

IN THE MATTER OF THE ARBITRATION

Between

The American Federation of  
Government Employees,  
Local 1034, hereinafter  
"Union,"

and

Federal Bureau of Prisons,  
Pollock, LA, hereinafter  
"Employer."

RECEIVED

MAY 27 2015

Labor Management Relations Branch  
West Office

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CASE NO. FMCS 14 53677-7

ARBITRATOR: J. R. Carr  
2311 Ranch Club Road, #416  
Silver City, NM 88061

APPEARANCES: For the Union:

John-Ed. L Bishop  
11909 Bricksome Avenue  
Suite W-3  
Baton Rouge, LA 70816

For the Employer:

Steven R. Simon  
Senior Labor Law Attorney  
Federal Bureau of Prisons  
Labor Law Branch, West  
230 North First Avenue, Suite 201  
Phoenix, AZ 85003

HEARING SITE: FCC Pollock, LA

HEARING DATE: January 13 and 14, 2015.

BRIEFS: Received May 4, 2015.

## INTRODUCTION

The parties acknowledged the matter was properly before the Arbitrator. A full and fair opportunity was afforded the Union and the Employer to present opening statements, offer exhibits, examine and cross-examine witnesses, and to otherwise make their positions and arguments known. The Arbitrator accepted into evidence 21 joint exhibits, six Union exhibits and two Employer exhibits.

Testimony was taken from Tylar Meeker, HR Specialist, Michael Melton, former Corrections Lieutenant at FCC Pollock, Corrections Lieutenant James Draves, Associate Warden Gene Beasley, and Complex Warden Michael Carvajal for the Employer. The Grievant, Corrections Officer Chad Luke, Corrections Lieutenant Kerry Jackson, Former Facilities Manager Charles Davis, Chief Union Steward Jason Shannon, Corrections Officer Andrew Howard, Corrections Officer Brian Richmond and Human Resource Manager Scott Clarkson testified for the Union. Mr. Clarkson testified via video conference.

## EXHIBITS

- J-1 Parties applicable Master Agreement.
- J-2 Grievance.
- J-3 Employer's Grievance Response.
- J-4 Union's Invocation of Arbitration.
- J-5 Discipline Proposal Letter dated September 9, 2013.
- J-6 Discipline Decision Letter dated December 13, 2013.

- J-7 Federal Bureau of Prisons Standards of Conduct.
- J-8 Grievant's Receipt of Standards of Conduct.
- J-9 Grievant's Affidavit.
- J-10 Andrew Howard's Affidavit.
- J-11 Hospital Log Book.
- J-12 Armenda Boteler Statement and Time and Attendance Records.
- J-13 Grievant's Written Response to Charges.
- J-14 Written Minutes of Grievant's Oral Response.
- J-15 Daily Roster 11/23/2011.
- J-16 Daily Roster 11/22/2011.
- J-17 Quarters History for Inmate Gates.
- J-18 Written Minutes of Howard's Oral Response.
- J-19 Howard's Written Response.
- J-20 Boteler Memo's and Affidavits.
- J-21 Original Proposal and Decision, Rescission Memo and Oral and Written Responses from Grievant.
- E-22 Checklist from Disciplinary File for Grievant.
- E-23 Checklist from Original Disciplinary File for Grievant.
- U-24 2011 Disciplinary Log, Redacted.
- U-25 2012 Disciplinary Log, Redacted.
- U-26 2013 Disciplinary Log, Redacted.
- U-27 Office of Inspector General 2004 Report.
- U-28 Grievant's Potential Overtime Log from 12/13/2013 to 1/16/2014.
- U-29 Charles Davis Disciplinary Materials.

ISSUE

The parties submitted oral issue statements that were not in agreement. They authorized the Arbitrator to craft the issue statement. Therefore, the issue is defined as follows:

Was the Master Agreement violated when the Grievant was suspended Grievant for 30 days for falsifying a hospital log entry?

If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE AND AUTHORITIES

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS

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.

THE BACK PAY ACT 5 U.S.C. § 5596

Section 5596 (b) (1) (A) (ii)

An employee of an agency who ... is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee ... is entitled, on correction of the personnel action, to all or any part of the pay, allowances, or differentials ... which the employee normally would have earned or received during the period of the personnel action had not occurred ... [and] reasonable attorney fees related to the personnel action.

