

**In the Matter of Arbitration**

**Between**

**Federal Bureau of Prisons**

**And**

**Council of Prison Locals  
American Federation of  
Government Employees  
Local No. 171  
Oklahoma City, Oklahoma**

**Grievant: Bryan Donnelly**

**FMCS Case No: 09-50980**

**BEFORE:**

Marsha C. Kelliher, J.D., LL.M.

**APPEARANCES:**

**For the Agency:**

Ruby Navarro

**For the Union:**

Donny Boyte

**PLACE OF HEARING:**

Oklahoma City, OK

**DATE OF HEARING:**

November 5, 2009

**RECORD CLOSED:**

January 26, 2010

**DATE OF AWARD:**

February 26, 2010

**TYPE OF GRIEVANCE:**

Discipline

**AWARD**

The grievance is sustained. The 7-day suspension issued to the Grievant was not for just and sufficient cause. The Grievant is to be made whole and this disciplinary action is to be expunged from the Bureau of Prisons records, including the Office of Internal Affairs and any files maintained by the Office of Inspector General on behalf of the Bureau of Prisons that pertain to this case.

The Arbitrator shall retain jurisdiction over this matter for ninety days from the date of this award to resolve any issues pertain to the remedy outlined herein.

**Background Facts:**

As this was a discipline case, Management had the burden of proof. All witnesses were sworn and sequestered. Both parties submitted cases for the Arbitrator's consideration. Captain Henderson issued a 10-day suspension to the Grievant, Brian Donnelly, for conduct unbecoming a correctional officer. The 10-day suspension was subsequently reduced to a 7-day suspension by Warden Kastner. The 7-day suspension is the basis of this grievance.

The Grievant, has been with the Federal Bureau of Prisons since 1994. On the date of the incident he was a GS-8 working in the Special Housing Unit (SHU) as the Recreation and Property Officer at the Federal Transfer Unit. The Special Housing Unit holds up to 172 inmates. The inmates are locked in their cells all day except for an optional hour of recreation. The inmates range from those needing protective custody to those who cannot be included in the general population. As a Recreation and Property Officer, the Grievant would take the inmates to the cages on each range outdoors for their recreation. He also inventoried and stored inmates' property when they were assigned to SHU.

Inmates receive their meals through locked food slots, which are about eighteen inches by ten inches. The food slots are not to be opened except for the delivery or retrieval of food trays. On the day of the incident, an inmate was yelling and banging on the food slot. The Grievant witnessed the inmate's hand through the food slot, which means the slot was not locked. The inmate was banging the food slot, creating a loud disturbance. The Grievant estimated the food slot had been open since 6:15 a.m. The situation had been relayed to the Lieutenant who did not take any action, which frustrated the Grievant. The inmate made numerous threats against staff and other inmates including threatening to throw feces. The Grievant notified his Supervisor on several occasions but nothing was done to correct the situation. Because nothing was being done about the situation, the Grievant believed it was his job to protect the staff so he kicked the food slot hoping that it would stay closed and he could secure the slot. The Grievant explained that typically, when they

kick a food slot it stays shut. In this circumstance, the food slot did not stay closed and the Grievant was not able to secure the slot.

The Grievant testified it was not his intent to hurt the inmate when he kicked the food slot. This was the first time he had attempted to kick a food slot and he has not done it since. The Grievant explained that the inmate had stopped banging the food slot and was quiet and he saw it as an opportunity to shut the food slot. After kicking the food slot the Grievant walked off the range. The door was not secured until after the inmate was removed from the cell.

At the time of the incident, the Grievant had worked in SHU for five to six years. According to the Grievant, the public is not aware of this incident. He is not a supervisor and there is no prominence in his position. This is the only time discipline has been proposed against the Grievant and he received a very good performance appraisal after the incident. The Grievant has also received different awards throughout his career.

The Grievant continued to work in SHU for a week after the incident. He was counseled about his behavior from the Captain after the incident who told him this type of behavior was not allowed and not to do it again. The day following the incident the Captain spoke with him again and reiterated that the Grievant's actions had been inappropriate. The Grievant thought the incident was over. After he was removed from SHU, he was placed in positions where he carried firearms and escorted inmates to doctor's offices and the hospital. He also was in a position to respond to emergencies throughout the prison.

Lieutenant Mark Wedding has been at the Federal Transfer Center for eleven years. On the date of the incident he was assigned as the Special Investigative Supervisor and was instructed by his superior to review the video from the SHU to determine if there was any contact between the staff and an inmate on B range. When he viewed the video he observed the Grievant kicking a food slot while the inmate's hands were outside of the slot.

