IN THE MATTER OF

ARBITRATION, OPINION, AND AWARD

BETWEEN

FCI MANCHESTER AND AFGE LOCAL 4051

CASE NUMBER: 13-58880-7

ARBITRATOR: C. Forest Guest

GRIEVANT: Randall Johnson

DATE OF HEARING: 2 days

March 13, 14, 2014

ISSUE: Discharge

DUE DATE OF POST HEARING BRIEFS: On or before May 16, 2014

DATE OF AWARD: June 13, 2014

REPRESENTATION

EMPLOYER REPRESENTATIVE

Ms. Jenifer Grundy Hollett

Assistant General Counsel

Federal Bureau of Prisons

UNION REPRESENTATIVE

Mr. Ryan Saunders

4th District Legal Rights Attorney

American Federation of

Government Employees

SUBMISSIONS AND COMMENTS

The parties submitted the following number of exhibits:

Employer Submitted: 13 exhibits

Union Submitted: 5 exhibits

Joint Submission: 18 exhibits

Witnesses:

The Employer called 3 witnesses

The Union called 5 witnesses including the grievant

This case is between FCI Manchester hereinafter referred to as the Agency or Employer, and AFGE Local 4051 hereinafter referred to as the Union. The Collective Bargaining Agreement (JX-1) provided to the Arbitrator is dated March 9, 1998 – March 8, 2001, but is still in effect and hereinafter referred to as the CBA, Agreement, or Contract.

AUTHORITY

The Arbitrator derives his authority in this matter from the specific and inferred terms of the Collective Bargaining Agreement between the parties, (JX-1). In addition, authority is governed by the applicable arbitration laws of the United States. This authority and associated responsibility is applied in keeping with the generally accepted principles and practices associated with arbitration interpretation and application of labor contract terms.

FORWARD

This two day hearing took place at the FCI facility in Manchester, Kentucky. The parties had met all terms of process and selection of the Arbitrator insofar as I have been made aware. The parties requested additional time to submit post hearing briefs and an agreed upon date of May 16, 2014 was accepted. Consequently, due to illness and other issues the actual print copy of the post hearing briefs did not reach the arbitrator until the 22nd. This date will serve as the formal closure of this hearing.

In addition, the parties used a court reporter for this hearing and the arbitrator was provided with those transcripts.

Note: At the end of the hearing Mr. Johnson was asked by me if he had been able to submit any and all information he thought was important to his case and had his Union properly represented him during this process. His response was that he had nothing more to offer and the Union had sufficiently represented him.

BACKGROUND

This is a discharge case of Randall Johnson for multiple causes that will be addressed in this award. The Employer believes this action is warranted due to the nature and intent of the grievant's conduct. The Union believes that not only was this discipline "overreaching", but that the Agency was untimely and improper with its action.

The Agency is requesting the discharge be upheld and the Union is requesting that the grievance be sustained and the grievant receive all back pay and entitlements.

The grievant, Mr. Randall Johnson, has been employed by FCI Manchester on two different occasions. He was a Correction Officer from 1996 to 2000. He was hired back as a Chaplain August, 2010. During the ten (10) year absence he was going to school, preaching, and he has also worked for State Government for approximately five (5) years in the state correction service.

CONTENTIONS OF PARTIES

EMPLOYER:

The Agency feels strong in their position that this discharge case is for just cause and that they have met the standards of just cause. They feel that the grievant's dishonesty was intentional and for self- motivated gains. They have used the Douglas Factor as a means test as well as the 7 criteria or Seven Just Cause used to determine whether an arbitrator should substitute his/her judgment for that of the Employer established by Arbitrator Carroll R.

Daugherty. Both the Douglas Factor and Seven Just Cause doctrines are well known in the labor relations environment and used by many advocates and arbitrators.

On March 27, 2013 a proposal to remove letter was sent to the grievant (JX-6). This letter notified Mr. Johnson he was in violation of the Standards of Employer Conduct which he had received on August 16, 2010 and that he had reviewed during annual training. The proposal included four (4) charges:

1. Charge 1: Providing Inaccurate Information
2. Charge 2: Introduction of Contraband
3. Charge 3: Misuse of Government Purchase Card
4. Charge 4: Failure to follow Policy

Note 1: In addition to these charges listed specifications were noted for each charge. Also noted were his rights and statement that the Warden would make the final decision.