### BACKGROUND

Grievant, Chad Luke is a corrections systems officer for the Bureau of Prisons at FCC Pollock. Grievant has been employed by the Bureau of Prisons for 13 years. On the morning of November 23, 2011, Grievant's co-worker Andrew Howard had volunteered for an overtime assignment as an armed guard for a prisoner hospitalized at Cabrini Hospital.

Mr. Howard became physically unfit to work that shift and Grievant volunteered to fill in for Howard. Grievant, then worked the shift but entered Howard's name in the on-site logbook at the hospital so that Howard would get the money for the shift.

Two years after the incident, the Employer determined the appropriate discipline was a 30-day suspension. The Union grieved the suspension.

### POSITION OF THE UNION

The Union states the administration of discipline in this case was not timely in accordance with the Employer's standards and the Master Agreement. Further, the Union contends the Employer lacked just and sufficient cause to suspend Grievant. Finally, the Union asserts the 30-day suspension is not equitable when compared with the discipline given others for similar offenses. The Union asks the 30-day suspension be removed or mitigated to a penalty consistent with like offenses at the facility. Further, the Union asks the Grievant be made whole for

wages lost and overtime opportunities missed while he was suspended. Finally, the Union asks for Attorney fees as required by the Back Pay Act.

#### POSITION OF THE EMPLOYER

The Employer maintains the original recommended discipline, and subsequent removal from service, was reduced to a 30-day suspension, notwithstanding that Grievant is a federal law enforcement officer and held to a higher standard of conduct by the Employer. The Employer believes it had just and sufficient cause to suspend the Grievant for 30 days and that this penalty is within the penalty range for this type offense. Further, the Employer argues putative comparators were dissimilar to Grievant's offense and should not be considered because the Grievant's offense involved money. The Employer admits the length of time taken to investigate was inordinate but states it was beyond the Employer's control since the investigation was conducted by the Office of the Inspector General.

#### FINDINGS OF FACT

1. Grievant admitted at all levels of investigation he entered Andrew Howard's name on the hospital log. (Tr. 119, 120, 124, 132, 134; Exhibits J-2, J-9, and J-21.)
2. The hospital log reflects Howard's name was printed, not signed, on the sheet. (Exhibit J-11.)
3. Grievant received no money for working Howard's hospital shift. (Tr. 35; Exhibit J-13.)

4. The overtime wages paid to Howard were actually owed to Grievant. (Tr. 82.)
5. Kerry Jackson received a recommendation of a 10-day suspension for multiple infractions of falsification of records and failure to follow policy. (Tr. 32, 148, 149.) On final review, Jackson received a five-day suspension for these infractions. (Tr. 147.)
6. Michael Bradshaw received a recommendation of a ten-day suspension for falsification of documents. (Tr. 33.) He falsified an official record, numerous times, took keys downrange against policy and left a door unsecured. (Tr. Vol. II 60.) Ultimately, Bradshaw received a five-day suspension for his infraction. (Tr. 33.)
7. Supervisors are held to a higher standard and should receive greater discipline for similar offenses. (Tr. 153, Tr. Vol. II 26, 46.)
8. Charles Davis signed the name of a subordinate on an inventory sheet. (Tr. 101, 158; Exhibit U-29.) Davis received a recommendation for a five-day suspension for the single count of falsifying a document. (Tr. 34.) Davis was a supervisor and held to a higher standard of behavior. Davis received a one-day suspension for his infraction. (Tr. 154.)
9. Jackson, Bradshaw and Davis all committed their infractions at the Pollock Complex. (Tr. 152; Exhibits E-23, U-25.)
10. In a 2004 report the Office of the Inspector General (OIG) recommended the Employer develop procedures to ensure that all discipline is consistently imposed BOP-wide. (Exhibit U-27.)
11. In its response to this report, the Employer concurred that "discipline imposed should be consistent assuming all facts

are the same; including position and security level at the institution." (Exhibit U-27.)

