

Before Arbitrator Joseph T. Moriarty

In the Matter of Arbitration
Of a Dispute Between

[REDACTED]

GR230501-ELYT
GR221026-NKAS
GR221001-BGWO
GR221003-KOWY
DAF: 2023-1484
DAF: 2022-4158
DAF: 2022-3920
DAF: 2022-3919
Arb Ref: 230426-1C

[REDACTED]

Written Reprimand, 1, 3 and 5-day suspension

and

[REDACTED]

SHERIFF'S OFFICE

Appearances:

[REDACTED]

[REDACTED]

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, [REDACTED] (hereinafter referred to as either "the Union" or "the Labor Council"), [REDACTED] (hereinafter referred to as the "the Sheriff") selected the undersigned as the arbitrator to hear and decide disputes over a series of disciplinary actions issued by the Sheriff to Deputy Sheriff [REDACTED] ("the Grievant"). A hearing was conducted by the arbitrator on May 22, 2023, at which both parties submitted evidence and made oral arguments with respect to the issues presented in the case. The parties stipulated to the Arbitrator's jurisdiction and to the arbitrability of the grievance.

I. Issue

Whether the Sheriff had just cause to issue a written reprimand, followed by 1, 3, and 5-day suspensions to Grievant? If not, what is the appropriate remedy?

II. Relevant Contract Provisions, Department Rules, Regulations, and Policies

A. Contract Provisions

Section 14.8 Discipline:

The Employer shall not take any disciplinary action against an employee without just cause. Employees who are to be or may be disciplined are entitled to Representation consistent with the Bill of Rights. The Union and the Employer agree that discipline should be timely, progressive and accompanied by counseling where appropriate. It is understood that employees are subject to the general orders, rules and regulations of the Employer. Notification to Employees and acknowledgment of disciplinary infractions to Employer shall be delivered electronically.

Upon hire, the Employer shall provide each Deputy Sheriff covered by this Agreement with an up-to-date copy of all general orders. Upon issuance of any newly published General Order(s) or addenda, each Deputy Sheriff covered by this agreement will be tendered a copy of such Order(s) and/or addenda. Each Deputy Sheriff shall sign for his/her copy upon receipt of these general orders and/or addenda. A current copy of all General Orders will be kept by each Assistant Chief in each unit/facility for reference by the Deputies.

Forms of Discipline:

1. Summary Punishment; The employer shall reserve the right to implement summary punishment, reprimand, and suspensions of up to 29 days. Reprimands shall be grievable, up to and including Step 3 of the Grievance Procedure.

Deputies who are disciplined or recommended for discipline trader Summary Punishment may choose to appeal either through the Sheriffs "Summary Punishment Action Request" form (SPAR) or the Grievance Procedure, but not both remedies. If the SPAR form is chosen, the steps of appeal are outlined by the Court Services Department General Order 1375.1 and D.C.S.I. General Order 3.3 ADD VII (whichever is applicable). If the Grievance Procedure is chosen, the steps outlined elsewhere in this Agreement shall be followed. In either case, the Deputy shall check the appropriate box on the SPAR form, indicating which appeal process, if any, he chooses to take.

A SPAR will be disregarded and removed from the employee's personnel file after eighteen (18) months from the occurrence, provided that the employee has received no other SPARs during this eighteen (18) month period of time.

SPAR is 29 days and no time served until grievance and arbitration procedure is exhausted. Includes 90 day expedited arbitration.

2. Suspension of up to and including 29 days: Any suspension imposed by the Employer on an Employee up to and including 29 days, may be appealed at all steps of the grievance procedure or the Sheriff's appeal procedure as outlined in General Order 7000, but not both remedies.

3. Suspensions in excess of 29 days (imposed post-ratification), excluding recommended discipline where demotion(s) and/or termination(s) is sought, shall be subject to Impartial Arbitration and the following procedure:

Excluding recommended discipline that includes demotions and/or terminations that impact merit rank, all other suspensions in excess of 29 days shall be adjudicated by Impartial Arbitration that shall be scheduled within sixty (60) calendar days from the date that the employee is served with the discipline. If the Arbitration is not scheduled within sixty (60) days or does not occur as scheduled the Sheriff may impose the discipline prior to the Arbitration taking place. Suspensions under this Section shall not be subject to Steps 1 through 3 of the grievance procedure of this Agreement. Upon service of discipline to the Employee, the Employer shall also notify the Union of the suspension.

