NATIONAL VETERANS
AFFAIRS COUNCIL
American Federation of Government Employees
AFFILIATED WITH THE AFL-CIO

MEMORANDUM

DATE: October 1, 2013
TO: AFGE Local Presidents
    NVAC Executive Board
    National Representatives, Safety Representatives
FROM: Alma L. Lee, President
SUBJECT: Packet Checklist

1. Opinion and Award, dated August 29, 2013, submitted by Robert A. Creo, Arbitrator, RE: A dispute involving the disciplinary suspension of an RN.

ALL/Imw
Enclosures (1)
In the Matter of Arbitration between
DEPARTMENT OF VETERANS AFFAIRS
and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145

OPINION AND AWARD

For the Agency: Timothy M. O'Boyle, Esquire
For the Union: M. Jefferson Euchler, Esquire
Grievant: Karen Sanders, RN
FMCS Case Number: 120724-57354-3
Subject: Suspension
Place of Hearing: McGuire Medical Center, Richmond Virginia
Date of Hearing: June 20, 2013
Briefs Filed: July 27, 2013
Date of Award: August 29, 2013
Statement of Award: The Grievance is granted. The disciplinary suspension shall be expunged and the Grievant made whole. The Arbitrator retains jurisdiction.
APPEARANCES

For the Agency
Timothy M. O’Boyle, Esquire
Arie Burks, LMER, Technical Advisor

Also Present
David Budinger, Associate Director
Mark Zunk, Nurse Manager
Robinette Tinsley, Human Resource Assistant
Allen Watson, Program Support Assistant

For the Union
M. Jefferson Euchler, Esquire

Also Present
Karen Sanders, Grievant
Jennifer D. Marshall, Local 2145 President
Kia Postell, Local 2145 Union Representative
Tanner Brantley, Intern

PRELIMINARY STATEMENT

The parties, Department of Veterans Affairs ("Employer" or "Agency") and the American Federation of Government Employees, Local Union 2145 ("Union"), having failed to resolve a dispute involving the disciplinary suspension of Karen Sanders, ("Grievant") proceeded to final and binding arbitration pursuant to the terms of their Collective Bargaining Agreement ("Agreement"). The parties selected Robert A. Creo, Esquire to hear and decide the case from a panel supplied by the Federal Mediation and Conciliation Service at Case No. 130215-53342-3. An oral hearing was held on June 20, 2013 at the offices of the VA McGuire Medical Center, Richmond, Virginia. A transcript of the hearing was made. All witnesses were sworn. All parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. Both parties closed by filing briefs which were received by July 27, 2013 thereby closing the Record. Neither party objected to publication of the Opinion and Award.
BACKGROUND AND SUMMARY OF EVIDENCE

The suspension issued to the Grievant, Karen Sanders, is based upon charges that she improperly accessed confidential timekeeping records while detailed to an administrative position and away from her regular position as a Registered Nurse. The Grievant has been an RN at the agency for six years. She was detailed to work in the Nursing Service administrative office in February 2012 while there was an ongoing investigation concerning issues arising in the Emergency Room. No charges ever resulted from that ER investigation. Mark Zunk was her immediate supervisor. She had never worked in an administrative position prior to this detail. The Grievant was not given a regular set of duties to perform but was given assignments on a daily basis. Because she was on a detail and was not a regular employee she was not given a key to the file cabinets so when she needed access to these records for her assignments she had to ask a co-worker to open the cabinets or wait for her acting supervisor, Mark Zunk to open them.

On October 2, 2012, the Agency proposed Karen Sanders’s five-day suspension based on one charge of “failure to follow leave requesting procedures,” with one specification, and one charge of “unauthorized access of records,” with two specifications. The Charges state in full:

Charge I: Failure to follow leave requesting procedures
Specification: On August 2, 2012, you failed to request or receive advanced permission from your supervisor to be away from your scheduled tour of duty from 8:15 a.m. to 1 p.m. for a period of four (4) hours and forty-five minutes.

Charge II: Unauthorized access of records
Specification I: On April 25, 2012, you entered and went through confidential timekeeping files without prior authorization. You told a co-worker you were working on a project for Nursing Management, when you were not.

Specification II: On May 2, 2012, you were seen pulling folders from the timekeeping file cabinet without prior authorization. You were instructed to put folders back into the cabinet and that a formal written request was necessary to access confidential timekeeping records. When you were later asked by your supervisor about why you needed access to the timekeeping cabinet for the project you were working on, you said it was a private issue.