12. Neither Carvajal nor Beesley reviewed comparable disciplinary logs at the complex. Both relied on the HR Specialist to advise them on past disciplinary cases. (Tr. 79, 92, 98.)
13. HR Specialist Meeker did not bring the discipline for Jackson, Bradshaw or Davis to the Warden's attention. (Tr. 34.)
14. Meeker believed the Grievant's case was different because it dealt with money. (Tr. 35.) But, Grievant was not paid for working Howard's shift. (Tr. 35; Exhibit J-21.) Grievant did not receive money he was not entitled to, nor did he attempt to obtain any money he was entitled to. (Tr. 82, 95.)
15. Two years and 23 days passed between the date Grievant signed Howard's name on the hospital log and the date he was suspended. (Exhibit J-6.)
16. In its 2004 report, the OIG recommended BOP establish written guidelines for the length of time in which the investigative and adjudicative phases of the disciplinary process should be concluded. (Tr. 78; Exhibit U-27.)
17. In response to the report, the BOP established an expectation that local investigations be concluded within 120 days. (Tr. 78; Exhibit U-27.) BOP also established a guideline of 120 days between receipt of the finalized investigation through conclusion of adjudication. (Exhibit U-27.)
18. The investigation of Grievant's charges was conducted by the OIG. (Tr. Vol. II 59; Exhibit J-9.) No evidence was submitted to prove the Employer controls the length of time the OIG takes to investigate. (Tr. Vol. II 48.)



19. The Employer established a general guideline of 120 days for adjudication of a case after the investigative phase, subject to a number of variables. (Exhibit U-27.)
20. The Employer received the OIG investigative findings on November 15, 2012. (Exhibit E-22.) The Employer took 273 days to adjudicate the offense, issuing a decision to remove the Grievant on August 15, 2013. (Exhibit E-22.) On the same date, the Employer rescinded that disciplinary action. (Tr. 68, 69; Exhibit J-21.)
21. Then the new incoming warden, Michael Carvajal, undertook to review all charges against Grievant. (Tr. 99.)
22. 121 days later, Warden Carvajal determined that all 28 Specifications in Charge 1 were to be dropped and the Grievant would be disciplined only for the single specification in Charge 2. (Exhibit J-6, E-23.)
23. The record provides no explanation for the extensive period of time it took the Employer to adjudicate the two initial charges after receiving the Investigative Report from the OIG.
24. Grievant has a clean record but for the instant case. (Exhibit J-2.)
25. Grievant asserted he would have worked overtime hours during his suspension. The Employer offered no rebuttal. (Tr. 144; Exhibit U-28.)

#### DISCUSSION

##### Timeliness.

The parties' disciplinary process is bifurcated into an investigative phase and an adjudicative phase. The record establishes the investigation phase was conducted by the Office of the Inspector General (OIG), but that the expectations for

timeliness adopted by the Employer cannot be applied to the OIG. Once the Employer received the original, completed investigation from OIG, the adjudication phase took another 273 days to complete. The discipline administered at the end of the first adjudication was rescinded and readjudicated by Warden Carvajal to a 30-day suspension. It is Warden Carvajal's adjudication that is considered here in the context of the parties' process.

The Union argues the 30-day suspension should be voided due to the excessive time between the alleged violation and the final discipline. However, Warden Carvajal concluded his adjudication phase in approximately 121 days, close to the general guideline.

The arbitrator in the Case Study cited in the OIG report ruled that a 14 month delay between the alleged misconduct and the conclusion of the adjudication violated the Master Agreement's concept of timely disposition of investigations and adjudications. The arbitrator reasoned that discipline was not handled in a timely manner and as a result, the employee in question suffered harm. The arbitrator found the employee was being "categorically bypassed for positions for which he is best qualified precisely because the charges are pending" and was "clearly . . . prejudiced by a delay in the disposition of those charges." (Exhibit U-27.)

Two factors distinguish the instant case from that discussed in the IOG Case Study. First, the extensive delay in the original adjudication in the instant case resulted in an adverse

action that was rescinded. Warden Carvajal arrived and elected to review the entire case, in effect starting a new adjudication period.

Second, there is nothing in the record showing Grievant suffered harm by the delay in the original adjudicative period. Unlike the Case Study, Grievant did not document loss of promotion, being bypassed for assignments or any other disciplinary treatment prior to the 30-day suspension that is the subject of this hearing.

Discipline.

The grievant has consistently admitted he committed the offense for which he was disciplined. The record reflects Assistant Warden Beesley recommended a 45-day suspension which was reduced to 30 days by Warden Carvajal. Neither official was made aware of the lesser disciplines meted out for comparable, and perhaps more serious, offenses.