In the event that the matter proceeds to Arbitration, the Employer and the Union shall agree to a list of 7 arbitrators who will as a condition of being on the permanent panel agree to schedule the hearing within 14 calendar days of the notification of selection. As a further condition of being placed on the permanent panel, the arbitrator will agree to issue a decision within ten (10) calendar days of the date of the hearing. The parties may mutually agree to waive post-hearing briefs to expedite the decision by the arbitrator. The decision of the Arbitrator shall be binding.

Expenses for the Arbitrator's services and the expenses which are common to both parties to the arbitration shall be borne equally by the County and the Union. Each party to an arbitration proceeding shall be responsible for compensating its own representatives and witnesses.

The Arbitrator, in his/her opinion, shall not amend, modify, nullify, ignore or add to the provisions of this Agreement. The issue or issue to be decided will be limited to those presented to the Arbitrator, in writing by the Employer and the Union. His/her decision must be based solely on the interpretation of the meaning or application of the express relevant language of the Agreement. In issuing his/her decision, the Arbitrator shall be bound by the precedential rulings of the ██████████ County Sheriff's Merit Board.

All hearings will be held as close to the grievant's work site as practicable. The Employer will upon reasonable notice from the Union, release from duty any employees requested by the Union as representatives or witnesses.

The hearing will be informal. There will be no requirement that a stenographic recording of the proceedings unless otherwise agreed. Excluding recommended discipline that includes

demotion(s), and/or termination(s), suspensions in excess of 29 days shall not be presented to the █████ County Sheriff's Merit Board. The parties agree that the Arbitration forum for suspension arbitrated under this provision shall not be challenged as it relates to the jurisdiction of the █████ County Sheriff's Merit Board. The Union and Employer agree that an Arbitrator's finding that a suspension be imposed, or any other relief so found, shall be served by the employee.

A. Rules and regulations

Procedure 113 - Unauthorized Absence Procedure

113.1 PURPOSE AND SCOPE

This procedure provides guidelines, reporting procedures and disciplinary procedures for employees who incur any unauthorized absence.

113.1.1 ISSUANCE/EFFECTIVE DATE

This procedure was re-issued on Sep. 21, 2018 and shall become effective upon issuance (labor updates).

113.1.2 DEFINITIONS

Unauthorized status - Authorized statuses include but are not limited to a non-absent working status, Sick/Medical Time, Vacation Time, Personal Time, Compensatory Time, Holiday Time, Bereavement Leave (death in family), Educational Leave, Ordinary Disability, Duty Disability (Injured on Duty), Family and Medical Leave of Absence (FMLA), Maternity/Paternity Leave, Military Leave, Leave of Absence and Compassionate Leave.

Attendance Review Unit - A centralized unit that processes and tracks all pre-discipline and discipline actions for attendance infractions incurred by Sheriff's Office employees.

Occurrence - For purposes of determining progressive discipline, an occurrence as used in this procedure is either:

- (a) An unauthorized absence that lasts from one hour to one work day and where the employee returns to work the next working day; or
- (b) An unauthorized absence that lasts between two and five consecutive work days. For example:
 1. If a member has one unauthorized absence day and returns to work the next work day, that will be considered one occurrence.
 2. If a member has five consecutive unauthorized absences in a row, that will be considered one occurrence.

3. If a member has 13 consecutive unauthorized absences, that will be considered three occurrences.

Rolling 365-day period - The period of time in which unauthorized absence hours are tallied for purposes of determining whether a member violates a rule that prohibits a certain number of unauthorized absence hours within a 365-day period, as follows:

- (a) The rolling period begins on the first day a member incurs their first unauthorized absence.
- (b) Unauthorized absence hours will roll off a member's count on the one-year anniversary date of that particular unauthorized absence. For example:
 1. If 80 hours of unauthorized absences is the maximum number of unauthorized absence hours a member can have within a 365-day rolling period before termination, then a member who has a full day (eight hours for most members) of an unauthorized absence on March 15, 2012 will not have those eight hours roll off their unauthorized absence count until March 15, 2013; and
 2. If the member has nine more unauthorized absences between March 15, 2012 and March 15, 2013, then the member will be recommended to the Merit Board for termination.
- (c) Leaves of absence and all attendance-related suspensions stop the running of the 365-day period. For example, upon a member's return to the workplace from a leave of absence status or from an attendance-related suspension, the 365-day period will be re-instated, along with the total number of days the member was on leave or while serving an attendance-related suspension added to the end date of the 365-day period.