Grievant Sanders submitted a written reply to her proposed suspension. The response to Charge 2 states in part:

Originally I was detailed to the nursing office in an area of the nursing timekeepers. I noted many file cabinets outside my office that were unlocked and accessed by multiple people. I did not know what these file cabinets contained
until I was given the task by Mr. Mark Zunk to remove the files from those cabinets that contained old nursing timesheets, box these timesheets, and organize and file the more recent timesheets. This task lasted for several days. I frequently arrived to work early, just prior to or after Ms. Sharon Mulcay. Upon arriving early one day I attempted to work at the above task and found the drawers locked. I asked Ms. Sharon Mulcay to unlock the drawers, which she did. A few days later I had a question as to what was on my time for a specific day. I went to the drawers that I had just had open access to find the answer. Mr. Allan Watson came to me and asked me what I was doing. I told him it was personal. He told me I couldn’t look at the files. I said I had just filed these time sheets per the project given to me by Mr. Zunk. He repeated that I no longer had access to the files. I apologized and closed the drawers. Later that day Mr. Zunk came to question me regarding the incident. I repeated the apology stating that since he had given me the task of filing the same thing I was looking at, I didn’t realize it would be an issue. He left without comment. Repeated requests to Mr. Zunk and the timekeepers for information regarding this incident have been ignored (see attachments 8, emails 12, 16 October).

The fax number Mr. Zunk references is to my Union representative, Ms. Marshall. As this event is over 6 months old, I can’t tell you exactly what I was faxing as we were working on grievances and State Nursing Board issues. Perhaps had I been asked 6 months ago I could have answered specifically. I do know it was not nursing unit timesheets as they would not have been relevant to Ms. Marshall.

This was dated 17 October 2012 and addressed to David Budinger.

On December 3, 2012, David P. Budinger, Interim Director, Richmond VAMC, sustained the “unauthorized access of records” charge and specifications, but did not sustain the “failure to follow leave requesting procedures” charge. Mr. Budinger decided to suspend Ms. Sanders for three days based on the sustained “unauthorized access” charge and specifications. The Union filed a Third Step Grievance on January 2, 2013 challenging Grievant Sanders’s suspension.

The Union contends that the suspension action is untimely. In its filing of the Third Step Grievance, the Union contends that the Agency deviated from established procedures for processing nursing staff proposed suspensions, stating in part:

The Notice of Proposed Suspension dated October 2, 2012 for Charge II specifically concerns a date of proposed misconduct concerning two (2) incidents that allegedly occurred on April 25, 2012 (SIX (6) months from Proposed Suspension Notice) and May 2, 2012 (FIVE (5) months from the Proposed Suspension Notice).

It is the Union’s position that management’s notice of proposed suspension for Charge II consisting of two Specifications is grossly untimely.
If the Agency had issued a timely notice of proposed misconduct the Grievant could have and would have produced all documentation to demonstrate that the charge is false. It is the Union position that the doctrine of laches applies. The suspension must be reversed. The Agency has placed the Grievant at a significant disadvantage in defending herself in that the agency waited 5 or 6 months in issuing the Proposed Suspension Notice. Clearly the two (2) Specifications of Charge II are not complex and should have been processed and should have been processed timely.

The Agency denied the Third Step Grievance by letter dated February 11, 2013 and the Union invoked arbitration.

The Grievant is accused of improperly accessing timekeeping records on two occasions, April 25, 2012, and May 2, 2012. The Grievant has denied acting improperly. For the first date, she was working on assignments given to her by Mr. Zunk. There may have been a concern from co-workers who reported to supervision that the Grievant was faxing some of these confidential documents. Although the Grievant did fax documents to her Union representative from the Agency machine, the Grievant denied faxing any documents involving other employees to anyone. The Agency introduced documents which showed faxes to the home fax number of the Union President with the date and time. These were as follows:

<table>
<thead>
<tr>
<th>ST. TIME</th>
<th>DESTINATION NO.</th>
<th>MODE</th>
<th>PGS.</th>
<th>RESULT</th>
</tr>
</thead>
<tbody>
<tr>
<td>04/25 13:20</td>
<td>9xxxxxxx</td>
<td>0110 TRANSMIT ECM</td>
<td>2</td>
<td>OK 00'24</td>
</tr>
<tr>
<td>04/25 15:13</td>
<td>9xxxxxxx</td>
<td>0112 TRANSMIT ECM</td>
<td>1</td>
<td>OK 00'16</td>
</tr>
<tr>
<td>04/25 15:16</td>
<td>9xxxxxxx</td>
<td>0111 TRANSMIT ECM</td>
<td>1</td>
<td>OK 00'16</td>
</tr>
</tbody>
</table>

