FEDERAL MEDIATION AND CONCILIATION SERVICE

Case No. 09-03023

Opinion and Award in the matter of the labor arbitration between

Federal Bureau of Prisons

and

Council of Prison Locals, American Federation of Government Employees, Local 612

GRIEVANCE IDENTIFICATION:	Timeliness of Investigations
DATE OF GRIEVANCE:	May 5, 2009
DATE OF HEARING:	December 17, 2009
LOCATION OF HEARING:	Inez, Kentucky
DATE POST-HEARING BRIEFS FILED:	February 9, 2010
DATE RECORD CLOSED:	February 9, 2010
ARBITRATOR:	Richard N. Block

APPEARANCES:

For the Federal Bureau of Prisons

Mr. John T. Lemaster, Assistant General Counsel
Ms. Theda Mobley, Employee Services Manager, United States Penitentiary, Big Sandy
Ms. Heike George, Employee Services Specialist, United States Penitentiary, Big Sandy
Mr. James Link, Special Investigative Agent, Special Investigative Section
Mr. Robert Ranum, Associate Warden, OCI Manchester
Mr. Jerome Zuercher, CEO, USP Big Sandy
Mr. James Manning, Tool Room Officer and Grievant
Mr. Charles Diamond, Senior Correctional Officer and Grievant

For the Council of Prison Locals, American Federation of Government Employees

Mr. DeWayne Person, Mid-Atlantic Regional Vice-President
Mr. Brian Salyers, Local Union Vice-President
Mr. Jimmy Kilburn, Chief Steward
Mr. James Manning, Tool Room Officer and Grievant
Mr. Charles Diamond, Senior Correctional Officer and Grievant
Mr. Hector Rios, Jr., Warden, USP Atwater, California

ISSUE

Was the disciplinary action taken against grievants James Manning and Charles Diamond for just and sufficient cause and for the efficiency of the service in compliance with the parties' contractual agreement? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE MASTER AGREEMENT

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 b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

Section c. 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. 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.

1. when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief

Executive Officer or designee; and

2. employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.

Section j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing. When adverse action is proposed, he/she will have fifteen (15) working days to respond orally or in writing. Approval or denial of extension requests must be provided within two (2) working days. These time frames do not apply to probationary employees or actions taken under the crime provision.

STIPULATIONS

1. Grievants James Manning and Charles Diamond misused government equipment while on duty in violation of Agency policy by sending electronic messages containing inappropriate photos and/or video clips (Tr. 11, 16).

2. The grievants were aware of the relevant Agency policies when they committed the violations (Tr. 11, 16).

3. The Agency imposed a two-day suspension on Mr. Manning and a one-day suspension on Mr. Diamond for the actions described in Stipulation 1, above (Tr. 11, 16).

4. The level of discipline imposed on the grievants was appropriate contingent on a finding that the investigation was done properly and in a timely manner (Tr. 16, 17).

5. The reckoning period for the offenses committed by the grievants is two years beginning with the date of the decision letter, April 6, 2009 (Tr. 165).

6. The reckoning period is the period of time during which any offense will result in a higher level of discipline (Tr. 165).

7. Grievant Charles Diamond was promoted after April, 2009, while in the reckoning period.[1]

FACTS AND BACKGROUND

The incidents that led to this grievance occurred at the United States Penitentiary, Big Sandy, in Inez, Kentucky operated by the Federal Bureau of Prisons in the United States Department of Justice (DOJ; hereinafter the Agency). Big Sandy is a maximum security prison housing approximately 1500 inmates (Tr. 80, 82). The average sentence of the inmates at Big Sandy is 240 months and some inmates are serving life sentences (Tr. 82).

There are approximately 380 employees at Big Sandy, of which approximately 240 are corrections officers (Tr. 81). The corrections officers at Big Sandy are represented for collective bargaining purposes by Local 612 of Council of Prison Locals of the American Federation of Government Employees (hereinafter the Union). The Agency and the Union are parties to a Master Agreement (Jt. Ex. 1).

