director because it first sought to remedy the matter informally through the assistant wardens acting in Kuta's stead. Such is not a basis for filing the formal grievance at the Regional director level. See federal Bureau of Prisons, FDC Sea Tac and AFGE, Local 1102, FMCS No. 06-57310, slip op. (Hauck, March 1, 2007)(finding that the union's attempts at informal settlement at the warden level of its complaint regarding the actions of an individual subject to the warden's disciplinary authority did not provide a basis for filing the formal grievance with the regional director).

The Agency also challenges my authority to award the relief that the Union seeks in the grievance. The Federal Employee Compensation Act ("FECA") is the sole means by which federal employees, or their surviving family members, may

obtain benefits for an occupational disease or work-related injury, or death. "A federal employee or surviving dependent is not entitled to sue the United States or recover damages for such injury or death under any other law." See, *Injury Compensation for Federal Employees Publication CA-810*, http://www.dol.gov/owcp/dfec/regs/compliance/agencyhb.pdf. The OWCP procedures for filing such claims are, in fact, incorporated into the Master Agreement, in Article 27, Section h. Reese filed her claim under FECA and, the evidence shows, she was assisted in doing so by management, specifically Marsh and the facility's Safety Specialist, Daniel Sharon. The evidence further shows that the OWCP denied her claim, finding that the evidence she provided was not sufficient to show that she suffered a work-related injury, and Reese did not avail herself of her rights to appeal that denial.

The Agency cites a fairly recent decision of Arbitrator Carl F. Jenks, in which he denied the union's request to restore leave benefits for employees who allegedly became ill from exposure to mold in a field office of the Social Security Administration, after the OWCP had denied their claims. See, American Federation of Government Employees, Local 3448 and Social Security Administration, Region V, 114 LRP 52083 (December 5, 2014), wherein Arbitrator Jenks noted:

> "The Office of Worker's Compensation Programs had previously denied several employees' claims to recover used leave because none of the employees provided verifiable evidence showing that they had mold-related medical conditions that were causally linked

> to the field office environment. . . . However, if employees are permitted to ask for reimbursement of personal leave after the fact and without proof of causation, there is no purpose in OWCP reviewing illness claims. The logic of requiring actual proof of illness under Workers' Compensation is a standard that cannot be marginalized now by simply seeking reimbursement under a different part of the National Agreement. It is clear that that Article 34 provides the proper procedure for processing after-the-fact reimbursement for illness claims such as presented in this case." (Accord., Agency Brief, p. 8).

As earlier mentioned, Article 27, Section h, of this Master Agreement provides the only procedure available to these employees for seeking benefits relating to a work-related injury, which proceeds through the OWCP, applying FECA. The Agreement does not provide an independent means by which employees might obtain reimbursement or reinstatement of annual leave or sick leave used "due to work related injury or fear claims."[5]

Moreover, Reese was the only employee who filed a claim for compensation with respect to this case. James, who similarly claimed that she took leave, in pay periods 17 and 18, purportedly as a result of the conditions on the ninth floor, did not file a claim with OWCP. It is also notable that James was not absent for a full day during the two weeks covered by pay period 17, and was absent a full day only once during the two week covered by pay period 18. She did

[5] The Agency also points out that the Federal Labor Relations Authority ("FLRA"), has itself ruled that an arbitrator lacks authority to order reimbursement of medical expenses, as that relief falls under the exclusive purview of FECA. See, U.S. Department of the Treasury, IRS, Philadelphia Service Center, Philadelphia, Pennsylvania and National Treasury Employees Union, Chapter 71, 41 FLRA 710 (July 19, 1991). However, I find that the Union has not specifically asked for such reimbursement and the record contains no evidence establishing damages in that regard.

not file a compensation claim with OWCP, and did not seek medical treatment. Her actions suggest that she did not in fact fear the conditions on the ninth floor during the period at issue here, and that her absences were not related to those conditions.