Unauthorized absence - Where an employee is absent from work but does not have the requested benefit time available for the absence or is not in an Authorized Status that excuses the absence(s), Unauthorized Absences generally fall into two categories:

- (a) Intermittent Unauthorized Absences - Less than five consecutive days (40 hours) of Unauthorized Absences.
- (b) Single Block/Long Term Unauthorized Absences- Five or more consecutive days (40 hours) of Unauthorized Absences.

Unauthorized Absence Payroll Codes - The various codes marked on the attendance record for a specific date that indicate a type of Unauthorized Absence. These include:

- (a) No Sick Time (NST/o): When an employee is docked pay due to calling in Sick/Medical time when none is available.
- (b) Absent Late Call (ALC/o): When an employee is docked pay due to calling in absent less than one hour prior to the start of duty/shift, unless the employee's respective department head or the applicable bargaining agreement provides for a different period of time.

- (c) Absent Late Call/FMLA (ALC/FMLA): When an employee calls in an FMLA absence less than three hours prior to the start of his/her duty/shift, unless the employee's respective department head or the applicable collective bargaining agreement provides for a different period of time.
- (d) Absent No Call (ANC/o): When an employee is docked pay due to failure to call in.
- (e) No Vacation Time (NVT/o): When an employee is docked pay due to attempting to utilize Vacation time when none is available.
- (f) No Personal Time (NPT/o): When an employee is docked pay due to attempting to utilize Personal time when none is available.
- (g) No Compensatory Time (NCET/o): When an employee is docked pay due to attempting to utilize Compensatory time when none is available.
- (h) No Holiday Time (H/o): When an employee is docked pay due to ineligibility to receive Holiday pay per respective collective bargaining agreements or County rules.
- (i) Unauthorized FMLA (o/FMLA Unauthorized): When an employee:
 - 1. Exceeds their certified FMLA time;
 - 2. Uses their FMLA time in a way that is inconsistent with the employee's FMLA certification and later fails to get the FMLA properly recertified; and/or
 - 3. The employee continues to call in FMLA when the employee does not have a current, approved FMLA on file.
- (j) Unauthorized Injured on Duty (IOD/Unauthorized) - When an employee is docked pay due to denial or termination of IOD/Duty Disability claim by Risk Management.
- (k) Tardiness Docked Time (o) -When an employee is docked pay due to arriving 16 minutes after the start of their duty/shift. For the purpose of this policy, an employee shall only incur an unauthorized absence if they are tardy for one hour or more after the start of their duty/shift.

113.2 POLICY

It is the policy of the █████ County Sheriff's Office to prohibit its employees from incurring Unauthorized Absences. Unauthorized Absences exacerbate absenteeism problems and strain Sheriff's Office employees and operations. Employees receive benefit time and have a variety of leave options available to cover the need for short-term and long-term absences. Therefore, even if an employee is legitimately ill or has some other reasonable excuse for being absent, the employee must obtain an appropriate Authorized Status prior to or immediately after the need for the absence.

113.3 PRE-DISCIPLINE PROCEDURES

Intermittent Unauthorized Absences:

- (a) When an employee has an Unauthorized Absence Occurrence, the Attendance Review Unit Supervisor will meet with the employee within 72 hours or three business days, upon their return to the workplace or as soon as practicable. An Unauthorized Absence counseling session will be performed, or when the Unauthorized Absence occurrence subjects the employee to progressive discipline in accordance with the provisions of this procedure, a Disciplinary Action Form will be presented. If applicable, an Unauthorized Absence counseling session constitutes a verbal reprimand.
- (b) During the Unauthorized Absence counseling session, the Attendance Review Unit Supervisor will notify the employee of the Authorized Leave options and provide instructions on how to apply for such options. The Attendance Review Unit Supervisor will also notify the employee of the progressive discipline schedule that will be used for subsequent Unauthorized Absences.
- (c) The Attendance Review Unit Supervisor will document the Unauthorized Absence counseling session by completing and signing the Unauthorized Absence Counseling Form, having the employee sign and date the Unauthorized Counseling Form, and where applicable, having the Union Representative sign and date the Unauthorized Absence Counseling Form.
- (d) A copy of the Unauthorized Absence Counseling Form will be provided to the employee.
- (e) The employee shall refer to the Authorized Absence Contact Information sheet and/or contact the Department of Human Resources for assistance in applying for an Authorized Leave.
- (f) An employee who applies for an Authorized Leave must notify the Attendance Review Unit Supervisor within two business days of the Unauthorized Absence counseling session using the Response to Counseling Session Form. The Response to Counseling Session Form will include the following information:
 - 1. Whether or not the employee will apply for an Authorized Status/Leave;
 - 2. Type of Authorized Status/Leave to be requested;
 - 3. Approximate start date of leave;
 - 4. If the leave is medical-related, the date of physician appointment.
- (g) Upon submitting the required Response to Counseling Session Form, the employee will be permitted 30 days from the date of the Response to Counseling Session Form to successfully apply for or obtain approval for the requested Authorized Leave. The Attendance Review Unit Supervisor shall submit a copy of all forms to the Executive

Director of HR or the authorized designee, and follow up to verify if the employee complied with the form.

- (h) In the event that the employee fails to submit the required Response to Counseling Session to the Attendance Review Unit Supervisor within two business days of the Unauthorized Absence counseling session, the supervisor shall initiate the applicable disciplinary process in accordance with this procedure.
- (i) Failure to successfully apply for or obtain approval for an Authorized Status within the 30-day period will result in appropriate disciplinary action as specified in this procedure for any Unauthorized Absence during the 30-day time period and for any further Unauthorized Absence. The Attendance Review Unit Supervisor shall initiate the applicable disciplinary process according to this procedure.
- (j) At the conclusion of the 30-day period, the Attendance Review Unit Supervisor shall verify with HR that the employee has successfully applied for or obtained approval for the Authorized Status.

Single Block/Long Term Unauthorized Status:

- (a) If the employee is coded in an Unauthorized Absence Payroll Code status code for five or more consecutive days, the Executive Director of HR or the authorized designee shall send a letter to the employee via certified mail and first class mail notifying the employee of their unauthorized status and providing specific information and instructions for obtaining an Authorized Status. The letter shall include a two-week deadline to report to the █████ County Medical Unit and to HR.
- (b) Copies of the letter shall be distributed to the Attendance Review Unit Supervisor (if applicable), the Personnel Manager, the █████ County Medical Unit Supervisor and OPR.
- (c) If after the two-week deadline the employee fails to report and HR cannot confirm if the letter was received, a second and final notice shall be sent to the employee with another two-week deadline. If the employee fails to report after the final notice, the Executive Director of HR or the authorized designee will forward a Complaint Register to the OPR. The Executive Director of HR or the authorized designee will notify the Attendance Review Unit if a Complaint Register is submitted to OPR.
- (d) It is the employee's responsibility to ensure that their respective Personnel Department has an updated address and phone number. If the employee does not receive either the first class mail letter and/or certified letter due to an incorrect address on file, the employee will be subject to discipline up to and including termination. The Executive Director of HR or the authorized designee will submit a Complaint Register to OPR and make notification to the Attendance Review Unit.
- (e) If within 30 days of consecutive Unauthorized Absences the employee returns to work through the medical process, the Attendance Review Unit Supervisor shall initiate the appropriate procedures.

- (f) Failure of the employee to either return to work, apply for an Authorized Status, or obtain an approved Authorized Status during the 30 consecutive Unauthorized Unpaid Status days will result in the appropriate disciplinary action, as specified in this procedure.

113.4 DISCIPLINARY PROCEDURES

Disciplinary procedure for an employee without a Rolling Calendar clause in an applicable collective bargaining agreement will be progressive and in accordance with the applicable collective bargaining agreement.

Disciplinary procedure for non-union employees will be progressive.

