ARBITRATION PROCEEDINGS

Before

M. BERNARD KEISLER

In the MATTER of ARBITRATION	)	**OPINION and AWARD**
Between	)	of
DEPARTMENT of JUSTICE **BUREAU of PRISONS** **FCI, MORGANTOWN, WV**	)	**ARBITRATOR** on **FMCS CASE no: 11-55696-A**
and	)	
AMERICAN FEDERATION of **GOVERNMENT EMPLOYEES** **LOCAL 2441**	)	**Issued: July 18, 2012**

SUBJECT: Discipline/Reprimand

APPEARANCES:

FOR THE AGENCY

Suzanne Courtney	Attorney- Advisor
Jeremy Grinnan	Material Handler Supervisor
Kenneth Montgomery	SIS Lieutenant
Timothy Stewart	Warden
William Land	Trust Fund Supervisor
Stacy Riffle	Material Handler Supervisor

FOR THE UNION

Greg Livengood	Union President
Brian Jones	Union Secretary
Joe Drenning	Grievant/ Material Handler Supervisor

HEARD: June 6 &7, 2012.

BACKGROUND

This grievance, brought forth by the Union on behalf of a Materials Handler Supervisor job incumbent, protests the Agency's* decision to issue a disciplinary Letter of Reprimand. It charges that the Agency's action was without just cause constituting a violation of employee rights guaranteed under Articles 30 and 31 of the Parties' Collective Bargaining Master Agreement, to wit:

"ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS

Section a: The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply." (underlining added)

* * * *

"ARTICLE 31 – GRIEVANCE PROCEDURE

Section a: The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b through g: (omitted)

Section h: Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. By going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, " Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?", or
2. Through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues. (underlining added)

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*The Employer, Bureau of Prisons, FCI, Morgantown, WV, henceforth, shall be referred to as the Agency.

FCI, Morgantown, West Virginia is a minimum security institution. It has a total staff of one hundred sixty- eight (168) of which one hundred thirty-four (134) are bargaining unit members. The institution is designed to accommodate approximately twelve hundred (1200) inmates housed in dormitory style units.

On April 7, 2010, the Grievant had been working in the Commissary in his job as a Material Handler Supervisor. Inmates also had been assigned to work in the same area. The Grievant walked behind Inmate Ramy Elhalaby and made contact with his back. The Grievant has indicated that he "had patted him on the back to let him know that he had done a good job."

Another employee working, in the same area, observed the incident and believed that the Grievant had "punched" the inmate with a closed fist. Knowing that such behavior was in violation of the Standards of Employee Conduct, the next day he reported the incident to the Trust Fund Supervisor.

"Joint Exhibit #4 - Change Notice Date: 2/5/99, No. 3420.09
Standards of Employee Conduct

8. GENERAL POLICY Employees of the Bureau (of Prisons) are governed by the regulations published in 5 CFR Part 2635.

....a through h omitted

i. Immediately report to their CEOs, or other appropriate authorities, such as the Office of Internal Affairs or the Inspector General's office, any violation or apparent violation of these standards.

9. PERSONAL CONDUCT It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. The following are some types of behavior that cannot be tolerated in the Bureau.

a. Alcohol/narcotics

b. Sexual relationships/contact with inmates

c. Additional contact issues.

(1)...................

(2) An employee may not use brutality, physical violence, or intimidation toward inmates, or use any force beyond that which is reasonably necessary to subdue an inmate."

* * * *

The Trust Fund Supervisor reviewed the information, talked to the inmate and proceeded to pass the information to the Lieutenant assigned to Special Investigative Services. The Lieutenant first interviewed Inmate Elhalaby to obtain his recollection of the incident. Subsequently, the Inmate had been examined physically to determine any

injuries. The Health Services report indicated "No visible signs of injury or trauma noted. Inmate denies any problems at this time."

After coordinating information with the Office of Internal Affairs (OIA), the SIS Lieutenant then proceeded, over the next ten (10) months to gather information, interview and take statements from involved employees and inmates. Inmate Elhalaby had been moved to a Miami, Florida correctional institution resulting in a greater time delay in the investigation.