The Agency denies that it violated Article 27 in any way. It acted promptly and effectively, and in accordance with CDC guidelines, to remediate hazardous conditions on the ninth floor once they were discovered. All employees were properly cared for, either by relocation or by provision of appropriate protective gear, the latter being supplied to employees who assisted in the remediation. The Union has not shown that any employees were actually exposed to any hazard. Therefore, the Agency submits that the grievance should be denied.

DISCUSSION

I first address the Agency's procedural objection, which I find was not timely raised. The majority opinion among arbitrators is that a procedural objection must be raised in a timely fashion, before the arbitration hearing in any case, or it is waived. See, Crestline Exempted Village School, 111 LA 114 (Goldberg, 1998)(discussing the "arbitration principle" that timeliness objections must be raised early in the grievance procedure or are considered waived). I agree with the principle, as I believe that it best serves the interests parties themselves, at least in the long term, in promoting an orderly grievance and arbitration process. Here, the Agency's objection was not raised in the Agency's response to the

grievance, and no evidence was submitted suggesting that it was raised in any subsequent correspondence or conversations between the parties' representatives. In fact, AW Barbee, who was involved in the grievance process, neither addressed the issue of the Agency's response to the grievance, nor suggested that its objection was raised before the day of the present hearing. The record here strongly supports the Union's contention that the objection was not raised until the hearing in this matter. The Agency has not suggested any reason why it waited so long to raise its objection, or any basis for finding that the objection should not now be deemed waived. I will therefore overrule the objection, as I find that it is waived, without reaching the parties' other arguments regarding the merits of it.

Turning to the merits of the grievance, I have reviewed the record evidence and the arguments of the parties, and I am persuaded that the Agency failed to meet its obligations under Article 27 of the Master Agreement. I initially stress that I have not found that the employees were actually exposed to "aerosolized mold spores," a term used by the Agency's expert, which I take to mean airborne mold. However, reading Article 27, as a whole, I see that the Agency is obligated to "furnish the employees places and conditions of employment that are free from recognized hazards. . .," and to promptly investigate reports of conditions that are "[u]nsafe and unhealthful", making its findings available to the Union. I am persuaded that the Agency's obligations under these provisions are not limited to reacting to a recognized hazard, i.e. mold, after its presence is established, but also

require the Agency to take action when conditions suggest that unsafe conditions are likely present, or are imminent.

Allowing moisture to remain in an enclosed workplace is fundamentally at odds with the requirement of an employer to provide a workplace that is safe, in particular one that is free of mold, I suggest. OSHA, in fact, advises, in its publications, that:

> Moisture control is the key to mold control. When water leaks or spills occur indoors - act promptly. Any initial water infiltration should be stopped and cleaned promptly. A prompt response (within 24-48 hours) and thorough clean- up, drying, and/or removal of water-damaged materials will prevent or limit mold growth.[6]

There is no dispute here that the problem of water dripping from the ceiling on the ninth floor has been a long-term problem at the facility, one that became fairly constant during the month of August 2014, and that the effects of the problem became unbearable as of August 25, 2014. Precisely when the Agency was required to remediate the underlying problem, the equipment failures occurring on the tenth floor, I cannot say. I find simply that management was required to promptly act on the reports it received of the conditions on the floor, really starting with Marsh's email to Flisk of August 19, 2014, by at minimum investigating the problem and informing the employees of what management found vis-à-vis any risks to their health. The bottom line is that management, having been advised of an unbearable odor on the ninth floor; along with saturated carpeting, tiles falling

[6] See, OSHA, Safety and Health Information Bulletins, A Brief Guide to Mold in the Workplace, found at https://www.osha.gov/dts/shib/shib101003.html.

from the ceiling, and paint peeling; and claims that mold appeared to be present, appears to have waited four days before doing anything. That is, management waited until August 29, 2014, to move the employees and begin its remediation work. Management's apparent indifference to the conditions in which the employees were forced to work cannot, in my opinion, be squared with the Agency's obligations under Article 27, I conclude.

