*in the matter of the*

# ARBITRATION

*between*

**U.S. DEPARTMENT OF JUSTICE**
**FEDERAL BUREAU OF PRISONS**
**FCI EL RENO, OKLAHOMA**

**and**

**AMERICAN FEDRATION OF GOVERNMENT EMPLOYEES**
**LOCAL 171**

**FMCS Arbitration No. 17-56242**
**Brian Ortiz – Suspension Grievance**

## OPINION AND AWARD
**of**
**John C. Fletcher, Arbitrator**
**April 26, 2018**

This matter came to be heard in El Reno, Oklahoma on January 17, 2018, before the undersigned Arbitrator. The Employer was represented by:

Lee R. Jones, Esq.,
Asst. General Counsel, FBOP
Employment Law Branch, NCRO
400 State Avenue, Tower II, 8th Floor
Kansas City, Kansas 66101

The Union was represented by:

John-Ed L. Bishop, Esq.
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Baton Rouge, Louisiana 70816

The proceedings were transcribed. The parties filed post-hearing briefs with the Arbitrator, which were received electronically on March 27, 2018, at which time the record was closed.

## BACKGROUND

American Federation of Government Employees, Local 171 ("AFGE" or "Union") represents correctional officers employed by the U.S. Department of Justice, Federal Bureau of Prisons ("Employer" or "Agency") at the Federal Correctional Institution ("FCI") in El Reno, Oklahoma. The relevant labor agreement is the Master Agreement between the Agency and AFGE, which covers bargaining units nationwide, and which has a stated effective term of July 21, 2014 through July 20, 2017 ("Agreement"). The present dispute concerns a 14-day suspension issued to the Grievant, Officer Brian Ortiz. The Agency contends that the Grievant was suspended for engaging in Discreditable Conduct on April 6, 2015 and for being AWOL for the period April 7-9, 2015. The Union contends that the Grievant was treated disparately by the Agency, as to the length of the suspension, and that the suspension was not issued timely, as required under Article 30, Section (d) of the Agreement.

No issues have been raised as to the Arbitrator's jurisdiction to hear and decide this case and issue a final and binding award.

## RELEVANT CONTRACT PROVISIONS

## ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS

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.

## THE ISSUES

The Arbitrator finds that the only issues to be decided are:

Did the Agency issue the 14-day suspension to the Grievant in a timely manner, in accordance with the requirements of Article 30, Section (d)?

If not, what shall the remedy now be?

## THE FACTS

The pertinent facts are not in dispute. On April 6, 2015, the Grievant pointed a gun at his landlord and an "unknown male" during an argument – the Grievant contends that he did so because the landlord had first pulled a gun on him. The episode occurred at the Grievant's residence. The police were summoned. The Grievant, who admits that he had been drinking but denies that he was intoxicated, left his residence in his automobile before the police arrived. The police located and arrested the Grievant a short time later.

The Grievant was charged criminally with what has been termed "felonious pointing of a gun," in two counts of the criminal complaint, and with Operating While

Intoxicated in a third count. He spent three days in jail, April 6-9, 2015. The Agency listed him as AWOL for April 7-9, 2015, although it appears that he had been removed from the schedule for each of those days, his supervisor having been notified earlier that he was unable to report for work.

The Grievant was placed on paid administrative leave on September 9, 2015. He was also notified, that same day, that a recommendation had been made to the warden for his indefinite suspension without pay, pending investigation of his conduct on April 5, 2015. On September 17, 2015, he was placed in an unpaid status, indefinitely. On April 26, 2016, the Grievant pleaded guilty in criminal court to all three counts of the complaint. The court accepted the plea, entered findings of guilt on each charge and an order deferring sentencing for six years, subject to conditions, was entered. The Grievant, at arbitration, testified, without rebuttal, that he advised Agency investigators as to the disposition of his criminal matter on or about April 26, 2016.

The Grievant first met with Agency investigators on June 11, 2016, at which time he provided an affidavit regarding the incident that led to the criminal charges against him. The record shows that he submitted additional affidavits on July 13, 2016, July 22, 2016 and August 11, 2016. Summarizing the Grievant's assertions in the affidavits, he admitted that he had been drinking on April 5, 2015, but denied that he was intoxicated; he also admitted that he "retrieved" a handgun from his closet in the presence of his landlord and an unknown male, but denied that he assaulted the landlord, and asserted

that he retrieved the weapon after the landlord had displayed her own weapon and after the unknown male had threatened him. He also denied that he was romantically involved with the landlord.

The Grievant was returned to work in a paid status on November 15, 2016. On April 12, 2017, the Agency issued a Proposal Letter in which it was proposed that the Grievant be suspended for a period of 30 days, on charges of Discreditable Behavior and Absence Without Leave. The Grievant provided written and verbal responses to the Proposal Letter on April 26, 2017. On July 5, 2017, the warden issued the final decision, advising the Grievant that he would be suspended without pay for a period of 14 days.

Regarding the Agency's handling of the investigation, Lt. Michael Burk, the current head of Special Investigative Services ("SIS") at El Reno, testified that he first became involved in this matter after the Grievant's criminal proceedings were completed– the initial investigatory referral documentation had been prepared and sent to the Agency's Office of Internal Affairs ("OIA") by Burk's predecessor, and Burk took up the investigation when OIA referred the matter back to SIS. Burk requested copies of the pertinent court files from the Grievant's criminal proceedings, and he received the files sometime in May 2016. He initially interviewed the Grievant on June 11, 2016. He took the additional three affidavits of the Grievant at the direction of the OIA.

Burk recalled that his third report to OIA, submitted after the August 11, 2016 interview of the Grievant, was approved by OIA, but he could not recall when he

received the approval. However, it appears that he likely received OIA's report approving the charges at issue here on or about November 1, 2016. He then forwarded the report and all pertinent documentation to human resources for review as to the appropriate disciplinary action.

