

**UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICES
IN THE MATTER OF ARBITRATION BETWEEN**

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES,)
LOCAL NO. 171 -- UNION)
)
AND) FMCS NO. 17-54766
)
U.S. DEPARTMENT OF JUSTICE)
FEDERAL BUREAU OF PRISONS)
FEDERAL CORRECTIONAL INSTITUTION)
EL RENO, OKLAHOMA -- AGENCY)

APPEARANCES FOR UNION:

Mr. John-Ed Bishop, Attorney at Law (Whitehead Law Firm)
Mr. Charles Bishop, Steward (Local 171)
Mr. Brian Ortiz, Correctional Officer, GS-5 (U. S. Department of Justice Federal Bureau of Prisons)

APPEARANCES FOR AGENCY:

Mr. Lee R. Jones, Assistant General Counsel (U.S. Department of Justice Federal Bureau of Prisons)

PERSONS WHOM PRESENTED TESTIMONY:

Mr. Brian Ortiz
Mr. Charles Bishop, Steward (Local 171)
Mr. Janice Humbertson, Human Resources Manager (FCI El Reno, Oklahoma)
Mr. Thomas Scarantino, (Former) Warden (FCI El Reno, Oklahoma)

The American Federation of Government Employees, Local No. 171 hereinafter referred to as the "Union". The U.S. Department of Justice, Federal Bureau of Prisons Federal Correctional Institution located in El Reno, Oklahoma hereinafter referred to as "Agency". Federal Correction Institution located in El Reno, Oklahoma hereinafter referred to as "FCI". The Union and Agency entered into a Collective Bargaining Agreement in effect from July 21, 2014 – July 20, 2017, hereinafter referred to as "CBA" or "Agreement" (Joint Exhibit 1). Officer Brian Ortiz hereinafter referred to as the "Grievant".

On April 6, 2015 the Grievant was arrested and charged with two counts of felonious pointing a gun and an OWI (Operating While Intoxicated). On or around April 7 or 8, 2015 the Grievant voluntarily informed the Agency of his criminal

charges. Upon returning to work the Grievant was placed on Temporary Assignment of Duties, which entailed him monitoring phone calls at training center. Grievant remained on Temporary Assignment of Duties from April to September 2015. On September 9, 2015 Grievant was placed on administrative leave and notified of a proposed indefinite suspension without pay pending outcome of his criminal charges (Joint Exhibit 5/Joint Exhibit 6). On September 17, 2015 Grievant received notice from Warden Thomas Scarantino that his indefinite suspension was supported by evidence and that it would remain "in effect until such time as there is a disposition of the charges against you, or there is sufficient evidence to either return you to duty or to support administrative action against you" (Joint Exhibit 7). On April 27, 2016 Grievant plead guilty to charges in court which resolved his charges without any imprisonment and released him to carry a firearm while at work (Joint Exhibit 4). On April 28, 2016 the Grievant informed Agency and Union personal verbally and in writing of the resolution of his criminal charges. On July 13, 2016 Grievant came to FCI providing affidavits and grievant was compensated for this task. On November 15, 2016 the Agency reinstated Grievant to work at FCI. Grievant returned to his previous employment duties and post with no restrictions. On April 12, 2017 Grievant received notice of a proposed suspension for thirty (30) days for Discreditable Behavior and Absence Without Leave (Joint Exhibit 8). On July 5, 2017 Grievant received notification of fourteen (14) day suspension (Joint Exhibit 11). On July 20, 2017 the Union asked for clarification from the Agency as to whether the Grievant would be awarded back pay (Joint Exhibit 12). On July 31, 2017 Warden Antonelli responded stating that the Grievant's disciplinary case was now closed and he was not entitled to back pay (Joint Exhibit 13). On August 1, 2017 the Union filed the grievance the subject matter of this Arbitration (Joint Exhibit 2). On August 31, 2017 the Agency's Western Regional Office (WRO) denied the grievance (Joint Exhibit 3). On March 7, 2018 the Arbitration hearing was held in FCI El Reno, Oklahoma. Arbitrator Charles Griffin was neutrally selected arbitrator elected by the parties to oversee and generate a binding decision regarding the matter. The parties stipulated the matter is proper for Arbitration

and submitted joint exhibits and throughout the proceeding without any stipulations.

PERTINENT CONTRACT PROVISIONS AND LEGAL AUTHORITIES

The Agreement, Article 31, Section D states "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. It further elaborates by stating " If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence".

5 U.S.C. § 7513 (b)(1) states "an employee against whom an action is proposed is entitled to - at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action". Further, 5 C.F. R. § 752.404(d)(1) states " Section 1713(b) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including indefinite suspension. This notice exception is commonly referred to as the "crime provision".

The Back Pay Act, 5 U.S.C §5596(b) provides "An employee of an agency who ... is found ... 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 ... is entitled, ... reasonable attorney fees related to the personnel action."

ISSUES

First, did the Union fail to file the grievance in a timely manner in violation of the Agreement, Article 31, Section D? If so, what is the remedy?

Secondly, did the Agency violate the Agreement, 5 U.S.C. §7513 (b) and/or 5 C.F. R. § 752.404 (d)? If so, what is the remedy?