This case involves two grievants; Officer James Manning and Officer Charles Diamond. On May 26, 2005, Manning used a government computer to send 30 individuals with access to Groupwise software an e-mail that contained a sexually explicit video clip (Jt. Ex. 2B; Tr. 126). On September 8, 2005, Officer Diamond used a government computer to send several individuals an e-mail message with inappropriate photographs of females and photos of graphic physical injuries (Jt. Ex. 2A). Both of these e-mail messages were sent in violation of Agency Program Statement 1237.12 which prohibits using a government computer for non-work purposes during duty hours and sending or forwarding e-mail messages that are sexually explicit or degrading (Jt.

[1] The record establishes that this promotion was effective on October 25, 2009 (Jt. Ex. 14).

Exs. 2A, 2B). Pursuant to Agency policy, misuse of a government computer is considered Classification 2 misconduct. Employee misconduct falling within Classification 2 is defined as actions that are serious but would not likely result in a criminal prosecution (Jt. Ex. 7, pp. 4-6; Tr. 23).[2]

The Agency has adopted a procedure for investigating allegations of staff misconduct (Jt. Ex. 7). When misconduct or an allegation of misconduct is brought to the attention of any staff member, that staff member must report the allegation to the CEO (warden) of the facility at which the alleged misconduct occurred, to the DOJ Office of Internal Affairs (OIA), or the DOJ Office of the Inspector General (OIG) (Jt. Ex. 7, p. 7). If the initial report is to the CEO, the CEO is required to notify OIA within 24 hours of receiving the report (Jt. Ex. 7, p. 6). OIA must then notify OIG of the allegation within 48 hours (Jt. Ex. 7, p. 9). After review, OIG refers to the case back to OIA, which then returns the case to the CEO of the facility for investigation (Jt. Ex. 7, pp. 9-10). The OIG, through OIG Report No. 1-2004-008, recommends that the investigation of local cases be completed within 120 days and the investigation of OIA-level cases be completed in 180 days (Jt. Ex. 10). [3]

Within the Agency, internal investigations involving alleged misconduct by inmates and staff are the responsibility of the Special Investigative Section (SIS) which reports to OIA (Tr. 20-21, 28-29). Each institution within the Agency has an SIS (Tr. 20-21). During the period 2005-08, which is relevant to this case, Special Investigative

[2] Classification 1 offenses are defined as misconduct that is serious and would constitute a prosecutable offense. Classification 3 offenses are serious but would not likely impair the day-to-day operations of the facility . (Jt. Ex. 7, pp. 4-7; Tr. 23)

[3] See also Jt. Ex. 9.

Agent James Link was responsible for the Big Sandy SIS. He had a staff of five to six investigators who reported to him (Tr. 32-33).

Special Agent Link testified that he received the allegations against the grievants in October, 2005 (Tr. 56). The record does not establish the manner by which Special Agent Link learned of the allegations, nor does the record explicitly establish the next steps he took and the timing of those steps. But because SIS reports to OIA, because the alleged misconduct was a Classification 2 offense, and because OIA is responsible for reviewing allegations of Classification 2 misconduct, it is reasonable to assume that the allegations were forwarded to OIA.

In November, 2007, OIA returned the allegations to Big Sandy for investigation. Agent Link assigned then-Big Sandy then-Deputy Associate Warden (DAW)/Consolidated Services Manager Robert Ranum to investigate the alleged violations by Officers Manning and Diamond. At the start of the investigation, DAW Ranum was given a packet from OIA that contained the evidence against the grievants, including copies of the offending e-mail messages and the items attached to the messages. Upon receipt of the packet, DAW Ranum took affidavits from Officers Manning and Diamond, both of whom admitted sending the e-mail messages and committing the offense. DAW Ranum wrote a report and sent it to Agent Link, who sent it to OIA. DAW Ranum testified that it took approximately one month to complete his part of the investigation. (Tr. 69-79, 126)

On March 2, 2009, as a result of these incidents, Big Sandy Captain D.G. Bruce proposed that Officer Manning be suspended for three days and Officer Diamond be suspended for one day (Jt. Exs. 2A and 2B). On April 6, 2009, Big Sandy CEO Jerome

Zuercher imposed a two-day suspension on Officer Manning and a one-day suspension on Officer Diamond (Jt. Exs. 3A and 3B). CEO Zuercher testified that Officer Manning had sent "pornography," while Officer Diamond had sent only "risque material" (Tr. 88, 90). CEO Zuercher testified that, in deciding on the discipline, he took into account the "Douglas Factors" that federal agencies are required to consider in discipline cases (Tr. 87-88).[4] On May 5, 2009, Union Representative Billy Farthing filed a grievance alleging that the Agency had violated Article 30 of the Master Agreement by failing to adhere to the time limits of the disciplinary process (Jt. Ex. 4).