Documents were introduced into evidence by Local President Marshall that show a receipt as “04/25/2012 15:13 FAX” of a one page document authorizing Deneen Harris and Jennifer Marshall to speak on the Grievant’s behalf to the Board of Nursing. There is a two page document showing “04/25/2012 14:22 FAX” that is a nursing note from January 24, 2012. There is another document showing “04/26/2012 07:32 FAX 001/001” authorizing Congressman Eric Cantor to act on the Grievant’s behalf signed and dated by the Grievant on 4/26/12. There is a 5 page document regarding the Commonwealth of Virginia Complaint Form showing “04/25/2012 11:09 FAX 001/005.” The Union contends that these faxes sent from the Grievant concerned her own ongoing issues and not any timekeeping or records of other employees.
Summary of Testimony of Mark Zunk

Mark Zunk is the Associate Chief Nurse at the Richmond VAMC and has served in that position for a year and a half. He has had several positions during his 15 years of federal service. He supervised Karen Sanders for approximately three months while she was detailed to his office pending the results of a board of investigation. While detailed to Mr. Zunk’s office, Ms. Sanders performed a variety of administrative tasks. Grievant Sanders spent the majority of her time on chart reviews, which involves reviewing patients’ medical records. Mr. Zunk would give Ms. Sanders her assignments on a day-to-day basis. Early in her detail, Mr. Zunk gave her an assignment that involved moving around files related to timekeeping in the Nursing Service. The project “was just movement of files from a file cabinet to boxes” and did not require her to read any of the files. Based on the assignments given to her, Witness Zunk testified that she had no reason to access and review timekeeping files, other than the movement of old files.

On the morning of April 26, 2012, one of the Nursing Service support staff, Robinette Tinsley, informed Mr. Zunk that Karen Sanders had accessed the master timekeeping files. Ms. Tinsley mentioned this to him because “she was just concerned that...it was confidential documents that she was dealing with and didn’t think she had any business being in those file cabinets.” Mr. Zunk then contacted Sharon Mulcahey, who told Mr. Zunk that the Grievant had contacted Ms. Mulcahey “and asked if she knew where the master time sheets were.” According to Ms. Mulcahey, the Grievant stated “that she was working on a project for Mr. Zunk,” and Ms. Mulcahey unlocked the file cabinet. Mr. Zunk stated that he did not have a project at that time that required the Grievant to access the master time sheet files. He then requested and received a report of contact from Ms. Mulcahey that day detailing what had occurred.

On May 5, 2012 Allan Watson, a support assistant in his office, contacted Mr. Zunk and told him that the Grievant had again accessed the master timekeeping files. According to Mr. Watson, when asked why she accessed the master time keeping files, she stated it was for her own personal research. Mr. Zunk requested, and received, a report of contact from Mr. Watson within “one or two hours” of the incident. He also spoke with Grievant Sanders about the incident and completed his own report of contact. When Mr. Zunk asked Ms. Sanders why she accessed these confidential files, Grievant Sanders said “that she was working on a project, and she thought she had access to her own time card.”
Summary of Testimony of Robinette Tinsley

Robinette Tinsley is a Human Resource Assistant at the Richmond VAMC and was a Program Support Assistant in the Nursing Service. She worked with Karen Sanders in the nursing administrative office during her detail. Ms. Tinsley and Ms. Sanders worked on a project involving boxing up and moving old files. The boxed up records did not include current time keeping records and, to the best of Ms. Tinsley’s knowledge, Ms. Sanders never had any assignments that required her to access current time keeping records. Witness Tinsley testified about some of the aspects of the task of moving and storing the time records. She stated that the records in the cabinet are sorted by month and year and that the Grievant had to remove them, hole punch them, and sort them by the unit before filing them. The Grievant would label when the front pay period began to the date the pay period ended. There had been a back log and the Grievant was assigned to help bring the filing current. Ms. Tinsely testified that employees are not permitted review these master records since they are handwritten and can be altered. If an employee requested review of time keeping records they would be redirected to their own supervisor or online to review their time card electronically.