Janice Humbertson, the Human Resource Manager at FCI El Reno, testified that she could not specifically recall her participation in the case of the Grievant. As to her general practice, she testified that she would have put together a disciplinary file from the materials she received from SIS, and would then conduct a review of the employee's disciplinary file and consult with the proposing officer regarding the appropriate level of discipline. She would then review the full file in the context of the Douglas factors and prepare the Proposal Letter, in draft, and send it to the regional human resources and labor relations offices for further review. She testified that Agency procedures allow her 90 days to complete her processing of the investigation.

## DISCUSSION AND ANALYSIS

The Agency focuses its arguments on the evidence relating to the Grievant's conduct during the period April 15-19, 2015, and the application of the Douglas factors in the context of that conduct. The Union, for its part, responds rather briefly on the issues raised by the Douglas factors, asserting only that the Grievant was treated disparately in terms of the level of discipline meted out. The focus of the Union's arguments is on the

application of Article 30, Section d of the Agreement, and the fact that 820 days elapsed between the conduct at issue and the issuance of the discipline. The Union's argument and evidence on this aspect of this matter are generally unrebutted.

The Union cites a collection of arbitral authority which it contends will support this Arbitrator in finding that the discipline was untimely, under any reasonable reading of Article 30, Section d. particularly in light of the Agency's own procedural rules, and that it was therefore issued without just cause. The Agency has elected to not respond to the Union's arguments or evidence as to the timeliness of the discipline.

This Arbitrator's review of the arbitral opinions cited by the Union reveals that a clear majority among them have recognized that Article 30, Section d, which does not itself define the term "timely disposition of investigations and disciplinary/adverse actions," should be interpreted as embodying reasonableness standard in terms of the timeliness of the Agency's disciplinary actions. These arbitrators have recognized that no simple time limits, or formula for deriving them, exist and, therefore, the timeliness of the Agency's disciplinary action must be determined on a case-by-case basis, taking into account the circumstances and complexities of each particular set of facts. See, for example, Federal Bureau Of Prisons (FCC, Pollock, La.) and AFGE, Local 1034, FMCS No. 14-54750, slip op. at pp. 15-16 (Arb. Rogers, 2015)("Simply stated, the Arbitrator must determine whether BOP investigated and adjudicated [the Grievant's] adverse action within a reasonable time under the circumstances and complexities of this

individual case. If so, then based on [the Grievant's] admission to the merits of the sustained [charge], AFGE's grievance must be denied. If not, then BOP's adverse action against [the Grievant] was without just and sufficient cause and AFGE's grievance must be sustained").

Nearly all of the arbitrators cited by the Union have discussed a report of the Office of Inspector General ("OIG"). issued in 2004, in which the OIG noted that this Agency had not adopted standards for the timely processing of disciplinary and averse actions. The report defined what the OIG termed the "investigative" phase, that phase of the process from the initiation of the investigation to the issuance of the disciplinary proposal, and the "adjudicative" phase, which runs from the point that discipline is formally proposed to the point it is issued. Finally, the OIG's report noted that the Agency's own internal "expectations" were that investigations conducted locally would take no more than 120 days, while those conducted by the OIA would have an upper time limit of 180 days, and that the adjudicative phase would have an upper time limit of 120 days. Finally, the OIG noted that when comparing investigative times, consideration should be given to the fact that the involvement of outside agencies, i.e. law enforcement agencies or the OIG, may prolong the investigative phase.

This Arbitrator requires little guidance from the internal reports of the Agency or the OIG in order to reach the conclusion that the 820 days that passed from April 6, 2015 and July 5, 2017 was an outrageously long time for the investigation and adjudication of

the discipline at issue here. That the Agency waited 420 days from the date of the incident to start its investigation is alarming, in itself. That the Agency took another 13 months to complete its investigation and issue discipline is outrageous, especially in light of the fact that the Agency kept the Grievant on unpaid suspension for the majority of that time.

The Agency has not explained why it waited a year to start the investigation. It is certainly possible that the Agency waited for the criminal proceedings against the Grievant to conclude. However, the Grievant was charged with the underlying conduct, and he was not disciplined for having been found guilty in the criminal proceedings, and there is no evidence to suggest that the delay was requested by the Grievant or his Union. In any event, the Agency offered no explanation as to why it took so long thereafter, more than a year, to investigate such a simple case. On this point, the Arbitrator notes that according to Burk's testimony, which was offered by the Union, the Grievant was the only witness interviewed by SIS, and the only other evidence gathered were the court files, which were received in May 2016. Considering all of the evidence, the Arbitrator is convinced that the investigation and adjudication of the Grievant's disciplinary matter could reasonably have been concluded in a matter of days, perhaps weeks.

The majority view among the arbitrators cited in this case is that discipline which is untimely under Article 30, Section d is issued without just and sufficient cause. Accordingly, the remedy is to grant the grievance in full, and to order that the

disciplinary action be removed and the affected employee made whole for his or her losses. This Arbitrator agrees, and will so order.

In light of this finding, the Arbitrator finds no reason to address the other arguments raised by the Union.

## AWARD

For the reasons set forth above and incorporated herein as if fully rewritten, the Arbitrator concludes that the Collective Bargaining Agreement has been violated. The grievance is accordingly granted. The 14-day suspension is to be removed from the Grievant's file and Grievant made whole for his losses, including backpay.

The Union is granted leave to file a petition for its fees and costs. The Arbitrator shall retain jurisdiction this purpose and for purposes of resolving any disputes as to the implementation of this Award.

**John C. Fletcher, Arbitrator**
**Poplar Grove, Illinois –April 26, 2018**