The following disciplinary process shall apply only to employees who incur any Unauthorized Absence and have a collective bargaining agreement Rolling Calendar clause:

- (a) Rolling 365-day calendar:
 - 1. Any employee under a collective bargaining agreement with a Rolling Calendar clause who incurs 10 days (or 80 hours) of Unauthorized Absences, not to be confused with Occurrences, in a rolling 365-day period will be recommended to the Merit Board for termination.
 - 2. The Attendance Review Unit will obtain data from HR and provide written quarterly reports to all employees under their chain of command in the collective bargaining unit who have incurred an Unauthorized Absence during the past quarter, advising them of their available benefit time and their total number of Unauthorized Absences during the last 365-day period.
- (b) For Unauthorized Absence activity that occurs prior to 10 days or 80 hours of Unauthorized Absence in a rolling 365-day period, supervisors shall use progressive discipline, which could include termination. For the first Occurrence of an Unauthorized Absence, the Attendance Review Unit Supervisor shall counsel the employee on available leave options, the requirements of this procedure, and the progressive discipline schedule outlined in this procedure. For subsequent Occurrences of Unauthorized Absences, assuming there are not 10 days or 80 hours of Unauthorized Absences within a 365-day period, the following schedule shall be followed:
 - 1. Step One: Second Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a Written Reprimand on a Disciplinary Action Form.
 - 2. Step Two: Third Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a one-day suspension on a Disciplinary Action Form.
 - 3. Step Three: Fourth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a two-day suspension on a Disciplinary Action Form.
 - 4. Step Four: Fifth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a three-day suspension on a Disciplinary Action Form.

5. Step Five: Sixth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a four-day suspension on a Disciplinary Action Form.
6. Step Six: Seventh Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a five-day suspension on a Disciplinary Action Form.
7. Step Seven: Eighth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a seven-day suspension.
8. Step Eight: Ninth Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 10-day suspension.
9. Step Nine: 10th Occurrence of an Unauthorized Absence: the Attendance Review Unit shall issue a 15-day suspension.
10. Step 10: 11th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 21-day suspension.
11. Step 11: 12th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 29-day suspension.
12. Step 12: 13th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall submit a complaint register to the Office of Professional Review seeking termination.

(c) Mitigation:

1. An employee on Step Two of this schedule must work 12 consecutive months without incurring another Unauthorized Absence in order to go up to Step One.
2. An employee on Steps 3 through 11 must work 18 consecutive months without incurring an Unauthorized Absence in order to move up to Step One.
3. An employee will only be issued an Unauthorized Absence Counseling Form once for Unauthorized Absences, and the Unauthorized Absence Counseling Form and any Employee Disciplinary Action Form will remain in the employee's Disciplinary file.
4. Notes from doctors shall not be accepted to support mitigation for those who have exhausted medical time and incurred any Unauthorized Absence

- (d) All unauthorized absence occurrences count against an employee's Rolling Calendar, but only those unauthorized absence occurrences that happen after the first unauthorized absence occurrence within an employee's open Rolling Calendar will be subject to the progressive discipline schedule outlined in this procedure, unless an employee has previously received a counseling for unauthorized absences, or has 10 or more consecutive unauthorized absence occurrences, which will result in the employee being sent to the Merit Board for termination action. This rule applies even in those instances when an employee has not been counseled for their first unauthorized absence occurrence, except where the delay in giving the counseling was unreasonable and unjustified.

OPR Complaint Registers: An OPR Complaint Register shall only be submitted once regarding an employee's attendance violation. Any additional attendance violations

must be submitted to OPR in the form of a memorandum referencing the original OPR Complaint Register and including any supporting documentation.

Pending Grievances: The Attendance Review Unit shall continue the applicable progressive discipline pursuant to this procedure regardless of any pending grievances.

III. Background

Prior to October 2022, Grievant had been compliant with the attendance policies and procedures contained in Procedure 113 for 10 years. Her last issue with attendance occurred on August 16 and 17 2012, for which the Sheriff gave her a counseling session. (Er. Exh. 6, 7, 8 and 9)

On September 13, 2022, Grievant was scheduled to return to work after a year on a leave of absence necessitated by an injury on duty. Grievant felt that she was rushed back to work and was not well enough to return. Moreover, she was suffering from the flu.