While it is rare for any two discipline cases to involve exactly the same circumstances, the record documents three cases containing the element of falsification of records. CO Jackson received a five-day suspension for multiple instances of falsifying records and failure to follow policy. CO Bradshaw received a five-day suspension for multiple instances of falsifying an official record, and violating security protocols. Supervisor Davis received a one-day suspension for a single count

of falsifying a document. Grievant was suspended for 30 days for a single count of falsifying a document.

The Employer's brief offers numerous cases in support of its argument that the 30-day suspension is warranted. However, those cases are distinguished in that they dealt with unjust enrichment to the grievants themselves or involved multiple repeated instances of falsification of time cards to reflect hours which were not worked, in addition to other charges. This case deals with a single incident in which the Grievant received no money.

Damages.

The record documents that Grievant habitually signed up to work overtime and that he had signed up to work overtime during the period of his 30-day suspension.

Attorney Fees.

The Back Pay Act entitles an employee

affected by the unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay ... reasonable attorney fees related to the personnel action.

Back Pay Act § U.S.C. § 5596(b)(1)(A)(ii). The record in this case establishes the 30-day suspension was unwarranted and unjustified.

The Employer should have known it would not prevail on the merits when it disciplined Grievant with a 30-day suspension. The record reflects Warden Carvajal's belief that had he known of

the comparable disciplinary cases, he might have decided differently. The Human Resources department failed to provide all relevant information to the decision maker. The fact that the deciding officer was not aware of similar cases is not an excuse. He should have been made aware.

#### CONCLUSIONS

Based upon the entire record and the Findings of Fact in this case, I make the following conclusions:

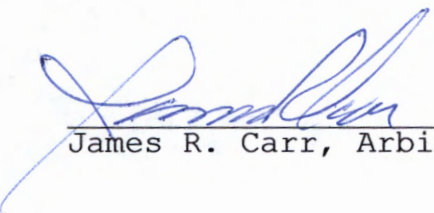
1. Warden Carvajal concluded his adjudication of the Grievant's case consistent with the guidelines.
2. The Grievant committed the offense for which he was disciplined.
3. The Employer violated Article 6 Section b(2) and committed a gross procedural error in that the 30-day suspension given Grievant is not consistent with the discipline given others at the same facility for similar offenses.
4. As a result of the 30-day suspension Grievant suffered financial losses due to his inability to work overtime.
5. Employer liability exists under the Back Pay Act.
6. Grievant's claim that he missed 44 eight hour shifts of overtime during his 30-day suspension is excessive. Other arbitrators have held 40 hours of overtime per week is reasonable. Given the Grievant's prior overtime history and the lack of any contradictory evidence in the record, I apply that standard here.

7. In that one of the five Allen factors has been met the Grievant is entitled to reasonable attorney fees for service provided back to the date the 30-day suspension began.

AWARD

For the above reasons, the Grievance is affirmed. The 30-day suspension is reduced to a one-day suspension. The Grievant is to be paid back pay for 29 days' lost wages and benefits, plus statutory interest. Grievant is to be paid four weeks and one day (168 hours) of overtime he reasonably would have worked during those 29 days, plus statutory interest accruing from the pay dates on which the Grievant would have been paid for having worked the overtime. The Employer is responsible for reasonable attorney's fees in accordance with the Back Pay Act.

The Arbitrator will retain jurisdiction for 90 days in the event the parties are unable to reach agreement on the make whole portion of this decision or the attorney's fees. Arbitration costs are assigned equally to the parties in accordance with the Collective Bargaining Agreement.

  
James R. Carr, Arbitrator

MAY 21, 2015  
Date

ARBITRATOR'S BILL

Please make check payable and mail to:

J. R. Carr  
2311 Ranch Club Road, PMB 416  
Silver City, NM 88061

Case No. FMCS 14-53677-7, Chad Luke Suspension

Union: John-Ed L. Bishop  
11909 Brickson Avenue  
Suite W-3  
Baton Rouge, LA 70816

Employer: Steven R. Simon  
Senior Labor Law Attorney  
Federal Bureau of Prisons  
Labor Law Branch, West  
230 North First Avenue, Suite 201  
Phoenix, AZ 85003

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ARBITRATOR'S COMPENSATION

Number of hearing days: 2 @ \$1000.00 = \$ 2,000.00  
Hearing dates January 13 and 14, 2015

Travel time @ ½ daily rate:  
Jan. 12, 2015 - 8 hours = 750.00  
Jan. 14, 2015 - 7.5 hours = 687.00