Note 2: Charge 2 (Introduction of Contraband) was later withdrawn by Warden Edenfield).

The Agency also takes issue with the premise that they are somehow untimely pointing out that there is no specific time allocation for investigation and movement to discipline. Rather, they are charged to make certain the investigation is conducted in a professional and fair manner and that the final outcome of the investigation is accurate. They summarize this by stating there was no harmful procedural error as a result of any delay in the post-hearing brief, pg. 2.

JX-6 is a six (6) page document that lists a menu of items purchased by the grievant that was not authorized by the Agency. Among the many items were food, drink, candy, movie film (DVD), shoes, jackets, water, and computer keyboard.

Warden Edenfield met with the grievant and listened to his oral response on April 10, 2013 and read the written response dated April 5, 2013. On July 11, 2013 she forwarded a very articulate letter outlining the various charges, conversations, and observations she had as a result of her investigation (JX-9). This letter clearly provides the reaction of the grievant that he either fabricated receipts or was unaware of the procedures and rules.

The Agency, specifically the Agency Advocate, spends a great deal of time in her Post Hearing Brief using Warden Edenfield's statement and her comments regarding the whole of the violations and investigation process. Warden Edenfield made the final decision to terminate the grievants employment as well as discounting one of the charges during that process.

Reading Warden Edenfields entire testimony I too must admit she presents a clear and understandable mapping of this process and why this decision was made. I am convinced she reviewed each charge thoroughly and each part of said charge to make a determination of applicability. To her, integrity had been violated, integrity lends itself to trust, and these could not be repaired.

Warden Edenfield has a long career with the Bureau of Prisons and has served in many different positions and locations. I found her testimony most credible.

UNION:

The Union contends that this termination violates the CBA, Article 30, 32H, 30C, and 30D. The Union's position is that the discipline was untimely taking approximately 22 months to process and did not follow progressive discipline. The amount of time it took to reach finality is of concern not only to the Union, but this arbitrator.

The Union points out that Mr. Johnson, the grievant, was a good employee, had received the employee of the month award, and had never been disciplined. He had in fact worked for FCI Manchester as a guard, left that employment, then was rehired into his current position as Chaplain.

Additionally, the Union feels that while the Agency cites the Douglas Factor and the Seven Cause Doctrine, they violated their own standard by not warning the grievant prior to discharge. Finally, the Union does not believe that the totality of these violations ascend to the level that discharge is called for and that this penalty is too severe. Simply put, the Agency should have demonstrated corrective action or corrective discipline when the violations were determined in order to stop the mistakes and avoid this kind of discipline.

The Union simply stipulates that just cause was abandoned by the Agency when it took so long to investigate and process this discharge. Additionally, this discipline was not in keeping with the type of mistakes and infractions that occurred. Mr. Johnson, when informed of a mistake, did everything possible to correct the error.

The Union points out that there was no malicious intent on the part of Mr. Johnson. He did not do anything that was self-serving, and when on the few occasions a discrepancy was pointed out he corrected it. Furthermore, the discipline issued was too severe as the penalty calls for a warning to discharge and there was no warning ever issued to Mr. Johnson. Finally, the time it took for this process is beyond explanation. Because of these factors the Union feels the Agency err in its discipline.

The Union is requesting that Mr. Johnson be returned to work and all back pay and benefits be paid. In addition, any and all expenses including interest and attorney fees be paid.

OPINION AND DETERMINATION

This is an interesting case due to the nature of the infraction (s) and the amount of time it took to render discipline. Hearing this case and reading the transcripts as well as the Agency/Union Post Hearing Briefs and my notes from the hearing has led me to formulate the following three (3) basic issues to this case:

1. Did the grievant commit the offenses he is accused of?
2. Is the penalty in accordance with the contractual provisions and of a nature that is applicable for the offense?
3. Was the discipline issued within a timely period as prescribed by the agreement or agreements used for these purposes?

Both advocates have prepared well documented cases and have presented their positions with passion and conviction. Both advocates make very good points, however there are some basic "givens" that cannot be ignored.

1. DID THE GRIEVANT COMMIT THE OFFENSE?

From the testimony and exhibits presented the grievant Mr. Johnson did in fact violate policy and did as he was accused. However, the grievant while admitting to these violations stipulates that these were mistakes and errors and corrected when he had the opportunity to correct. His feeling was that he was not properly trained and made some mistakes.