Other facts are also relevant to this case. During the period 2005-08, Big Sandy was experiencing severe problems with its inmate population and its staff. Staff members were smuggling drugs into the facility and inmates were assaulting staff (Tr. 29-30). Big Sandy had experienced two homicides in a three-week period, hundreds of inmate assaults, and 21 inmate narcotics cases (Tr. 32). The problems reached a point at which SIS was given permission by the warden at Big Sandy to operate outside the facility in conjunction with the Federal Bureau of Investigation (Tr. 30). During the period 2006-08, SIS was carrying from 400 to 800 inmate cases and 30-50 staff cases (Tr. 32-33).

Officer Diamond testified that several corrections officers who started at the facility at the same time he started have been promoted, while he has not (Tr. 117-18). He also testified that did not apply for positions posted while the investigation was ongoing because he believed he could not receive a promotion while under investigation (Tr. 122).

---

[4] See Douglas v. Veterans administration, 5 MSPB 313, 332, 5 M.S.P.280, at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253434&version=253721&application=ACROBAT, accessed March 10, 2010. The Douglas Factors are summarized at http://www.aele.org/douglas-factors.pdf, accessed March 10, 2010.

Officer Manning testified that while he was under investigation, he applied for several positions at Big Sandy, a position at the facility in Ashland, Kentucky about 60 miles north of Big Sandy, as well as other jobs (Tr. 129). Officer Manning testified that he was rated as "best qualified" on several of the positions for which he applied, but that he was not awarded any of these positions (Tr. 129-30).

POSITIONS OF THE PARTIES

Position of the Agency

The Agency contends that the grievants admitted committing the acts in question and were aware of the policies prohibiting those actions. The discipline imposed upon them resulted in the correction of the behavior and deterring other staff engaging in the same types of actions.

In imposing the discipline, Warden Zuercher considered the Douglas Factors, including the nature of the offense, the records of the grievants, and the timeliness of the investigation. The penalties imposed did not exceed the appropriate range in Agency policies. Thus, the penalties imposed by the Agency are entitled to deference.

The Agency also contends that there is no statute, regulation, or any administrative authority that creates a mandatory time frame for the imposition of discipline. While the General Counsel of the DOJ recommends that discipline be imposed within 120 to 180 days, this time frame is not mandatory; it carries no legal significance. These are guidelines and recommendations, not requirements. Indeed, the Master Agreement states that the time frames may vary from case to case depending on circumstances and complexities. Establishing such time frames would prevent the

Agency from allocating staff to deal with unanticipated problems that are likely to arise, given the critical mission of the Agency.

During the time frame relevant to this grievance, the staff at Big Sandy was dealing with 400 to 800 inmate cases and 30 to 50 staff cases that had an impact on the safety of the inmates and the staff. The institution was facing serious problems. Given the minor offenses committed, the investigations were given the appropriate priority and the Agency's decision on the allocation of resources is entitled to deference.

Finally, even if it is assumed that the discipline was untimely, the Union has not shown how the grievants were harmed. In addition, the Union has not shown how the Agency's decision would have been different had the discipline been imposed in a timely manner.

For all the foregoing reasons, the Agency requests that the grievance be denied.

Position of the Union

The Union contends that the Agency guidelines establish the time frames that the Agency must follow in administering discipline, taking into account the complexity of the case. The Union, points out that the instant case was not complex. Once it was brought to the attention of the grievants, they admitted they committed the offenses.

The Union notes that DAW Ranum completed his local investigation in December, 2007. There is no reason why DAW Ranum's report could not have been electronically sent to OIA on the day he completed it. The Union observes that once the local investigative packet is sent to OIA, OIA must complete its review within 10 days.

The Union also argues that the grievants were denied promotions due to the uncertainty resulting from this long investigation. Indeed, the Union points out that it was only after the investigation was completed that Officer Diamond received a promotion.

The Union also notes that the case was not complex. The grievants admitted the offenses once confronted with the evidence. Thus, there was no reason why the Agency could not have complied with the guidelines in this case.