On March 28, 2011, all evidence had been delivered to the Trust Fund Supervisor, in summation, the Grievant was charged with two (2) counts:

"Charge 1: Striking An Inmate and Charge 2: Unprofessional Conduct."

The letter to the Grievant stated: " This is notice that I propose that you be suspended for a period of seven (7) calendar days for the following charges, all violations of the Standards of Employee Conduct, which you acknowledged receiving on November 15, 2004." This letter concluded with the following paragraphs:

"The Warden will make the final decision on this proposal. You may reply to the Warden orally, in writing, or both orally and in writing. Your reply may include affidavits or other supporting documents. Any reply which you make must be received by the Warden **within ten (10) working days from the date you receive this letter.** Consideration will be given to extending this time limit if you submit a written request, to the Warden, stating your reasons for desiring more time.

No final decision on this proposal will be made until after your reply, if any, is received and considered. Your present duty and pay status are not affected by this letter. You have the right to a representative of your choice to assist you in the preparation and presentation of any reply you may wish to submit. You and your representative, if your representative is an employee of this institution, will be allowed **a reasonable amount of official time** to review the materials, if copies have not been provided, upon which this action is based and present a reply. You may review these materials during normal office hours by contacting, several hours in advance, the Human Resource Department of this institution." (Bold print and underlining added)

* * * * *

On April 22, 2011, the Grievant and his Union representative did meet with the Warden and presented their appeal relative to the charges and recommended discipline (a seven (7) day suspension). In addition the Grievant presented a written apology for "causing the Agency to concentrate its valuable resources into investigating this innocent action. For this I am truly sorry."

Following this appeal, the Warden issued the final decision.

"**May 4, 2011**

Xxxx X Xxxxxxx
Materials Handler Supervisor
Federal Correction Institution
Morgantown, West Virginia 26507

Dear Mr. xxxxxxxx:

You are hereby reprimanded for Striking an Inmate. Such behavior will not be tolerated. You are advised that future misconduct may result in further disciplinary action, up to and including removal.

A copy of this letter will remain in your Official Personal Folder for a period not to exceed two years.

Sincerely,

Xxxxxx X Xxxxx
Warden

* * * *

Subsequently, the Union informed the Human Resources Manager that "........Our commitment is to appeal the decision in hopes the decision and penalty will be overturned."

AFGE Local #2441 requested remedy is to have the Letter of Reprimand removed from (*the grievant's)* employee file and the matter be expunged from his record. Additionally, the Union requests *the grievant* suffer no reprisal, harassment or intimidation, as a result of this appeal."

In response to the Union's decision, the issue has been brought forth for review and resolution here, in Arbitration.

POSITIONS OF THE PARTIES

The Agency's first witness, the Grievant's fellow worker, testified that he saw the Grievant walk behind the inmate and strike him in the lower back with his fist. He reported the incident to the Trust Fund Supervisor the following day. At that meeting he also reported that the Grievant winced at the time that the blow had been struck, but, after the Grievant whispered in the Inmate's ear, both began to laugh. The witness further testified that the blow had been witnessed by six (6) inmates in the Commissary

The investigation phase of this incident had been conducted by another Agency witness, the SIS Lieutenant. The Lieutenant reviewed some twenty-plus (20+) dispositions and memorandums that he had conducted from the date, April 9, 2010, when he had first been assigned the investigation until the issuing of the proposed discipline letter of March 28, 2011.

Based upon the evidence, the Lieutenant presented his report indicating "that there was sufficient evidence to sustain the allegations of Physical Abuse of an Inmate and Unprofessional Conduct against *the Grievant.*" Although he acknowledged that the Grievant made no admission to having ever "punched" any inmate, he further indicated that the original memorandum from the Grievant's fellow employee carried much weight.

As a concluding witness, the Agency called the Warden. The Warden testified that he had reviewed all the details in the affidavits and memorandums. He stated that he had concluded that the inmate had definitely been struck. Furthermore, even if the inmate "sloughs it off", such conduct is inappropriate and unacceptable. In consideration of the Grievant's length of service with a good history of work performance, he reduced the discipline to a reprimand.

In its post-hearing brief, the Agency basically reviewed the criteria for establishing the just and sufficient cause for disciplinary action. It showed that, based upon its evaluation, it had covered all criteria for such a conclusion. It did anticipate that the Union would contend that the investigation took too long. In rebuttal, the Agency wrote "There is no evidence that there is a strict guideline for the completion of cases or that the grievant was prejudiced in anyway."