The problem this arbitrator has with this is that purchasing items and sending to your home address raises questions. Purchasing R rated movies, knowing this is against policy, is more than a mistake. Purchasing shoes for your person is again, more than just a mistake. Fabricating receipts in order to meet a policy standard instead of simply getting a new receipt and/or going directly to the appropriate administrator to explain and correct the error is unexplainable.

It is not just one item, but the totality of the items that make me believe these actions, at least in part, were intentional. The Union feels that using this "menu" of issues is wrong and violates the grievant rights, but I disagree. These issues are the result of an investigation to reveal the habits and possible violations over a period of time and I do not see anything that would disallow the use of this information.

I do not know the grievant's motive, but someone with Mr. Johnson,s experience in government work cannot claim ignorance of the rules for issue after issue. That reasoning is not credible to me. Additionally, I don't see that personal gain, in the normal sence of the meaning, was the motivation for Mr. Johnson, but I will not speculate what his motive was.

2. **IS THE PENALITY CORRCT?**

Mr. Johnson was discharged for violation of policy and using a purchase card to purchase various items already summarized in this report. From my observation none of these items were particularly egregious, but the totality over a period of time renders this a "major issue.

However, how did this happen and what should have happened? Mr. Johnson was never given a warning by his supervisor that he was making errors when purchasing. The CBA stresses that discipline be progressive underscoring the need for a warning to be provided for a possible violation. The Employer uses the Douglas Factor and the Seven Test of Just Cause. The first test of the Seven is if a warning was given that possible discipline could result from the misconduct. The answer is NO. When reviewing the Douglas Factors I must conclude that I question at a minimum the 3rd, 4th, and 7th factor and there application to this discharge.

The Employer position is that the employee is given training, especially with the Standards of Employee Conduct (JX-10) and provided a copy of same. This in their opinion constitutes a warning to observe the rules and therefore no additional warning is necessary. I disagree with the Employer. Simply being given a policy, book, and training material does not constitute a Warning as applied in labor relations. Providing these materials is proof of expectations and perhaps what the overall culture might be for the organization, but does not replace a formal warning under the discipline clause of a labor contract. Especially when disciplinary provisions state reprimands to discharge.

Additionally the CBA (JX-1) Article 30, Section C states: *The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.* Section D states: *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.*

In addition, (JX-2) is an exhibit titled Standard of Employee Conduct, dated 2/5/99. Part of this document is a table noted as Attachment A that is intended to be used as a guide in

determining appropriate discipline to impose according to the type of offense committed. There are four (4) different "nature of offense" used by the Agency and they are as follows:

Number 19. Conversion of government funds or funds in government custody to personal use. First Offense: Official reprimand to removal. Second Offense: 14-day suspension to removal. Third Offense: Removal.

Number 32. Falsification, misstatement, exaggeration or concealment of material fact in connection with employment, promotion, travel voucher, and record, investigation or other proper proceeding. First Offense: Official reprimand to removal. Second Offense: 14-day suspension to removal. Third Offense: Removal.

Number 35. Criminal, dishonest, infamous, or notoriously disgraceful conduct. First Offense: Official reprimand to removal. Second Offense: 14-day suspension to removal. Third Offense: Removal.

Number 36. Conduct which could lead others to question an employee's impartiality. First Offense: Official reprimand to removal. Second Offense: 14-day suspension to removal. Third Offense: Removal.

There is no question that the offenses committed by Mr. Johnson were in there totality severe and egregious. However, it is noteworthy that every document used to establish proper offense calls for a first offense as either "progressive" or "verbal to removal". Nowhere is there a subject to discharge or discharge for a first offense. So you have to look at the total number of incidents and the severity of those incidents to determine if the measure is sufficient enough to warrant discharge. Had the supervisor officially warned Mr. Johnson that he was in violation at any time during the period of offenses, placed that warning in his file, continued violations would have been inexcusable.

Additionally, you must look at the employee's record and circumstances of the actual incidents. This employee had never received any discipline, he had been hired twice and therefore I have to conclude he was a worthy applicant and employee. He had received good performance reviews and an employee of the quarter reward. With the exception of the

noted offenses in this case, there were no other infractions before or after these stated incidents.