Big Sandy and OIA were aware of the status of the investigation. Each facility receives a monthly report from OIA on the status of investigations originating at the facility.

The Union cites and quotes from multiple federal sector arbitration cases in support of its contention that timeliness in imposing discipline is an essential component of efficient Agency operations and of the just cause principle. It is also a requirement of the Federal Labor Relations Act.

Based on the foregoing, the Union requests that the grievance be sustained.

DISCUSSION

By stipulation the parties agree that the discipline, if properly imposed, was appropriate to the offenses committed by the grievants. The issue in the case, however, is whether the discipline was improperly imposed because it was not timely and was in violation of the Master Agreement.

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, i.e., approximately four months for local investigations and approximately 6 months for OIA investigations (Tr. 10). Moreover, as these time frames were based on an Agency recommendation to the OIG (Jt. Ex. 10, pp. 60-61), these were time guidelines that, in the opinion of the Agency, it could generally meet, taking into account the circumstances and complexity of the case.

The Agency notes, however, that these are guidelines, not requirements, and that the complexities or circumstances individual cases may prevent the Agency from meeting these time frames. Indeed, Article 30d of the collective bargaining agreement recognizes that failing to meet these time frames is a possibility.

Based on the foregoing, it is reasonable to interpret the collective bargaining agreement as creating an expectation that investigations and disciplinary actions will occur within the 120-180 day time frame, although there may be situations in which it is impossible for the Agency to meet those time frames. I also interpret the collective bargaining agreement provision that the parties endorse the concept of the "timely disposition of investigations disciplinary/adverse actions" as requiring the Agency to move as expeditiously as the circumstances and complexities of the case permit, even if the disposition of the case extends beyond the 180-day limit. Thus, I agree with the Agency that the mere fact that case investigation and disposition cannot be completed in 180 days would not constitute a violation of the collective bargaining agreement if the complexities and circumstances of the case require additional time.

Nevertheless, Article 30a of the collective bargaining agreement requires that adverse action/discipline must be taken only for just cause and to promote the efficiency

of the service (Jt. Ex. 1). Just cause involves more than simply evaluating the substantive discipline that was imposed. This principle also requires that employees subject to adverse action/discipline be afforded reasonable due process. Thus, Article 30d must be interpreted in conjunction with Article 30a.

Turning to the instant grievance, the record establishes that it took the Agency approximately 46 months to dispose of Officer Diamond's case and; 44 months to dispose of Officer Manning's case. Based on the foregoing, the question in this grievance is whether those time periods were in compliance with the collective bargaining agreement, taking into account the complexities and circumstances of the case?

First, turning to the complexities of the case, the record establishes that the cases were not complex. The evidence of the grievants' misconduct was obvious and irrefutable. The Agency obtained the e-mail messages and the offending attachments. As e-mail messages always include the e-mail address of the sender, tracing the messages to the grievants was a simple task. Once confronted with the e-mail messages and attachment, the grievants admitted they sent the messages.

Second, with respect to the circumstances surrounding the case, I am unable to find any circumstances that are unusual or would have taken the Agency an inordinate amount of time to investigate. The grievants continued to be employed at Big Sandy during the investigation. They were accessible to the Agency, facilitating its investigation. The grievants admitted their misconduct. Thus, it was unnecessary to locate and interview other witnesses either in the Agency or outside the Agency.

The Agency claims that the inmate and staff difficulties at Big Sandy during the period 2005-2008 occupied all of the Agency's resources and they were unable to

allocate resources to investigating the allegations during this period. Essentially, the Agency is contending that the term "circumstances" in Article 30d covers the situation in a facility and is not limited to circumstances surrounding the case. Thus, the Agency contends that the situation in the facility shields it from an allegation that its disposition of the case was untimely.

I find such Agency contentions unconvincing in this case. First, even if it is assumed, without finding, that the word "circumstances" covers matters outside the specifics of the case, giving the Agency leeway in meeting the guidelines, I am unable to find that that a period of almost four years between offense and penalty meets any reasonable definition of "timely."