At her return, Grievant had a sick leave bank of 0.88 hours according to the Sheriff's records. (Er. Exh. 6) On September 13, 2022, the Sheriff restored 18.50 sick time hours to her bank, apparently from the time prior to her leave of absence. (*Id.*) That gave Grievant a total of 19.38 hours of sick leave time in her bank on September 13, 2022. She also had a personal time bank and a comp time bank with hours in them. (*Id.*)

Grievant called in sick on September 13 and 14, 2022 because she was suffering from the flu and used 8 hours each of those days in sick leave time, which left her with a bank of 3.38 hours on the morning of September 15, 2022. On September 15, 2022, still suffering from the flu, Grievant called into the Sheriff's timekeeping system, to record a sick day. With only 3.38 hours in her bank, Grievant did not qualify for a sick leave day and, consequently, was in violation of Procedure 113, Section 113.1.2 (See, Er. Exh. 1; 8). The following day, September 16, 2022, Grievant called into the system again to record a sick day with the same result. (Er. Exh. 9)

As a consequence of her September 15th and 16th absences, the Sheriff issued Grievant a disciplinary action form (DAF) 2022-3919 on October 3, 2022, which memorialized a written reprimand for violations of Procedure 113. (Jt. Exh. 2C1) The Union grieved that discipline in GR221003-KOWY on October 4, 2022. (Jt. Exh. 2C2). It appears that during the steps of the

grievance process, Grievant raised issues about whether her sick back had been fully restored.¹ In its Step 3 response to the grievance made on November 21, 2022, the Sheriff pointed out that Grievant had had 18.50 sick leave hours restored to her bank on September 13, 2022. (*Id.*)

On September 25, 2022, Grievant had 7.08 hours of sick leave in her bank. She called in sick on September 25, 26, and 27, 2022 reportedly due to physical therapy appointments. (Er. Exh. 7) Those absences could only be authorized if Grievant had a sick leave bank with at least eight hours for each of those days. She didn't and under the terms of Procedure 113, those absences were unauthorized. As in the earlier case, the Sheriff initiated the disciplinary process and issued Grievant a one-day suspension on October 3, 2022, for violating Procedure 113.1.2, which is memorialized in DAF 2022-3920. (Jt. Exh. 2C3). The Union filed grievance GR10003-BGWO on October 3, 2022 on her behalf. (Jt. Exh. 2C4). The Sheriff's Step 3 response came on the same day, November 21, 2022, as its response to Gr10003-KOWY.

On October 19, 2022, Grievant had an accumulated sick leave bank of 6.48 hours. She called in sick again due to a physical therapy appointment. She was ineligible for sick leave because she did not have a full eight hours of sick leave and under the terms of Procedure 113, that absence was unauthorized. (Er. Exh. 8) As a consequence, the Sheriff suspended Grievant for three days, which is memorialized in DAF 2022-4158. (Exh. 2C5) The Union grieved that discipline in grievance GR221026-NKAS. (Jt. Exh. 2C6). The Sheriff's Step 3 response was also made on November 21, 2022. (*Id.*)

On April 23, 2023, Grievant was suffering from food poisoning. She called in sick but only had 6.58 hours in her sick leave bank. (Er. Exh. 9) The Sheriff, therefore, considered her April 23, 2023 absence unauthorized and issued Grievant a 5-day suspension in DAF 2023-1484. (Jt. Exh. 2C7) As before, the Union grieved the discipline on May 1, 2023, in grievance GR230501-ELYT. (Jt. Exh. 2C8). The Sheriff's Step 3 response was made on May 10, 2023.

¹ Grievant continued to raise this issue during the arbitration hearing.

IV. The Arguments of the Parties

A. The Sheriff's Position

The Sheriff contends the evidence is undisputed that the Grievant violated Procedure 113 by trying to call in sick when she had insufficient sick time to be eligible for sick leave. None of the Grievant's absences were authorized and discipline was appropriate. The Sheriff notes that it followed progressive discipline and grouped pay period absences together rather than disciplining Grievant for each absence. It further argues that with each discipline Grievant could have conformed her conduct to the requirements of Procedure 113 but persistently failed to do so. The Sheriff notes that Grievant could have used other forms of paid time off, but kept attempting to use sick time. In response to Grievant's concerns about whether sick time was restored, the Sheriff pointed to the timekeeping records which indicate that sick time was restored on September 13, 2022.