The Agency's brief concluded: "Based upon the testimony and the exhibits, the Agency respectfully requests that the Honorable Arbitrator deny the grievance and find that the letter of Reprimand was for just and sufficient cause."

In cross examination of the Agency's witnesses, as well as the direct testimony of the Grievant, the Union repeatedly emphasized the difference between " a pat on the back" and "a punch" Each Agency witness had been asked by the Union to make such a differentiation. The Grievant testified that, from his annual ART sessions, he was aware that any punch was not acceptable. He further emphasized that in all three (3) depositions he had declared that he patted the inmate on the back and that he had "never in my entire career punched an inmate with a closed fist on any part of his body."

The Union employed its post-hearing brief to point out many of the alleged inconsistencies in the testimony of the Agency's witnesses. It referred to several incidents in which both the Trust Fund Supervisor and the Warden acknowledged that they had made physical contact with inmates. In these instances, the contact had been confined to a handshake or a pat on the back.

In addition, the Union placed much emphasis on the time lapse between the reporting of the grievant-inmate physical contact and the final discipline letter. It provided several citations in which the Arbitrator had sustained the grievance based primarily on a denial of due process as a result of an extended delay in the final disciplinary imposition..

In the Union's conclusion, it read: "In light of the evidence and argument presented, the Union respectfully entrusts the Honorable Arbitrator to find the Agency discipline was not warranted nor for just and sufficient cause and sustain the Union's grievance."

DISCUSSION, FINDINGS and OPINION

As previously stated at the hearing, testimony/presentations that do not contribute to the Arbitrator's knowledge to reach a decision will not be addressed in this Award. Accordingly, the testimony about an "air punch" and review of the Grievant's military service as well as the rebuttal witnesses' testimony to that effect will be set aside.

The main thrust of this entire proceeding appeared to be the differentiation between a 'punch" and a"pat." The Grievant has acknowledged that, on April 7, 2010, he

did make physical contact with an inmate. While he acknowledged that he had definitely patted the Inmate on his back, he strongly testified at the hearing and with the SIS Lieutenant (Jt Ex 6-tab 9) that "I did not punch inmate____ in the back. I have never in my entire career punched an inmate with a closed fist on any part of his body." It appears that the Grievant, despite his annual training, was unaware that any uncalled for physical contact with an inmate was a violation of the General Policy as described in the Standards of Employee Conduct, 2/5/99.

The actual determination of what constitutes acceptable friendly physical contact as compared to "may not use brutality, physical violence, or intimidation towards inmates" is somewhat vague. Several of the Agency's witnesses, during cross examination stated that they had shaken hands with inmates and had patted an employee on the back and said "good job." One of the attending inmate's depositions (Jt.Ex.6 – tab 23) read "*Trust Fund Supervisor*" has patted me on the back and told me I did a good job." Based upon these events, it appears that the SIS Lieutenant concluded that the Grievant's actions had risen to the level of "brutality" or "physical violence" towards this inmate.

To add to the uncertainty and inconsistency of the actions of the participants, the Trust Fund Supervisor, during cross examination, recounted a recent incident in which an inmate had returned a box cutter to him after hours. The inmate had been given the box cutter to use in the warehouse. He reported that he had been given the box cutter by the same Grievant involved in this present arbitration process. The witness further explained that, because of the current ongoing situation he had "minimized" it.... "I think I might have brought it up" (with the Grievant) When asked about the Grievant's work performance, the witness replied "I think *the Grievant* does a fabulous job. Anytime I give him something, a task to do, I never have to worry about anything.......without hesitation, it's done."

In reviewing the various depositions and memorandums, it is noted that on the memorandum (Jt. Ex 6-tab 32), provided by the accusing employee, it reads:
"*The Grievant* leaned up and said something to Inmate___ and both started laughing."