Research and writing days: 4 days @ \$1,000.00 = \$4,000.00

Subtotal \$7,437.00

ARBITRATOR'S EXPENSES

Airfare = \$ 793.20  
RT mileage Silver City to  
El Paso Airport  
324 miles @ .56/mile = 191.09  
Hotel/Meals = 456.76  
Rental car and gas = 280.41  
Airport and Hotel Parking = 15.00

Luke Arbitration  
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Invoice Page 2

Total Expenses: \$1,736.46

**Grand Total \$9,173.76**

PAYABLE BY EMPLOYER \$4,586.73

PAYABLE BY UNION \$4,586.73

Arbitrator's Tax ID number 534-50-1088  
(2015 W-9 attached)

Date May 21, 2015

Signature 



**Request for Taxpayer  
Identification Number and Certification**

Give Form to the  
requester. Do not  
send to the IRS.

Name (as shown on your income tax return)  
**JAMES R. CARR**

Business name/disregarded entity name, if different from above  
\_\_\_\_\_

Check appropriate box for federal tax classification:  
 Individual/sole proprietor   
  C Corporation   
  S Corporation   
  Partnership   
  Trust/estate  
 Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶ \_\_\_\_\_  
 Other (see instructions) ▶ \_\_\_\_\_

Exemptions (see instructions):  
 Exempt payee code (if any) \_\_\_\_\_  
 Exemption from FATCA reporting code (if any) \_\_\_\_\_

Address (number, street, and apt. or suite no.)  
**2311 Ranch Club Rd #416**

City, state, and ZIP code  
**SILVER CITY, NM 88061**

Requester's name and address (optional)  
\_\_\_\_\_

List account number(s) here (optional)  
\_\_\_\_\_

**Part I Taxpayer Identification Number (TIN)**

Enter your TIN in the appropriate box. The TIN provided must match the name given on the "Name" line to avoid backup withholding. For individuals, this is your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Social security number  

5	3	4	-	5	0	-	1	0	8	8
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Note. If the account is in more than one name, see the chart on page 4 for guidelines on whose number to enter.

Employer identification number  

		-							
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**Part II Certification**

- Under penalties of perjury, I certify that:
- The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me), and
  - I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding, and
  - I am a U.S. citizen or other U.S. person (defined below), and
  - The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

**Certification instructions.** You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 3.

Sign Here    Signature of U.S. person ▶     Date ▶ **1/20/15**

**General Instructions**

Section references are to the Internal Revenue Code unless otherwise noted.  
**Future developments.** The IRS has created a page on IRS.gov for information about Form W-9, at [www.irs.gov/w9](http://www.irs.gov/w9). Information about any future developments affecting Form W-9 (such as legislation enacted after we release it) will be posted on that page.

**Purpose of Form**

A person who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) to report, for example, income paid to you, payments made to you in settlement of payment card and third party network transactions, real estate transactions, mortgage interest you paid, acquisition or abandonment of secured property, cancellation of debt, or contributions you made to an IRA.

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN to the person requesting it (the requester) and, when applicable, to:

- Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
- Certify that you are not subject to backup withholding, or
- Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the

withholding tax on foreign partners' share of effectively connected income, and

- Certify that FATCA code(s) entered on this form (if any) indicating that you are exempt from the FATCA reporting, is correct.

Note. If you are a U.S. person and a requester gives you a form other than Form W-9 to request your TIN, you must use the requester's form if it is substantially similar to this Form W-9.

**Definition of a U.S. person.** For federal tax purposes, you are considered a U.S. person if you are:

- An individual who is a U.S. citizen or U.S. resident alien,
- A partnership, corporation, company, or association created or organized in the United States or under the laws of the United States,
- An estate (other than a foreign estate), or
- A domestic trust (as defined in Regulations section 301.7701-7).

**Special rules for partnerships.** Partnerships that conduct a trade or business in the United States are generally required to pay a withholding tax under section 1446 on any foreign partners' share of effectively connected taxable income from such business. Further, in certain cases where a Form W-9 has not been received, the rules under section 1446 require a partnership to presume that a partner is a foreign person, and pay the section 1446 withholding tax. Therefore, if you are a U.S. person that is a partner in a partnership conducting a trade or business in the United States, provide Form W-9 to the partnership to establish your U.S. status and avoid section 1446 withholding on your share of partnership income.