DECISION

First, Arbitrator will examine whether the Union filed the grievance in a timely manner in violation of the Agreement, Article 31, Section D. The Agreement, Article 31, Section D states "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. It further elaborates by stating " If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence". The Union filed the grievance the subject matter of this Arbitration on August 1, 2017. On July 5, 2017 the Grievant was given formal notification by Agency of his fourteen (14) day suspension in resolution of his internal discipline, in response to the Grievant's criminal charges that occurred on April 6, 2015. The Union attempted to clarify on July 20, 2017 whether the Agency intended to provide the Grievant back pay. On July 31, 2017 Warden Antonelli responded to the inquiry stating that the Grievant's disciplinary case was closed and Grievant was not entitled to back pay. In response, to Warden Antonelli's answer the Union filed a formal grievance on August 1, 2017.

Arbitrator concludes after the Grievant was given notice of his fourteen-day (14) suspension on July 5, 2017, was when the Union was placed on notice of a potential grievable action by the Agency. Furthermore, the Union once becoming aware of a potential grievable action exercised due diligence in clarifying the issue of back pay with the Agency. It wasn't until July 31, 2017 when the Agency verified that the

Grievant's disciplinary case was closed and the Grievant would not be awarded back pay. Did the Union become aware of the action which is the subject matter of the grievance. The Agreement language allows for forty (40) calendar days after the grievable action occurred or forty (40) calendar days from the date the parties would reasonably have been put on notice that a grievable action occurred. At the earliest July 5, 2017 was the date the Union was put on notice of a potential grievable action. The Union filed their formal grievance on August 1, 2017 well within the allowable forty (40) calendar days established in the Agreement. Arbitrator would like it noted that the testimony and evidence concluded that the Union and Grievant from the date of the Grievant's arrest on April 6, 2015 showed due diligence in keeping the Agency informed about the progression of his criminal charges as well as attempting to resolve his inter disciplinary case.

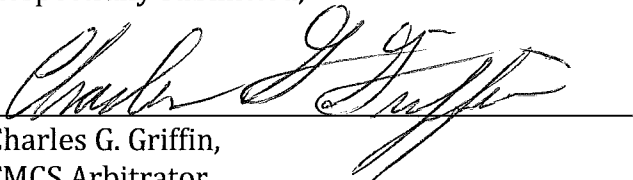
Secondly Arbitrator will address did the Agency violate the Agreement, 5 U.S.C. § 7513(b) and/or 5 C.F. R. §752.404(d). Arbitrator concludes 5 U.S.C. §7513 (b)(1) states "an employee against whom an action in proposed is entitled to - at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action". Further, 5 C.F. R. § 752.404(d)(1) states " Section 1713(b) of title 5, U.S. Code, authorizes an exception to the 30 days' advance written notice when the agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed and is proposing a removal or suspension, including indefinite suspension. This notice exception is commonly referred to as the "crime provision". In attempting to apply the two referenced legal authorities, Arbitrator concludes the Agency was not in compliance with the standards established. The Agency processed the Grievant's disciplinary case properly up until they were given notice of the outcome of his pending criminal charges on April 28, 2016. The Agency in accordance with 5 U.S.C. §7513 (b) was required at the resolution of the Grievant's criminal charges to begin the necessary steps to resolve the internal disciplinary case. The Grievant's indefinite suspension on September 17, 2015 stated it would remain in effect " until such time as there is a disposition of the

charges against you, or there is sufficient evidence to either return you to duty or to support administrative action against you.” The disposition of the Grievant’s criminal charges occurred on April 27, 2016 with the Agency be given prompt notice of the outcome which canceled any potential imprisonment and released the Grievant to be able to carry a weapon at work. The notification given to Agency on April 27, 2016 accomplished the requirement of sufficient evidence to return the Grievant to work because the disposition lifted any restrictions which would have forbidden Grievant to return to his previous employment position. The remaining pending requirement in the Grievant’s indefinite suspension was the support of administrative action. Arbitrator agrees with the Union’s contention that the Agency has a duty to return the Grievant to after any criminal restrictions were lifted regardless of any pending internal discipline. The presiding legal authorities stress that the reinstatement must be reasonable. The Grievant was reinstated on November 15, 2016 back to his previous duties with no restrictions. The testimony and evidence provided showed the Union attempted to clarify the Agency intentions regarding any potential administrative action or internal disciplinary action. The Agency further contended that during this time they were attempting to clarify with their presiding legal authority as to the course of action necessary regarding the Grievant’s internal disciplinary case. Arbitrator determines this clarification does not excuse the Agency’s failure to promptly return the Grievant to work after April 27, 2016. Arbitrator concludes no legal authority justified the Agency’s failure to not reasonably return the Grievant to work after April 27, 2016 and further waiting until November 15, 2016 to reinstate Grievant. Arbitrator concludes the Agency’s delay in returning the Grievant to work from April 27, 2016 until November 15, 2016 violated 5 U.S.C. §7513(b) and 5 C.F.R. §752.404(d) and constituted a unjustified or unwarranted personnel action. As a result of this violation Arbitrator concludes presiding legal authorities determine the application of the Back Pay Act to resolve the Grievant’s loss of wages due to the Agency’s unjust and unwarranted actions. The Back Pay Act, 5 U.S.C §5596(b) provides “An employee of an agency who ... is found ... 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 ...


AWARD

Grievant will be awarded in accordance with the Back Pay Act loss wages from the first day of the next pay period/cycle after April 28, 2016 until November 14, 2016. Further in accordance with the Back Pay Act the Agency must pay for all Union's reasonable attorney's fees and expenses incurred in the course of this arbitration.

Respectfully submitted,



Charles G. Griffin,
FMCS Arbitrator
205-999-4828



Date