Sharon Muleahey mentioned to Ms. Tinsley that Ms. Sanders had accessed records in the bottom drawer of a filing cabinet, which contained current time keeping records. Only Ms. Tinsley and the other office staff had a key for that file cabinet and Ms. Sanders did not have a key to access that cabinet. Ms. Tinsley then asked Ms. Muleahey who let Ms. Sanders access those records, and, according to Ms. Mulcahey, Ms. Sanders stated that she needed access to the records because “she was working on a special project for Mark.” Ms. Tinsley then told Ms. Mulcahey that Ms. Sanders was not allowed to be in those files and she reported the incident to Mr. Zunk.

Witness Tinsley testified that she did not see the Grievant fax any documents and that the fax machine is in a separate room with the copier. She is unable to see the fax machine from her desk. Witness Tinsley testified that she did not see the Grievant take a document from the files and go to the area where the fax machine is located. Witness Tinsely testified that she arrives at work between 8:30 and 9:00 a.m. and that she thought that any faxing by the Grievant happened before she arrived to work those days.
Witness Tinsley testified that she was aware that the Grievant had complaints and issues with her own time and pay being incorrect and that she attempted to address it as the person responsible for the time keeping while the Grievant was on her detail.

**Summary of Testimony of David Budginer**

David Budginer is Associate Director of the Richmond VAMC. At the time of the action with Ms. Sanders he was Interim Director. One of Mr. Budginer's roles as Interim Director was involved disciplinary action. Mr. Budginer said he makes sure that the VAMC has clear standards that are understood by all employees. He was the deciding official concerning incidents of misconduct, misbehavior and other actions that might need disciplinary action.

Mr. Budginer stated he had ruled on two charges against Ms. Sanders and presented to him by Rita Duval, Associate Director for Patient Care, who heard the case for him. Ms. Duval recommended a five day suspension for Ms. Sanders but Mr. Budginer reduced it to a three day suspension. He did not sustain the first charge based on Ms. Sanders reply. He felt there was "enough ambiguity and doubt in the instructions" Ms. Sanders had received that he didn't want to sustain the first Charge and found her not guilty of the first charge.

Mr. Budginer did sustain the second Charge about unauthorized access of records because Ms. Sanders "without authorization, was observed in the sensitive personnel-related files, the time keeping files with personally identifiable information and that she didn't have a mission of being in there." He said that she was in those files apparently of her own volition, and removing items were secure files.

**Summary of Testimony of Karen Sanders**

Karen Sanders is a Registered Nurse at the Richmond VAMC where she has been employed for six years. She is currently assigned to Non-VA Care which is the group that coordinates the care for veterans that utilize care outside the VA system. On February 10, 2012 she was detailed to the nursing service under Rita Duval and was supervised by Mark Zunk. Mr. Zunk had assigned her to help the time keepers, Allan Watson and Robinette Tinley, as they were backlogged with reorganizing their files. Some files, which would have been those from 2011, needed to be put in the file cabinets, and the oldest year files need to be removed and put into boxes. This involved reconfiguring files and each had to be looked at and determined which unit
it came from, what the date was, and then putting it into the file it belonged to by date. The
Grievant testified that she was looking at the timekeeping records on one occasion, probably the
date of the second charge, to check her own records due to problems she was having with her
own pay.

Regarding the first incident of access to the time keeping records, she asked Sharon
Mulcahey to unlock the file cabinet so that she could remove “old files, putting them in boxes.”
She testified that these 2011 files were thrown in the drawer along with the new part of 2012 so
she had to organize it. She was given a piece of paper to fill out for each box as to what each box
contained. Grievant Sanders also placed new time keeping records into the file cabinet on this
occasion. Ms. Mulcahey had to unlock the drawers that contained old and new files for her when
she arrived at 7:30 in the morning, previous to the arrival of Mr. Watson and Ms. Tinley. Ms.
Mulcahey did not say anything about when she could or could not access the files, nor did
anyone else.

Witness Sanders that she “went back to the drawer to look up something” that was an issue
with her own paycheck after asking Sharon Mulcahey to open the file for her. She did not
remember the exact day. Ms. Sanders went back to these files for something that was “personal”
to her, specifically, her claim that she was having issues with her paycheck. The nurse manager
was blaming the pay issue on the time keeper not entering the data from those files into VISTA
correctly. The time keeper was stating that it was because it wasn’t on her original time card. The
only way to figure that out was to look at the original which is what the time keepers use to put
the data into VISTA and see if it was there or not.