In the deposition (Jt. Ex. 6 –tab 8), from the Inmate:
5. "When the staff member punched me he didn't whisper anything in my ear, the only thing he did was laugh."
16. "He never whisper anything to me he just laugh like he got satisfaction out of it." (sic)

Also, in deposition (Jt Ex. 6 – tab 9) from the Grievant:
9. "The allegation that I punched inmate ___ in the back, and that I said something or whispered something to ______, and we began to laugh, is not true. It did not happen on April 7, 2010, or any other date." (All underlining added)
It is noteworthy that the first statement relative to the whispering and laughing had been recorded on April 12, 2010; the other two (2) depositions had been collected in February, 2011. The passage of ten (10) months must make a difference in accurate recollection of events Also, one must note the difference in the recollection of events from the accuser and the Inmate.

Both Parties cited *Enterprise Wire Cos. 46 Lab. Arb. (BNA)359 (1966)* as the criteria for the determination if the discipline had met the requirements of just cause.

While the evidence does support the finding that the Grievant did use a closed fist and did deliver a punch to the Inmate which resulted in his showing surprise and being uncomfortable, other inconsistencies in the entire investigation cast doubt upon the SIS findings and the evenhanded application of discipline in general. Specifically, the Agency witness who related a specific, serious infraction (box cutter) which did not result in any discipline is an example of discipline not being applied in an evenhanded manner.

Beyond the above incidents one must consider the time elapse between the reporting of the improper activity, April 8, 2010, and the final discipline letter, May 4, 2011.

The Union has presented citations that speak directly to this element……specifically:
1.Federal Bureau of Prisons, FCI, Miami and American Federation of Government Employees, AFL-CIO, Local 3690, 110FLRR-2 28; October 16,2009.
2.American Federation of Government Employees, Local 2585, AFL-CIO and Federal Bureau of Prisons, FCI, Bennettsville, S.C., 111 LRP 22715; April 26, 2010.
3.Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees; Local 612, 111 LRP 23336; March 17, 2010.

In each of the above cases, the Arbitrator or Judge/Administrative Officer took considerable exception to the time between charges and penalty imposition.. The commonality within each of these citations is the determination of a violation of the just cause provision of the Master Agreement, which, in part, read:

"ARTICLE 30-DISCIPLINARY AND ADVERSE ACTIONS

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.
Section d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions."

* * * *

To support the interpretation of the Master Agreement language. Judge/ Administrative Officer Richard N. Block, in Federal Arbitration, 111 LRP 23336 wrote:

"Article 30d of the collective bargaining agreement states that the parties endorse the concept of timely disposition of investigations and disciplinary actions, taking into account the complexity of the case and the circumstances surrounding the case. Although the parties do not define the term "timely" in Article 30d, the record establishes that both parties accept the written time guidelines referenced in OIG Report No. 1-2004-008; 120 days for local investigations and 180 days for OIA investigations......... "

In addition, in Federal Bureau of Prisons, FCI, Miami and AFGE, AFL-CIO, Local 3690. Federal Arbitration, 110 FLRR-2 28, Arbitrator Robert B. Hoffman wrote:

"The arbitrator stated that it was noteworthy that the parties endorsed timely investigations and discipline by including the principle in the collective bargaining agreement.. Article 30 adopted the principle **that the due process inherent in just cause for federal workers includes the right to the timely imposition of discipline."** (Bold type and underlining added)

It has been noted that, in this instance, the time between the reporting of the infraction and the final imposition of the discipline was thirteen (13) months. In a relatively simple case as this, such a time lapse must be construed as a violation of due process and detrimental to the efficiency of the service.

Although the Grievant's conduct was in violation of the Standards of Employee Conduct, based upon these findings and reasoning, it is concluded that the Grievant has been denied proper due process rights as a component of just cause. Accordingly, the grievance shall be sustained.

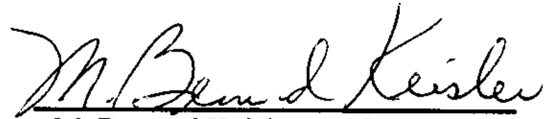
AWARD

The grievance is sustained.

The Grievant's employee file, as well as any records held by the offices of Internal Affairs or the Inspector General, shall be expunged of any documentation of the discipline or relative events.

Any benefits impacted shall be restored.

Findings and Award issued pursuant to Articles 30 and 31- Grievance Procedure provisions of the Parties' Master Agreement by



M. Bernard Keisler, Arbitrator