Paul Kastner has been the Warden of the Transfer Center for two years and has over twenty-two years of service with the Agency. He was the Deciding Official on this grievance. Warden Kastner explained that there is a Table of Penalties that is used as a guideline for issuing discipline but there is nothing that is a direct comparison to the Grievant's actions in the Table. The Warden reduced the 10-day suspension originally issued to the Grievant to a 7-day suspension because the Grievant did not have a prior disciplinary record, he had fairly high performance evaluations, he admitted his actions, he admitted this actions were wrong, and the Grievant promised it would never happen again.

Warden Kastner felt the suspension was appropriate because the Grievant knew what he did was wrong and the Grievant's actions could have resulted in very serious injuries to the inmate. Warden Kastner's decision to discipline the Grievant was not based on a possible injury to the inmate, but on the inappropriate action taken by the Grievant, which could have resulted in a serious injury. Had the inmate sustained a serious injury, the Grievant could have been terminated and prosecuted.

Warden Kastner testified he considered the charge under which the Grievant was disciplined to be similar to charges such as physical abuse of an inmate and endangering the safety of or causing injury to staff, inmates or others through carelessness or failure to follow instructions. He knew Captain Reich verbally counseled the Grievant and does not consider the counseling to constitute discipline. He was unaware of the fact the Grievant received a verbal reprimand. Warden Kastner did not believe the Douglas Factors applied to this situation because, based on case law, they only apply to adverse actions of fifteen days or more. He considered issuing discipline to other employees but none was issued and the Lieutenant involved was not investigated.

The Grievant was initially investigated for a potential abuse of an inmate because the inmate received a minor laceration to his hand. Although the incident was referred to the Office of Internal Affairs (OIA), the OIA declined to investigate. Based on the tape and the statement from the inmate, Warden Kastner determined it was more likely than not

that the minor laceration to the inmate's hand occurred when the Grievant kicked the food slot.

Warden Kastner explained that Guards are taught to only use the amount of force necessary to bring a situation under control. According to Warden Kastner, there was no immediate threat to the inmate and the Grievant did not make any attempt to secure the food slot door after kicking it. Warden Kastner testified the Grievant escalated the situation as evidenced by the fact that later in the day the inmate threw a substance called a "correctional cocktail" on the Grievant and as a result, Warden Kastner had to put a retraction team together to remove the inmate from the cell.

Captain Samuel Charles Henderson, Jr. has been a Captain for the Bureau of Prisons since 2004. He came to this facility in July of 2008, following this incident. He first learned about the incident from the Grievant but could not remember the extent of their discussion. This incident was referred to the Office of Internal Affairs (OIA) for the Bureau of Prisons. He was unsure what the original charges were against the Grievant. He chose to charge the Grievant with conduct unbecoming a correctional officer after consulting with the personnel department. He recommended the 10-day suspension. In formulating a proposal for discipline, he looks for what transpired and a corrective action that will fix or keep the problem from happening again.

As part of his investigation, Captain Henderson reviewed the SIS report and then he spoke with the Employee Services Manager. The affidavits, injury report, and SIS report were in the packet he reviewed. Captain Henderson testified employees can be disciplined for leaving a food slot unlocked. He believed the Grievant's actions were egregious because they occurred in SHU. Captain Henderson testified the length of time the slot had been opened did not justify the Grievant's actions. He did not consider the facts leading up to the incident nor did he consider the Grievant's prior work history. He also did not take into consider whether Captain Reich verbally reprimanded the Grievant because he does not consider verbal reprimands to be a disciplinary action.

Special Agent John Damrill testified that the Grievant was originally investigated for bodily harm of an inmate. He took the Affidavit of the Grievant and was instructed to conduct a follow-up investigation. He sustained the charge and forwarded the evidence to the Captain. Agent Damrill explained that "Sustaining the Charge" means they determined the evidence supported the charge. In this case, he determined the Grievant physically abused the inmate.

Dr. Tom Goforth is the Clinical Director for the Transfer Center and he has worked at the Center since 1999. He performed an injury assessment on the inmate involved in this incident and his report reflects the inmate had a superficial laceration that did not require stitches. Following the forced removal from his cell, the inmate told him that "a guy kicked the F'ing Beanhole," but the inmate did not identify who it was. The inmate also complained of hand pain. The medical assessment form reflects that the inmate claimed he sustained the injuries to his hand while banging on the door through the food slot.