After accessing these files for the second time, Allan Watson and Mark Zunk told Ms.
Sanders that she should not look at those time records. Mr. Zunk did not suggest Ms. Sanders
write a Report of Contact. No one approached her during that time or before then to ask what she
was accessing or why. No one briefed her about any procedures about accessing records or not
accessing them. After receiving the five-day suspension proposal almost seven months after
speaking to Mr. Zunk, the Grievant submitted written responses to the proposal.

Witness Sanders testified that she did not make specific reference to faxes sent to Jennifer
Marshall in her written response because it wasn’t relevant to the Charge of her accessing time
records. Witness Sanders testified that although she faxed other documents to Jennifer Marshall,
she did not send Ms. Marshall anything related to time records.
**Summary of the Testimony of the Jennifer Marshall**

Jennifer Marshall is employed at the Richmond VAMC as a medical technologist. She is also President of Local 2145 American Federation of Government Employees. Ms. Marshall has represented Karen Sanders in several grievances including this one. She testified that she had received three faxes from Ms. Sanders on April 25, 2012. First, she received a copy of a patient’s, or the patient’s brother’s, complaint that was filed with the nursing board and according to Ms. Marshall it does not show any patient information but it does show who received the patient on January 24, 2012 and that it wasn’t Ms. Sanders. Second, Ms. Marshall said she had received a faxed and signed copy of an e-mail from Karen Sanders where Ms. Sanders had indicated she was authorizing Deneen Harris and Jennifer Marshall to speak with the Board of Nursing on her behalf. And third, there were state licensing board-related documents that outline a complaint against Karen Sanders including a letter dated April 23, 2012 from Kim Lynch Senior Investigator to Ms. Sanders. She received another fax on April 26, 2012 of a copy of a representational release form for Congressman Eric Cantor that Ms. Sanders had signed.

**EXHIBITS**

**Joint Exhibits**

2c. October 17, 2011 Letter.
2d. Attachments to 2C Letter.
3b. February 17, 2013 Letter.

**Employer Exhibits**

Union Exhibits
1. Copy of Fax with Notation 04/25/12 time 14:22, Patient Admission Form.
2. Copy of Fax with Notation 04/25/12 time 15:13, Authorization.
4. Copy of Fax dated 4/26/12, Commonwealth of Virginia.

ISSUE
The parties stipulated to the following issue:

1. Was the suspension of the Grievant, Karen Sanders, for just and sufficient cause?  
   If not, what shall the remedy be?

PROVISIONS OF THE AGREEMENT
Section 1 - General
The Department and the Union recognize that the public interest requires the maintenance of  
high standards of conduct. No bargaining unit employees will be subject to disciplinary action  
except for just and sufficient cause. Disciplinary actions will be taken only for such cause as will  
promote the efficiency of the service. Actions based upon substantively unacceptable  
performance should be taken in accordance with Title 5, Chapter 43 and will be covered in  
Article 27 - Performance Appraisal System.

POSITIONS OF THE PARTIES  
The following is incorporated from the Briefs submitted by the parties with format, style and  
non-substantive or minor edits, and with the omission of emphasis and exhibit citations.

THE EMPLOYER  
The Federal Labor Relations Authority has held that grievances over suspensions present  
arbitrators with two issues: (1) whether disciplinary action was warranted; and (2) if so, whether  
the penalty assessed was reasonable. Dep't of the Army and AFGE, 62 F.L.R.A. 70 (2007).  
Although the Master Agreement does not define the term "just and sufficient cause," a federal  
arbitrator has provided the following definition:

   In cases of discipline under the just cause principle, the employer bears the burden  
of proof to show that the employee committed a form of prohibited conduct that  
warranted corrective action. The employer also bears the burden of proof to show  
that the severity of the penalty taken against the employee was commensurate  
with the seriousness of the employee's misconduct.

Karen Sanders committed the charged misconduct and the imposed three-day suspension was reasonable under the circumstances. The Union failed to prove its laches defense and the Arbitrator should deny its Grievance.

Ms. Sanders’s three-day suspension was for just and sufficient cause. The Agency met its burden of proving that Ms. Sanders committed the charged offense, unauthorized access of records, on two occasions in April and May of 2012, and that her resulting suspension was for just and sufficient cause. Ms. Sanders admits accessing these records, but claims that she was either told to access the records or had the authority to access the records for “personal” reasons. However, the evidence of record does not support Ms. Sanders’s claims.