B. The Union's Position

The Union argues that the Sheriff did not have just cause to issue a written reprimand to Grievant for the September 15 and 16 incidents because Grievant was being rushed back to work and was suffering from the flu. It further questions whether sufficient sick time was restored to Grievant's sick bank and whether any of the September or October incidents truly violated Procedure 113 inasmuch as Grievant could have had sufficient sick leave to comply with Procedure 113 if the pre-injury sick leave bank had been properly restored. It asks the arbitrator to sustain each grievant and order the Sheriff to issue lesser or no discipline to Grievant. With respect to the Sheriff's contention that the Grievant could have used other forms of time off, the Union asserts that the use of other forms of paid time off requires greater notice by the employee and, in some cases, supervisory approvals.

V. Discussion²

The Sheriff bears the burden of proving that the Grievant committed misconduct that violated its rules and that the discipline is justified. *See*, Elkouri & Elkouri, “Discharge and Discipline” in How Arbitration Works, 7th Ed. (New York: Bloomberg BNA. 2016), pp. 15-23-24. *See also*, Fairweather’s Practice and Procedure in Labor Arbitration (4th Ed. 1999) at pp. 273-275. The grievances are granted in part and denied in part. The Sheriff shall counsel Grievant for the September absences, issue Grievant written reprimand for the October absences, and issue Grievant a one-day suspension for the April absence.

A. Discipline for the September 15th and 16th and September 25, 26, and 27, 2022 absences was not for just cause; discipline for the October 19, 2022, and April 21, 2023 absences was justified.

Article 14.8 of the collective bargaining agreement (Jt. Exh. 1) requires that discipline be imposed on employees for just cause. Procedure 113 acknowledges that its terms must comport with the just cause requirement. (Er. Exh. 1, Section 113.4) Contractual just cause provisions manifest a bargain whereby the employer and employees’ representative acknowledge that discipline is an important management right that must be exercised fairly by meeting at least minimal due process requirements and by giving due consideration to the context in which an employee has violated policy or otherwise engaged in misconduct. *See*, Abrams, R. I. “*Toward a Theory of “Just Cause” in Employee Discipline Cases.*” <https://doi.org/1372372>.

Procedure 113 is a form of no-fault attendance policy in which the employee’s individual circumstances are not given consideration. If an employee calls in sick and does not have sufficient sick time, the absence is unauthorized, and discipline is commenced. (Er. Exh. 1) Procedure 113 does have factors that mitigate the level of discipline imposed based on time elapsed since prior discipline but even those factors do not require an individualized assessment of the context in which the disciplinary incident arose. *See*, Employer Exh. 1, at Section 113.4

² The parties stipulated to my jurisdiction to hear the matter and to the arbitrability of the grievance. Additionally, no procedural issues were raised at the hearing. Sheriff’s Procedure 113 specifically defers to the collective bargaining agreement with respect to disciplinary procedures where the collective bargaining agreement does not have a Rolling Calendar clause. The parties have not identified any such clause in the collective bargaining agreement and I have found none. Consequently, I find that the disciplinary steps in Section 113.4 of Procedure 113 are inapplicable here, and the just cause provision in Article 14.8 of the collective bargaining agreement guides my disposition of the grievance.

(c)(1) and (2). No-fault systems like Procedure 113 have much to recommend them - clear notice of employer expectations and consequences of not meeting them, consistent and uniform application, and ease of administration - and they will more often than not comport with just cause requirements, but in some cases, their rote application puts them on a collision course with those requirements. *See*, Hill, Marvin & Sinicropi, Anthony. Management Rights, (Washington, DC: BNA 1986) at pp. 69-70. Elkouri, How Arbitration Works, supra at Section 15.2A(ii). Fairweather’s Practice & Procedure in Arbitrator, 4th Ed, (Washington DC: BNA 1999) at p. 318. I find that this is one such case.