3. Was discipline issued in a timely manner?

The time it took to investigate this case to actually rendering discipline is at the very least, extraordinary. The following is a quick summary of the events as I have noted:

October 23, 2011 – Supervisor Sumner notifies Owens that there are concerns with Johnson

October 25, 2011 – Complaint referred to OIA – Office of Internal Affairs

November 18, 2011 – OIA releases the case to SIS staff at Manchester

July 30, 2012 – Statements taken of witnesses

August 30, 2012 – Statements taken of witnesses and also Mr. Johnson

March 27, 2013 – Notification letter to Mr. Johnson proposing his removal

April 5, 2013 – Mr. Johnson's written response

April 10, 2013 – Mr. Johnson's oral response to the Warden

July 11, 2013 – Letter of removal from the Warden effective midnight July 13, 2013.

While there may not be specific time (number of days) noted in the CBA or documents used for discipline, there is certainly language regarding suggested time frames and the importance of expeditious processing. (UX-3) Appendix 111, BOP Response To The Draft Report, dated September 15, 2004 offers suggestions regarding this issue as it so notes:

We propose as an alternative our own internally communicated time expectations for staff conducting investigations (120 days for local investigations and 180 days for OIA on site investigations as upper-limit parameters). Failure to do so, barring unforeseen circumstances, will be dealt with as a performance issue.

We generally concur there should be time guidelines for the adjudication phase of the investigative process. However, as with time lines for conducting an investigation, it is

difficult to always adhere to such guidelines, as there are times when a proposal letter is received raising questions that must be resolved by reopening the investigation to gather more information. We will establish a general guideline of 120 days as the upper level parameter for completing the adjudication phase of the process. The target date established for implementation is October 31, 2004.

Insofar as the Unions position directed toward this discipline being untimely I do not agree with their position. In fact, there is not a specific policy or any specific limitations on time requirements so the Union does not have an argument insisting a specific time line be followed when that timeline is coming from a recommended time frame, i.e. Appendix 111.

However, if the Agency is going to take the position they have as long as they like, now and forever, to process discipline they are wrong. In this kind of language environment where there is no specificity, but where there is language that expeditious processing is a goal, there must be a showing of a need or problem that caused an extraordinary amount of time. If not a need, then actual efforts that are being expended that are causing additional time. Otherwise, the integrity of the progressive discipline and the overall process is challenged. Integrity seems to be a core principle at the Agency as noted in Warden Edenfield's testimony, statement, and advocates post hearing brief. Integrity goes in both directions.

There is no explainable reason why it took this long to process this case. This case is not sufficiently complex to warrant delay and delays or complications did not occur or at least not suggested at time of hearing. The fact that it did take this long raises questions as to motive and intent by management and compromises the due process expectation of the grievant. So, while there may be a lack of specificity regarding time, there are certainly plenty of recommendations and suggestions to move a case along.

While I am willing to allow for bureaucratic delays that might be incurred this is not the case here. FCI received the case from OIC on 11-18-11, but did not take statements until July and August 2012 and did not act on the discharge (removal) until July 2013 almost a year later. Investigating this case compromised the grievant's right to a reasonable speedy adjudication as intended in Article 30, Section D, pg.63, of the CBA (JX-1)

That brings me to an interesting fact that was neither explored nor hardly mentioned by either advocate. According to testimony and submissions, on October 23, 2011 Mr. Sumner reported to Assistant Warden Angela Owens that he had concerns regarding purchases made by Mr. Johnson. As far as I can tell, he never warned or talked to Mr. Johnson about those concerns. This set in motion the investigation and ultimate removal of Mr. Johnson on July 11, 2013, almost two (2) years later. But, what is interesting, is that Mr. Johnson did not make any mistakes, errors, or invalid purchases after this report to Ms. Owens. His fabrication or dishonest purchases occurred from January 27, 2011 to October 14, 2011 according to the information given the Arbitrator during the hearing.

So, from October 2011 to July 2013 Mr. Johnson did not commit another purchasing error. In fact, he did not commit any errors or exhibit any behavior problems. He was allowed to continue to work and to retain his purchasing card and I have to assume make purchases. All of this without any problems. Yet, the Warden discharged this employee because she had a problem with trust and integrity. This "activity" is not credible to this Arbitrator. It took almost two years to investigate possible irregularities that took place over 10 months and did not occur during the investigation process.