On the issue of remedy for the violation, I find instructive the reasoning of Arbitrator Lang, as reported and approved by the FLRA in IRS Philadelphia and NTEU 71, supra., in finding that employees who took leave rather than report to to their workplace solely because they feared it was an unsafe workplace, following exposure of others to toxic fumes, were entitled to have their leave time treated as administrative leave. Arbitrator Lang reasoned that the employer in that case was obligated to fully inform the employees regarding the conditions at the worksite, in order that they might make informed decisions as to their health, and, he found, the employer failed meet that obligation. The fact that not all of the employees sought medical treatment was not dispositive, he added. The circumstances were such that no reasonable person could conclude that the employees "were seeking to 'play hooky' and get paid for it." IRS Philadelphia and NTEU 71, supra., at p. 3. The FLRA reported Arbitrator Lang's conclusion as, "[T]he varying reactions that people had to the fumes were significant 'as positive proof of the importance

of clear and open communications regarding the existence of hazardous chemicals in the work place.'" (Id).

Under the circumstances revealed in this record I credit both Reese and James as to their testimony that each felt sickened by the conditions on the ninth floor during the week of August 25, 2014, and that each took leave for that reason – I find no evidence to suggest that either was merely playing hooky, in other words. Indeed, Marsh reported that employees were developing headaches as early as August 19, 2014, several days before things really deteriorated. Under the circumstances, I believe that actual proof that mold was present or that it caused the ill feeling that the employees experienced is not necessary. Stated another way, I believe that the employees' fear that they were being harmed by the conditions, coupled with the Agency's inaction vis-a-vis dealing with those conditions, are a sufficient basis for me to order that the Agency treat any leave time taken by Reese and James during the week of August 25, 2014 as administrative leave, and to return the used leave to their respective leave banks. [7]

I note that the FLRA, in IRS Wichita and NTEU 71, 40 FLRA No. 56 (May 1, 1991), specifically, and at length, discussed and rejected the argument, asserted by the Agency here, that the remedy of ordering a federal agency to restore sick or annual leave to the employees, and to treat the leave taken as administrative leave,

[7] I do not extend this order to any other employees because the Union did not submit any evidence showing that other employees took leave as a result of the conditions on the ninth floor and did not request a bifurcation of the proceedings.

is outside the authority of an arbitrator. I also suggest that while the reasoning of Arbitrator Jenks, in American Federation of Government Employees, Local 3448 and Social Security Administration, Region V, supra., as quoted by the Agency, may be sound as a general rule, I do not accept the notion that employees should be left to apply for relief through general procedures for obtaining compensation for work-related or occupational injuries as their sole recourse in all circumstances, and especially not in circumstances such as those shown in this record. Reese and James, among others perhaps, were face with an immediate threat to their health, which the Agency had allowed to fester. I believe that the approach taken by Arbitrator Lang is the more fitting approach for this case.

I will deny the remainder of the Union's requests for relief, I add. I believe that the absence of proof that elevated levels of aerosolized mole spores were ever present on the floor distinguishes this case from those cases in which the arbitrator has ordered the employer to seek hazard pay, to begin, and also prevents me from ordering the Agency to reinstate the sick and annual leave that Reese and James took after they were moved from the floor, which I find to have occurred on August 29, 2014. The rationale for awarding the employees administrative leave changes substantially once the hazardous conditions were remediated, or the employees were removed from them. I find that the reasoning of Arbitrator Jenks applies with greater force when the question turns to the leave taken by Reese and James, not to escape the threat present on the ninth floor, but because they were in

fact ill. Specifically, because the leave was taken strictly due to illness, which was claimed to be due to exposure to mold on the ninth floor, causation must be shown. Evidence of causation is lacking here, particularly in light of the absence of proof regarding the actual presence of aerosolized mole spores.

A W A R D

The grievance is granted, in part. Based on the foregoing, I order that the Agency treat the sick and annual leave taken by Reese and James, during the period beginning August 25, 2014 through August 28, 2014, as administrative leave, and to restore the corresponding sick and annual leave to the employees' respective leave banks.

s/ Robert Costello

Robert Costello, Arbitrator

Cook County, Illinois – February 8, 2016