In addition, the record also establishes that it is possible that the investigation was not at the facility level for a substantial part of the period in question; thus there is no reason to believe the timing of the investigation above the facility level would have been affected by the situation at Big Sandy. Special Agent Link testified that he first received the allegations in October, 2005. Yet, it took more than two years, until November, 2007, for the review packet to be returned to Big Sandy for the investigation ultimately carried out by DAW Ranum. Although the record does not establish when Special Agent Link forwarded the DAW Ranum's report to OIA, even if it is assumed that it took him as long as 12 months to forward the report, this means that the report was the responsibility of OIA for 12 months.

After receiving the packet at Big Sandy, DAW Ranum completed the investigation in about a month, most likely in December, 2007 or January 2008. As noted, this investigation found that the grievants committed the conduct that was alleged.

The Agency's brief states that it took approximately five or six months, until on June 28, 2008, to reach the conclusion that policy was violated. It is reasonable to believe that the investigation was at OIA for most of portion of the first half of 2008. Even after the finding of a violation, it took the Agency another 8 months to propose discipline. Thus, even if one assumes that the situation at Big Sandy diverted resources from investigating the allegations and even if it is assumed, without finding, that the Master Agreement permits this situation to be considered a "circumstance" within the meaning of Section 30d, the situation at Big Sandy does not explain why OIA did not move expeditiously.

Additionally, even if it is assumed that the 120-180 day reference in the OIG report constitutes non-mandatory guidelines, there must be limits on the time it takes the Agency to complete an investigation and issue discipline. One need not determine those limits to conclude that a time frame for investigation and disposition case that is approximately seven times longer that the guidelines is far outside any such limits.

This time period also constitutes a denial of due process to the grievants in violation of the just cause requirement of Article 30a. Even if it is assumed that the grievants knew they would not be discharged, the uncertainty surrounding the investigation clouded their employment. The grievants testified that they believed that this uncertainty would be a bar to a promotion during this period (Tr. 121-22, 129-31). While this belief may have been incorrect (Tr. 107), there is no way the grievants could have known that. Moreover, I find this belief reasonable and verified, from the perspective of the grievants, by their failure to receive promotions.

In addition, the record establishes that there is a "reckoning period" that runs for two years from the date the Agency became aware of the misconduct, in this case June

28, 2008.[5] During this reckoning period the discipline imposed remains on the employee's record and may be cumulative with other penalties via progressive discipline. Thus, the finding of misconduct affects the grievants' employment status until June 28, 2010, or approximately five years after the events. This is an additional disadvantage to the grievants that would have been mitigated had the discipline been issued in a timely manner.

Based on the foregoing, the decision will be to sustain the grievance, to direct the Agency to expunge the suspensions from the records of the grievants, and to make the grievants whole for all lost earnings. A decision such as this may encourage the Agency to expedite its investigative processes. Consistent with this decision, the reckoning period associated with this discipline shall be terminated.

The record also indicates that a decision to expunge the discipline from the records of the grievance will not compromise the efficiency of the service. The record establishes that the grievants are productive and efficient officers. This conclusion is based on the testimony of CEO Zuercher who stated that the grievants are "very good officers" as well as by the testimony of Hector Rios, who was CEO at Big Sandy from February 2007 through October 2008 (Tr. 83, 143, 148-49). During the period of the investigation, the grievants received positive evaluations and received several awards (Jt. Ex. 13-17). Officer Diamond has since received a promotion (Jt. Exs. 14). The grievants have acknowledged their error. Thus, the probability is minimal that they will engage in similar misconduct in the future.

---

[5] Although the parties stipulated at the hearing that the "reckoning period" was effective on the day the discipline was issued, the Agency stated in its post-hearing brief that the "reckoning period" is effective on the date the Agency becomes aware of the violation, in this case June 28, 2008 (Ag. Br., p. 10). As the statement would be adverse to the Agency's interests, I credit it over the stipulation.

CONCLUSION

The disciplinary action taken against grievants James Manning and Charles Diamond was not for just and sufficient cause, not for the efficiency of the service, and was not in compliance with the parties' Master Agreement.

AWARD

The grievance is sustained. Within 30 calendar days of the date of this Opinion and Award, the Agency shall expunge the two-day suspension from the employment records of Officer Manning and the one-day suspension from the employment records of Officer Diamond and shall reimburse Officers Manning and Diamond for the loss of wages associated with the suspensions. The reckoning periods associated with these disciplinary actions shall be terminated effective with the date of this Opinion and Award.

March 17, 2010

Richard N. Block
Arbitrator
East Lansing, Michigan