The first occasion of unauthorized access of records occurred on April 25, 2012, when Ms. Sanders – per the suspension proposal – “entered and went through confidential timekeeping files without prior authorization.” Ms. Sanders admits to accessing the time keeping files on this occasion, but claims that she accessed these files because she was working on a project for her supervisor, Mark Zunk. However, Ms. Sanders provides no evidence to corroborate her claim that she had authorization to access these records. Ms. Sanders had no authority to access these records because they were kept in a locked cabinet and Ms. Sanders did not have the key to unlock this cabinet. To access the records, Ms. Sanders contacted Ms. Mulcahey, who had a key to the cabinet, and claimed that she was working on a project for Mark Zunk. Based on Sanders’s claim, Ms. Mulcahey unlocked the cabinet. However, Mr. Zunk and Ms. Tinsley testified that Ms. Sanders did not have an assignment that involved moving or reviewing the current timekeeping records on the day in question.

The second occasion of unauthorized access of records occurred on or about May 2, 2012, when Ms. Sanders “was seen pulling folders from the timekeeping file cabinet without prior authorization.” As with the first occasion of unauthorized access of records, Ms. Sanders admits that she accessed the timekeeping files on or about the charged date. However, this time she claims that her unauthorized access of these records was somehow authorized because it was for her own “personal” purposes. Ms. Sanders’s knowledge that these records are kept in a locked cabinet, which she did not have a key to access, demonstrates that these are not publicly-available records that an employee would be able to access for “personal” reasons.
Mark Zunk testified that employees have never been allowed to access these records for "personal" reasons, and that an employee can access his or her personal time keeping information through a computer system or by requesting it from the employee's supervisor. Ms. Tinsley testified that employees are not allowed to review these files because "those are our master records, they can't be altered." And, Ms. Tinsley testified that the cabinet contained the time keeping records for other employees and that if an employee did request to see his or her personal records "[w]e would always redirect the employee to contact their supervisor or go to their own menu option to view their time card." Obviously, the master time keeping files are kept in a locked cabinet and access is restricted so that the hundreds of employees of the nursing service—such as Ms. Sanders—cannot access the files whenever they choose.

Karen Sanders attempts to minimize her unauthorized access of these records, either by saying that she did not know that she could not access these records or that she accessed the records for purely "personal" reasons. However, the cabinet does not just contain Ms. Sanders's "personal" time keeping records. Access to the records is limited and they are kept in a locked cabinet because they are the confidential time keeping records of all 900 employees of the Nursing Service, they are handwritten, and they are susceptible to alteration. Ms. Sanders's access of these records was without authority or any credible explanation, and she received an appropriate penalty for her misconduct.

The Union failed to prove its laches claim. Generally, a laches defense involves a situation where there is "[u]nreasonable delay in pursuing a right or claim—almost always an equitable one—in a way that prejudices the party against whom relief is sought." Black's Law Dictionary (9th Ed. 2009). This concept is also termed "sleeping on rights." In this case, the Union failed to show that either the Union or Karen Sanders was prejudiced in presenting its defense to the charged misconduct.

The Union claims that the Medical Center took too long in investigating Ms. Sanders's misconduct, which supposedly prejudiced her ability to respond to the charged misconduct. However, the evidence of record demonstrates that Ms. Sanders had no apparent difficulty in describing exactly what happened in this case. Her testimony at hearing was detailed and specific regarding what had supposedly occurred and why she believed she had the authority to access the time keeping records. At the time of her proposed suspension, Ms. Sanders also provided two detailed and lengthy written responses. The Medical Center also provided Ms. Sanders the
opportunity to respond to her proposed suspension in person to present additional information, which she declined. The Union and Ms. Sanders had an opportunity, in Ms. Sanders’s response to the proposed suspension and at hearing, to present their case. There is no evidence of prejudice to Ms. Sanders in any claimed delay in this matter, and the Union’s laches claim must fail.

Karen Sanders had no authority to access the confidential time keeping records at issue, which were kept in a locked cabinet. The Agency had just and sufficient cause for Karen Sanders’s suspension and the Arbitrator should deny the Grievance.