If, and it appears that in actuality, a self-correcting action occurred how can this be considered a discharge offense almost two years later when during that time there was no action that would warrant concerns about integrity or the ability to correct conduct. I find this interesting that in a correctional facility correcting bad behavior is considered impossible.

It is my conclusion that the penalty is too severe based on the evidence and testimony provided and the fact that the grievant was allowed to continue his employment with no discipline or disruption for almost the entire investigation period of approximately two years seems to minimize the seriousness of the offense.

OVERALL CONCLUSION:

I read and reviewed the statements, notes, and submissions provided by the parties. I have also read and re-read the post hearing briefs presented by both advocates and have had to work my way through their reasoning for their respective positions, finding myself in disagreement with some of their contentions. The assumption by the Employer that they have the right to discipline without any regard to the amount of time it takes I find in error. Likewise the position of the Union that regardless of the offense the amount of time it took to discipline renders that action a violation of just cause and the grievant should be returned to work and made "whole" in this case is also in error.

The problem this arbitrator has with that logic is that it does not address the obvious actions by the grievant and the alterations of explanations he has provided on statements and testimony. Reading the Affidavits (JX-12 thru JX-16) the grievant's statements and allegations are specifically denied by Mr. Sumner and Ms. Carmack and once again make me wonder about the credibility of the grievant's comments. Having served for as long as he served in both the Federal and State Prison systems, I cannot accept that he could be so lack of knowledge and judgment regarding procedures and the constant requirements for procedures and policies to be followed. I find this especially true in a correctional facility and Mr. Johnson's excuses of either not knowing or simply wanting to provide a better environment does not adequately address the purchase of clothing, shoes, and R rated films. His suggestion that he had not been trained only to find out that he had been trained extensively makes me doubt some of the other "excuses" for this bad behavior. To say in his testimony that candy placed on the desk of employees is not purchased by the government but by the person he "knows now" falls short of anything reasonable.

While the totality of the expenses might not add to a huge amount, the cavalier action (at the least) or arrogant intent (at the most) is reason enough for his actions to be called into accounting and consequences be set forth. It might appear in light of all the arguments of procedure and time that Mr. Johnson did what he was accused of doing. He has excuses, some appear to be logical, but others do not reach the threshold of logic. His statements

often times change and his comment that he was telling his peers is not at all agreed to by either of those individuals. Finally, there is no explanation as to why R rated movies would be purchased when it is against policy and why shoes and jackets were also purchased. Additionally, Mr. Johnson has tried to alter some receipts, repay other mis-purchased items, and made no reinbursement on other items, and no one has followed up on this matter from management.

I am therefore going to mediate this discipline and grievance request and hold for the Union insofar as removal of the discharge. I find that Mr. Johnson should be returned to work immediately, but as a consequence of his actions only receive partial pay. His time off from work will be time served for this act.

My decision to mitigate this discharge is based on several observations including but not limited to, 1. The penalty was too harsh for the offense committed, 2. Disproportionate to the degree of the offense, 3. It was out of step with the principles of progressive discipline established in the CBA and agency policy, and 4. It is punitive rather than corrective. The grievant could have easily been lulled into believing that he would not be subject to sanction since it took so long from the time of the last offense to the actual notification of intent to remove.

Having found nothing in the Collective Bargaining agreement, Article 32, Arbitration, that bars the arbitrator from altering the discipline invoked I have made these modifications.

AWARD

Considering all of the exhibits, policy, procedures, witness statements, post hearing briefs by both advocates I find the following: The grievant, Mr. Randall Johnson, shall be returned to work immediately upon the first work day of the week following receipt of this award.

Mr. Johnson shall be paid six (6) months pay for 2014 (January through June less any amount earned in June after returning to work). The balance of the loss of pay shall be considered forfeited for disciplinary reasons.

Mr. Johnson shall not be entitled to any other pay or benefits for the period he has been removed from work.

This removal shall be considered a suspension and Mr. Johnson is on notice that this will be considered his final warning for this type of violation.

This will attest that the foregoing is a true copy of the Arbitrators Opinion and Determination in this matter of Arbitration.

I therefore affix my signature in the City of Louisville, State of Kentucky, this 13th day of June, 2014.

C. Forest Guest

C. Forest Guest

Arbitrator


RECEIVED
JUN 17 2014
GENERAL COUNSEL