Harold Hill is a Correctional Systems Officer at the Transfer Center. According to Officer Hill, the inmate was being very loud and disruptive. The inmate was banging the food slot, which hindered the Officers from performing their duties, including moving inmates to the recreation area. In his thirteen years, this was one of the worst days in SHU. On a scale of one to ten, with ten being the worst, he felt the situation that day was a ten. According to Officer Hill, the inmate called the Officers names all day and was threatening them. The SHU Lieutenant was aware there was a problem as the food slot was open when he arrived that day. Normally when an inmate takes a food slot hostage, they have to be creative to get it shut. Often, the Officers try to sneak up and close it when an inmate is not looking. It was not safe to go up to the food slot and lock it during this incident. After the inmate threw something on the Grievant, they put a team together and moved the inmate out of the cell and into another cell. They also put the inmate into soft restraints. Officer Hill has never seen a food slot held hostage for six hours prior to this incident.

Officer Hill and Captain Reich were walking around the area and had walked past the inmate several times. The Captain had not made up his mind what to do about the situation because the inmate was about to break off the food slot door. They did not believe the inmate was going to allow them to secure the food slot. After the Grievant kicked the food slot, he admitted it to the Captain. The Captain told the Grievant “you can’t be doing shit like that” and pulled the Grievant away so Officer Hill could not hear what was said between them. He knew the Lieutenant was aware of what the inmate was doing but he did not personally talk to the Lieutenant about the situation.

According to Officer Hill, creative ways to get the food slot closed including kicking it shut and then locking it. He also testified that Officers can be written up for leaving a food slot open.

**Issue:**

Was the disciplinary action taken for just and sufficient cause, or if not, what shall the remedy be?

**Agency’s Argument:**

The Grievant’s conduct constituted conduct unbecoming a correctional officers. The 7-day suspension was issued for just cause and was within the Agency’s Table of Penalties.

The Grievant’s performance ratings shortly after this incident are irrelevant to the discipline issued in this case. Employees are presumed to be innocent until an investigation is finalized. Because the investigation had not been completed it was not reflected in his evaluation for the timeframe during which this misconduct occurred.

No other employee has been disciplined for attempting to kick a food slot closed. As a result, there are no other “similarly situated” discipline cases for comparison purposes.

**Union's Argument:**

There were a number of mitigating circumstances that led up to the Grievant's actions. The Grievant took action to protect himself and fellow Officers. It is the Lieutenant who failed to take action that should be disciplined and not the Grievant.

It took the Agency ten months to investigate this case and issue discipline. The investigation largely consisted of an affidavit from Officer Donnelly and the inmate involved in the incident. The issuance of the discipline was untimely and violated the terms of the Master Agreement between the parties.

The discipline should be overturned and expunged from the Grievant's record because the deciding official did not take into account each of the Douglas Factors. The delay of ten months in issuing the suspension reflects the Agency did not lose faith in the Grievant's ability to do his job. Additionally, the discipline was untimely and not in accordance with the Master Agreement due to the delay.

The discipline is harsher than the discipline issued to other employees and it was not for just and sufficient cause. Additionally, since the Grievant was verbally counseled, this is a case of double jeopardy.

**Stipulations:**

There is nothing in the Proposal Letter dated August 2, 2008 or the Decision Letter dated October 14, 2008 stating the Agency had lost confidence in the Grievant.

**Analysis and Decision:**

While it is unknown what, if any action the Lieutenant had taken or was going to take regarding this incident, Captain Reich and Officer Hill were assessing the situation to determine how to bring the situation under control when the Grievant took it upon himself to kick the food slot. It is also clear from the record that the Grievant's actions accelerated an already volatile situation that resulted in Warden Kastner having to authorize a use of force against the inmate. A review of all of the evidence and testimony



in the record has convinced me that contrary to the Union's claims, the Grievant was no hero that day and violated the code of conduct. The Grievant's actions could have resulted in serious injuries to the inmate, actions for which he could be prosecuted.

The record is inconclusive regarding how the inmate sustained the lacerations to his hand. Therefore, I find that the Agency failed to prove that the Grievant's actions did in fact result in the injuries to the inmate and should not be a consideration in this decision.

In accordance with the Master Agreement between the parties, disciplinary action will be taken only for just and sufficient cause and it must promote the efficiency of the service. The just cause standard requires an analysis of the due process issues raised by the Union. Captain Henderson, the charging official, testified he did not consider the facts leading up to the incident nor did he consider the Grievant's prior work history. He also did not take into consider the verbal reprimand the Grievant received from Captain Reich. Warden Kastner, the deciding official, testified he did not consider the Douglas Factors because he believed they did not apply. And, while he knew the Grievant was counseled by Captain Reich, he was unaware that Captain Reich verbally reprimanded the Grievant.

While Arbitrators are not required to consider the *Douglas Factors* in cases involving suspensions of 14-days or less, they are not precluded from doing so. National Air Traffic Controllers Association MEBA/NMU and US Department of Transportation Federal Aviation Administration Memphis, TN, 52 FLRA 787 (December 31, 1996) citing Douglas v. Veterans Administration, 5 MSPR 280 (1981). I agree with Arbitrator Wilkinson that the *Douglas Factors* reflect the types of "mitigating and aggravating" conditions that are frequently relied upon by Arbitrators when assessing the appropriateness of a disputed penalty. Bureau of Prisons, FCI Sheridan and American Federation of Government Employees, Local 3979, FMCS Case No: 07-59290 (October 12, 2009). The *Douglas Factors* include:

- (1) The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities;
- (2) The employee's job level and type of employment, including supervisory or fiduciary role;

- (3) Any past disciplinary record;
- (4) The past work record, including length of service, performance, ability to get along with fellow employees, and dependability;
- (5) The effect of the reasons for action on the employee's ability to perform satisfactorily and on supervisors' confidence;
- (6) Consistency of the penalty with those imposed on other employees for the same or similar offenses;
- (7) Consistency of the penalty with any applicable agency table of penalties;
- (8) The notoriety of the offense or its impact on the agency's reputation;
- (9) The clarity with which the employee was on notice of any rules violated in committing the offense or had been warned about the conduct in question;
- (10) Any potential for rehabilitation;
- (11) Mitigating circumstances surrounding the offense; and
- (12) The adequacy and efficacy of alternative sanctions to deter such conduct in the future by the employee or others.

It has long been recognized that management is not required to demonstrate it has considered all potential mitigating or aggravating factors before selecting a penalty; however, the penalty may be questioned if relevant issues are not addressed. In this case, the charging official did not consider the majority of the factors and the deciding official testified he did not believe the *Douglas Factors* applied. A review of portions of Warden Kastner's testimony reflects that, if given every benefit of the doubt, he did consider information related to some of the factors. However, clearly, neither Captain Henderson nor Warden Kastner gave thoughtful and deliberate consideration to the Douglas Factors before issuing the Grievant a suspension. I consider it to be a serious violation of the Grievant's due process rights that neither Captain Henderson nor Warden Kastner considered the mitigating factors surrounding this incident which, in this case, were extreme as reflected in the testimony of Officer Hill who testified this was one of the worst days in SHU during his thirteen years working in the unit and the testimony of the Grievant.

Additionally, Management had the burden to prove the discipline issued to the Grievant was consistent with that imposed upon other employees for the same or similar offenses. Management failed to do so. The relevant testimony in this regard is that Warden Kastner did not consider the penalties imposed upon other Officers for conduct unbecoming a

correctional officer, the charge upon which the Grievant was suspended. Instead, the basis of his comparison was to charges such as physical abuse of an inmate, causing injury to others, and failure to follow instructions. Mr. Townley testified that unprofessional conduct and conduct unbecoming an officer are analogous. He also testified that based on his nineteen years of experience, the 7-day suspension issued to the Grievant was extreme. The evidence in the record reflects that during the three years prior, most of the employees charged with failure to follow policy or failure to follow instructions received at most, a letter of reprimand. Employees charged with unprofessional conduct received, at most, a one-day suspension.

The standard proposed by the Agency for a determination of what comparisons are appropriate for discipline purposes is that “To be similarly situated, comparative employees must have reported to the same supervisor, been subjected to the same standards governing discipline and engaged in conduct similarly to complainant’s without differentiating or mitigating circumstances.” Harris v. Henderson, EEOC No: 01982575, 2000 WL 1280680 (August 29, 2000). The Agency then argues that there are no other similarly situated disciplinary cases because no other employee kicked a food slot door. The Agency’s reliance on this argument is unpersuasive. I find a comparison of discipline to other employees who were issued discipline as a result of charges similar and identical to the charge made the basis of the Grievant’s discipline to be the appropriate level of analysis. The relevant evidence in the record was proffered by the Union and it demonstrates the Grievant was punished more harshly than other Officers who were charged with the same or a similar charge as the charge relied upon to discipline the Grievant. Given the Agency’s burden, and that no contradictory evidence was introduced by the Agency, I find the Agency did not demonstrate it satisfied the sixth *Douglas Factor*.

Because the due process issues raised by the Union are sufficient in and of themselves to sustain this grievance, a ruling on the merits on the additional issues raised by the Union has not been reached herein.

**AWARD**

The grievance is sustained. The 7-day suspension issued to the Grievant was not for just and sufficient cause. The Grievant is to be made whole and this disciplinary action is to be expunged from the Bureau of Prisons records, including the Office of Internal Affairs and any files maintained by the Office of Inspector General on behalf of the Bureau of Prisons that pertain to this case.

The Arbitrator shall retain jurisdiction over this matter for ninety days from the date of this award to resolve any issues pertain to the remedy outlined herein.

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**Marsha Kelliher, J.D., LL.M.**  
**Arbitrator**

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**Date**