THE UNION

The suspension was not for cause. The Agency action should be precluded by the Doctrine of Laches. The Agency is also precluded by the equitable defense of laches from deliberately delaying an action to the detriment of the employee. To prevail on this defense, the Grievant must show an unreasonable delay on the part of the agency and that she has been prejudiced by the delay. See Social Security Administration v. Carr, 78 M.S.P.R. 313, 330 (1998); Jones v. Dept. of Justice, 87 M.S.P.R. 91 (2000). As is confirmed in Hoover v. Department of the Navy, 957 F.2d 861(1992) and Niss v. Office of Personnel Management, 974 F.2d 1316 (1992), the purpose of the doctrine of laches is to prevent a party from being denied due process by virtue of his or her case being prejudiced due to the loss of documents, unavailability of witnesses, and loss of witness memories due to the passage of time. This facility had a similar case regarding the Agency’s delay in processing the charges against the grievant. Department of Veterans Affairs Medical Center, Richmond, Virginia and American Federation of Government Employees, Local 2145, FMCS Case No.: 000731-13942-8 (May 18, 2001)(Arb. Strongin).

In the current case, the Agency delayed even bringing the matter to the Grievant’s attention for six months. During that time the Agency had reports of contact prepared by the employees it used as witnesses but never even told the Grievant that there was anything wrong with what she was doing, much less that she was facing discipline.

For the April 25 charge, Mark Zunk testified that he had reports of contact prepared by the co-workers and he prepared one himself because he wanted the facts down while they were still fresh. In spite of this however, he never mentioned to the Grievant that she had done anything wrong on April 25, 2012, even when speaking to her later about the second charge.
As noted in the testimony of the Grievant and Jennifer Marshall, the Union President, the Grievant had numerous issues ongoing on April 25 related to her pay and the ongoing investigation that had resulted in her being detailed. She was unable, when issued the charge in October, to determine exactly what she would have been working on that particular day and thus rebut the accusation she was taking records from the timekeeping files and faxing them. She is similarly handicapped by the time elapsed in that she simply cannot recall with specificity the assignments she was given and when she worked on them in the cabinets.

Similarly, the Grievant could not reference the documents at issue in the May 2 charge because she was not advised this was problematic other than being told not to do it again. She had no reason to prepare for a defense and no way of knowing that the Agency was already compiling documents to eventually suspend her.

There is no excuse for the Agency’s actions here. The Grievant was not questioned or even told she was doing anything wrong. The importance of having a chance to make notes and specifically recall the exact days is obvious and demonstrated beyond all doubt by the actions of Mr. Zunk in being so careful to make sure he was compiling a written record while denying the Grievant opportunity to do the same. A six month delay before taking discipline may not, in itself, be inherently improper. What is improper is to use that delay to disadvantage the Grievant while the Agency prepares its record in secret.

The Grievant is not guilty. The first sustained Charge here is that the Grievant was improperly accessing records on April 25, 2012 and faxing them to a third party – in this instance the Union. The problem is that there is no support for this. First, the Union produced the testimony of Jennifer Marshall that she received no documents from the Grievant that would have related to anything in the timekeeping records. Ms. Marshall was even able to go back and find documents matching most of the times referenced in the fax machine record and show that these related to other unrelated matters. Absent any suggestion anything was going on with the timekeeping records there is no reason to support that the Grievant was accessing the cabinet for anything other than routine work.

Mr. Zunk stated he believed that the Complainant was accessing the cabinet and faxing the documents based on what he was told by Robinette Tinsley. Ms. Tinsley, when pressed, acknowledged she had seen no such thing and neither had anyone else to her knowledge. Ms. Tinsley also corroborated the Grievant’s testimony that the work in cleaning out the files which
had been assigned the Grievant was occurring during that time frame. She also confirmed that there was more involved in the Grievant’s sorting of these files than Mark Zunk testified. Ms. Tinsley also testified her understanding was the faxing of these documents occurred in the morning before Ms. Tinsley arrived to work. This is not reflected in the record for the fax machine however because the ones to the Union were in the afternoon.

In summary, it is clear from the testimony of Ms. Tinsley and the Grievant that the Grievant was working with these files during that time frame due to an ongoing assignment. There is no evidence she had any other reason to access the files on that date and the event triggered excitement because of speculation she was faxing these documents even though there is no evidence for it and the testimony of Ms. Marshall to the contrary.

The second charge concerns the later date when the Grievant looked up her own time records due to ongoing problems with her time and pay. The Grievant testified to having problems with her pay and even Ms. Tinsley recalled this. No one was able to produce any sort of authority, instruction, policy or anything else saying that the Grievant was not allowed to look at her own records. It may be that this is unusual but there is no basis for claiming that any employee can’t look at their own record. No one had given the Grievant – who was inexperienced with procedures for these files being fresh from direct patient care – any instruction not to look at her own records and there is nothing in writing she should have been aware of or looked at first. When she was told not do it again, she stopped. There is no basis for finding that this should result in discipline.

The Grievant was truly placed in a miserable work environment. She was an experienced nurse suddenly being overseen by clerks who plainly were not happy with her presence. To try and formulate an excuse for discipline here is absurd and the Agency action should be reversed. Even if the allegations were true, it makes no sense to suspend the Grievant for minor mistakes in accessing files she accessed on a regular basis in any event as part of her detail.

The Union requests that the Grievance be sustained and the Grievant awarded all back pay and benefits.

**DISCUSSION AND FINDINGS**

The Arbitrator finds that the facts do not support the imposition of any discipline. The Arbitrator finds that the Grievant did not improperly access any confidential time records of any
employees other than herself at any time. The Arbitrator finds that the Grievant did not fax any confidential or private documents to the Union President and that the documents faxed to the Union President were related to her own issues and representation by the Union. The Arbitrator finds that Charge II and its two Specifications have not been proven by the Agency. The Arbitrator finds that there is no factual basis to conclude that the Grievant engaged in any misconduct which warranted discipline. The Arbitrator finds that there was not just and sufficient cause to discipline and suspend the Grievant.

The Arbitrator agrees with the Union that there were not written policies or express and clear instructions regarding limitations on access to files. No one testified that the Grievant received any specific directives on the appropriate access and handling of files. Employee files always contain confidential information and the Grievant worked with some of these files. There was unrebutted testimony from the Grievant that some of the file cabinets were unlocked. While working on projects, the Grievant had full access to the contents of files in order to be able to identify the unit and dates. Grievant, as an employee working in the office on a daily basis, was permitted entry to the file cabinets by asking for the key. Employees opened up the cabinets for her which also makes it reasonable for her to conclude that she was not engaging in misconduct by looking at files which she had already handled at other times. It is reasonable to conclude that if you are working with documents 2 or 3 days in a row, then accessing them is not an offense which subjects you to discipline, especially when another employee has to unlock the cabinet, and has actual knowledge of the Grievant accessing the records. Grievant was a med-surgical floor nurse without experience in an HR office, so it is not appropriate to hold her to an unarticulated standard of confidentiality in the absence of express and unequivocal direction from the experienced supervisors and co-workers.

It is not unreasonable for the Grievant to have concluded that she could review her own employee records. Although the prudent course would be to ask the other employees about being able to look at her own records, the Arbitrator declines to conclude that failure to do is misconduct subjecting the employee to discipline under these circumstances. When she was confronted about the first incident on April 25th, she was not advised, counseled or otherwise informed of the expectations of her role in the office. This is not the case where supervision gave her a directive which she willingly disobeyed. It appears that her faxing of documents were inappropriately linked to her access of a locked file cabinet. The Arbitrator finds that both the
Grievant and President Marshall testified with great credibility about their own recollection of what happened with the faxes. This testimony, when coupled with the documentary evidence of the faxes introduced at the arbitration hearing, convinces the Arbitrator that no confidential documents were faxed to the Union. Some of the employees, and perhaps even some of the managers, may have believed that improper faxes were sent and that there was a lack of requisite evidence for a specification and charge. This may, or may not, have influenced their view of what may have happened and whether the Grievant should have been disciplined for going into the file cabinets. The Arbitrator does not base the findings upon speculation of motivations or conclusions not supported by evidence. The Arbitrator issues the findings based upon the fact that the Grievant went into file cabinets, which she had access to before, on two occasions when it may not have been related to a specific assignment given to her by a supervisor. This was not done secretly since someone had to unlock the cabinets. Although this may not have been proper, the Arbitrator finds that the Grievant did not have intent to violate any known rules or published regulations. The Arbitrator holds that these actions do not rise to the level of misconduct warranting discipline.

The Arbitrator does not address the laches contention raised by the Union since the case is resolved in favor of the Union on the underlying facts.

AWARD

The Grievance is granted. The disciplinary suspension shall be expunged and the Grievant made whole. The Arbitrator retains jurisdiction.

It is hereby so Ordered this 29th day of August, 2013.

Robert A. Creo, Arbitrator
Pittsburgh, Pennsylvania