Here, the formal discipline issued to Grievant occurred 10 years after she last had any issue concerning attendance and just as she was returning from a leave of absence. Further, at least the first two incidents occurred while she had legitimate questions about whether her sick leave bank had been restored when she returned from the leave. The timeline of the incidents, discipline, grievances, and grievance responses are important to my thinking in the case, as they indicate when Grievant was actually or reasonably should have been on notice that her conduct was violating Procedure 113. Here’s the timeline:

<u>Dates of Absences</u>	<u>DAF Received Grievant</u>	<u>Grievance filed</u>	<u>Sheriff’s Step 3 Response</u>
9/15/2022 9/16/2022	10/3/2022	10/4/2022	11/21/2022
9/25/2022 9/26/2022 9/27/2022	10/3/2022	10/4/2022	11/21/2022
10/19/2022	10/22/2022	10/28/2022	11/21/2022
4/21/2023	5/1/2023	5/1/2023	5/10/2023

Several factors have led me to conclude the sanction contained in DAFs 2022-3919 and 2022-3920 are unjustified. First, critically in my view, the Sheriff issued them the same day - October 3, 2022 - and that was Grievant’s first notice that her absences on returning from leave were not compliant with Procedure 113. Second, at the time, Grievant had sincere questions about how much sick time she had available given her long leave of absence. The Sheriff did not

answer those questions until November 21, 2022. Third, Grievant had last had an issue complying with Procedure 113, in 2012, fully 10 years prior to these absences. While I generally do not subscribe to the belief that the employer is obligated to repeat pre-disciplinary steps like counseling before proceeding to formal discipline, some circumstances may make that appropriate, especially in circumstances where there may be legitimate questions in the employee's mind about the application of the employer's policies.

In my view, the situation as it existed on October 3, 2022, cried out for a conversation between management and the Grievant about where her paid time off banks stood upon her return from her leave and about her options going forward. The written reprimand and one-day suspension represented in DAF2022-31919 and DAF2022-3919 are a product of a rote application of a policy when contextual issues should have been examined. Those DAFs were unjustly issued.

The same cannot be said for the disciplinary actions issued after October 3, 2022. On October 3, 2022, the Sheriff put Grievant on clear notice that her sick leave bank was insufficient for her to use any sick time. Thereafter, it was incumbent on Grievant to ensure that she had sufficient sick leave before calling off sick. She failed to do that on October 19, 2022, and April 21, 2023, and discipline for those instances was justified though not at the level imposed by the Sheriff given Procedure 113's progressive discipline regime.

B. The Discipline Issued Should be Modified to Comport with the Sheriff's Progressive Discipline Procedures.

As the discipline issued was unjust, the Grievant should be put in a position she would have been in had the Sheriff complied with the just cause provisions of the collective bargaining agreement. That requires modification of the disciplinary decisions made by the Sheriff to make the discipline consistent with the principles of just cause and the Sheriff's progressive discipline regime. The actions should be modified as follows:

<u>DAF</u>	<u>Discipline Issued</u>	<u>Permissible Action</u>
2022-3919	Written Reprimand	Counseling
2022-3920	One Day Suspension	
2022-4158	Three Day Suspension	Written Reprimand
2023-1484	Five Day Suspension	One Day Suspension

AWARD

Based on the foregoing analysis, I make the following award:

1. Grievances GR221003-KOWY and GR221002-BGWO are granted. The Sheriff shall modify DAFs 2022-3919 and 2022-3920 to indicate that Grievant was counseled as part of a pre-disciplinary process for her absences on September 15, 16, 25, 26, and 27, 2022.
2. Grievance GR221026-NKAS is sustained in part and denied in part. The Sheriff had just cause to issue formal discipline to Grievant but the Sheriff shall modify DAF 2022-4158 to reflect that Grievant is being issued a written reprimand for her October 19, 2022 noncompliance with Procedure 113.
3. Grievance GR230501-ELYT is sustained in part and denied in part. The Sheriff had just cause to issue formal discipline to Grievant but the Sheriff shall modify DAF 2023-1484 to reflect that Grievant is being issued a one-day suspension for her April 21, 2023 noncompliance with Procedure 113.
4. The arbitrator reserves jurisdiction for a period of 30 days from the date of issuance of this award to resolve any issues arising out of the award.

Signed and issued this 6th day of June 2023 at Chicago, Illinois:

