BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 1034,

Union

and

FEDERAL BUREAU OF PRISONS, FCC POLLOCK, POLLOCK, LOUISIANA,

Employer.

(Grievant: Andrew Howard)

FMCS No. 14-54750

OPINION AND AWARD

APPEARANCES:

On behalf of the American Federation of Government Employees, Local 1034:

Jack Whitehead, Esq. and John Ed Bishop, Esq., Whitehead Law Firm

On behalf of the Federal Bureau of Prisons FCC Pollock, Louisiana:

Steven Simon, Esq., Labor Counsel, Federal Bureau of Prisons

PROCEDURAL BACKGROUND OF THE ARBITRATION

This arbitration arises out of a dispute between the American Federation of Government Employees, Local 1034 (AFGE or Union) and Federal Bureau of Prisons, Federal Correctional Complex (FCC), Pollock, Louisiana (BOP or Employer) (collectively the Parties).

The arbitration takes place pursuant to the *Master Agreement, Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees*

(CBA), effective March 9, 1998 through March 8, 2001.[1] Pursuant to Article 31, *Grievance Procedure*, AFGE grieved the January 16, 2014 30 calendar day suspension of Andrew Howard, a BOP Correctional Systems Officer (CSO). AFGE's grievance asserts BOP violated Articles 6, *Rights of Employees*, and Article 30, *Disciplinary and Adverse Actions*, when it suspended Howard.

The Parties were unable to resolve the dispute through the CBA grievance procedure and AFGE demanded arbitration. From a panel of arbitrators provided by the Federal Mediation and Conciliation Service, I was selected by the Parties to resolve the dispute.

A hearing was held on January 15 and 16, 2015 at the FCC Pollock, 100 Airbase Road, Pollock, Louisiana. AFGE was represented by Jack Whitehead, Esq. and John Ed Bishop, Esq., Whitehead Law Firm. BOP was represented by Steven Simon, Esq., Labor Counsel, Federal Bureau of Prisons. At the hearing, the Parties were each afforded a full opportunity: to present testimony, documents and other evidence; to examine and cross-examine witnesses; and to challenge documents and other evidence offered by the other Party. BOP's witnesses were: Tyler Meeker, BOP Human Resources Specialist (HRS); Michael Melton, BOP Disciplinary Hearing Officer; Gene Beasley, BOP Associate Warden, Federal Medical Center, Carswell, Fort Worth, Texas; James Draves, BOP Lieutenant; and Michael Carvajal, BOP Complex Warden, Federal Correctional Complex, Pollock, Louisiana. AFGE's witnesses were: Chad Luke, BOP CSO; Charles Davis, BOP Maintenance Worker Supervisor; Kerry Jackson, BOP Lieutenant; Brian Richmond, President AFGE, Local 1034; Scott Clarkson, BOP Human Resources Manager; and Andrew Howard, BOP CSO and the Grievant.

The witnesses were sworn and sequestered, and a transcript (Tr) was taken. Joint Exhibits (Jx) 1-31 were offered and received into the record. The Parties' counsels elected to submit Post-hearing Briefs. On or about May 11, 2015, the Arbitrator received by e-mail attachment the counsels' Post-hearing Briefs and the record closed.

This Opinion and Award is based on the entire record. It considers the Parties' arguments, interprets and applies the CBA and work rules based on the facts established at hearing.

---

[1] The CBA was in effect at all times relevant to this dispute.

STATEMENT OF THE ISSUE

Whether the Grievant's 30-day suspension was for just and sufficient cause and to promote the efficiency of the service? If not, what shall be the remedy?[2]

RELEVANT CONTRACT LANGUAGE

From the *Master Agreement Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees*, effective March 9, 1998 through March 8, 2001 (Jx 1):

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTION

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 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.

* * *

[2] At hearing, during initial off-the-record housekeeping discussions, the Parties' counsels discussed the issue and each suggested Issue Statements. After reviewing the CBA and based on the Parties' counsels suggestions, I suggested the Issue Statement as above. My notes state the Parties' counsels agreed to my Issue Statement. While BOP's Post-hearing Brief does not state the issue, AFGE's Post-hearing Brief states the issue as,

> *Whether or not the employer complied with the Master Agreement when it disciplined the grievant, Andrew Howard, on January 16, 2014, and if not, what is the remedy?*

There is no material difference between my Issue Statement and AFGE's Issue Statement. Therefore, my Issue Statement will apply to the resolution of this dispute.

From the BOP Program Statement 3420.09, Standards of Employee Conduct, 2/5/1999, Attachment A, Standard Schedule of Disciplinary Offenses and Penalties, page 12 Offense # 32. (Jx 7).

> Official Reprimand to Removal is the penalty range for "Falsification, misstatement exaggeration or concealment of material fact in connection with employment ...[or] an record. . ."

DISCUSSION

I. The Parties

The United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Pollock, Louisiana (FCC Pollock) comprises a high security penitentiary, a medium security correctional institution (FCI Pollock) and an adjacent minimum security satellite camp.

The American Federation of Government Employees, Local 1034 is the recognized, sole and exclusive representative for all bargaining unit employees at FCC Pollock. (Jx 1).

Andrew Howard is an FCC Pollock Correctional Systems Officer (CSO). Howard has worked at FCC Pollock since January 2, 2001. (Tr 142).

II. Statement of the Case and Undisputed Facts

The facts are not disputed. The discussion below describes the witness testimony, exhibits, the timeline of events, and the relevant and material facts forming the basis of the BOP's decision to suspend the Grievant for 30 calendar days.

On November 22, 2011, the Grievant was on sick leave. At some point that day, he signed up for a November 23, 2011 midnight-to-8:00 a.m. overtime, armed-assignment at Christus St. Frances Cabrini Hospital (Cabrini Hospital). The record established this assignment was for two, armed Correctional Officers to guard an inmate from the maximum security United States Penitentiary Pollock (USP Pollock).

At the time, the Grievant was under the care of a doctor for unspecified family problems and the doctor had just switched his prescription medication to Klonopin. (Tr 144-145). The Grievant testified he had an adverse reaction to the Klonopin and then

consumed alcohol. (Tr 145).

On the afternoon of November 22, 2011,Chad Luke, the Grievant's coworker and friend called the Grievant because Luke had not seen Howard at work recently. (Tr 83-84). Luke testified that when he reached the Grievant by phone, "[h]e was very agitated, he also sounded impaired." (Tr 84). Luke testified Howard's "speech was slurred" and "he had been drinking" and "he took medication, he didn't need to be doing both at the same time." (Tr 85).

Luke and Howard spoke again around 11:00 p.m. (Tr 86). Luke concluded Howard was in worse condition, "obviously upset, . . . repeating his sentences and his speech was slurred . . . he didn't need to be driving." (Tr 87). Luke testified he "was also concerned because the post that he was going to working that night was an armed post." (Tr 87). Luke testified that he said to Howard, "if you'll give me your word that you'll stay home and not drive anywhere I'll work the shift for you." (Tr 88). Howard agreed to stay home if Luke covered the assignment. (Tr 88).

Luke testified that he attempted to call the USP Operations Lieutenant, Lieutenant James Draves, about covering Howard's shift, but he was not successful. (Tr 88-90 and 96). The record establishes that Luke covered the Grievant's overtime assignment at Cabrini Hospital.

On or about December 1, 2011, Supervisory Correctional Systems Specialist Armenda Boetler, Howard and Luke's immediate supervisor, reported to the FCC Pollock Warden, M. Medina, that she had learned from Luke that he covered Howard's November 23, 2011 overtime assignment at Cabrini Hospital. (Jx 12 and 20). An investigation ensued conducted by investigators from the Department of Justice, Office of Inspector General (DOJ OIG).

The record establishes that on or about November 23, 2011, the Grievant submitted a false overtime claim for the November 23, 2011 overtime assignment that Luke worked under his name. (Tr 146-147, 172, 174; Jx. 10, 12, 18 and 19). Moreover, the Grievant freely admitted to this falsification of documents at hearing. (Tr 146-147).

On July 11, 2012, the Grievant gave a sworn affidavit to Special Agent Sandra D. Barnes, DOJ OIG stating as follows:

> I signed up to work overtime at the hospital on November 23, 2011, from 12:00 a.m. to 8:00 a.m. Due to unforeseen family circumstances I communicated with CSO Chadwick S. Luke in an unknown manner that I cannot recall, to work the overtime shift for me and he agreed. I submitted my T&A to my timekeeper indicating that I worked the 8 hours of overtime on November 23, 2011. I falsified the overtime authorization form indicating that I worked on November 23, 2011. I was paid 8 hours of overtime for November 23, 2011, even though I never worked the shift. (Jx 10).

On March 26, 2013, Howard received the ***first*** Notice of Proposed Removal from Jeffrey Bowe, Associate Warden, based on two misconduct charges. (Jx 21).

On April 23, 2013, Howard submitted a Written Response to ***first*** Notice of Proposed Removal. (Jx 21). On that day, Scott Clarkson, BOP HRS, prepared a Memorandum of Howard's April 23, 2013 Oral Reply. (Jx 21).

On August14, 2013, Howard received the ***first*** Final Decision for Removal from Kim Ask-Carlson, Pollack FCI Warden, sustaining the Charges, and sustaining Howard's removal. (Jx 21).

AFGE's witness Brian Richmond, President, Local 1034, testified that he learned of Howard's removal while he was "in Washington, DC on some negotiation." (Tr 132). Richmond testified that he called Dale Deshotel, AFGE President, Council of Prison Locals, about requesting a stay of Howard's adverse action. (Tr 132). Richmond also called J. A. Keller, BOP Regional Director, South Central Region, and "[g]ave him my sentiments on [Howard's removal]". (Tr 132). Richmond testified that "later that evening he called me back and notified me that he would rescind the removal." (Tr 133). Richmond's testimony was unchallenged and unrebutted.

On August 16, 2013, BOP issued a memorandum titled *Rescinding of Proposal/Decision Letters*. The memorandum was dated August 14, 2013 and rescinded the ***first*** Notice of Proposed Removal and the Final Decision for Removal. The memorandum was signed by G. Beasley, Pollack FCI Associate Warden. The memorandum states, "[a] new proposal letter will be issued at a later date." (Jx 21). The record is silent on the reason for BOP's rescission of the ***first*** Notice of Proposed Removal and Final Decision for Removal.

On or about September 9, 2013, BOP served Howard with a ***second*** Notice of Proposed Removal (*Proposal*) to remove him from his CSO position based on two misconduct charges. (Jx 5).

Charge I of the ***second*** *Proposal*, asserted that Howard committed "Time and Attendance Irregularities." (Jx 5, p. 1). **Charge I** was supported by 27 specifications of alleged time and attendance irregularities by Howard from January 26, 2010 through December 8, 2011 involving 30-minute overlaps with next shift. (Jx 1, p. 1-7).

Charge II, asserts that Howard had submitted "a materially inaccurate overtime claim." (Jx 5, p. 7). **Charge II** was supported by one specification alleging that Howard,

> while working in the capacity of the Correctional Systems Officer, you submitted a materially inaccurate overtime claim on a Bureau of Prisons Overtime form, BP 8369.035, and on your time and attendance records to indicate that you worked overtime at the hospital on November 23, 2011. In your affidavit, dated July 11, 2012, you admitted, "I signed up to work at the hospital on November 23, 2011, from 12:00 midnight to 8:00 a.m. Due to unforseen family circumstances I communicated with CSO Chadwick S. Luke in an unknown manner that I cannot recall to work the overtime shift for me, and he agreed. I submitted my T&A to my timekeeper indicating that I worked the 8 hours of overtime on November 23, 2011. I falsified the overtime authorization form indicating that I worked on November 23, 2011. I was paid 8 hours of overtime for November 23, 2011, even though I never worked the shift. I did not pay Luke for working the shift for me." (Jx 5, p. 7-8).

On October 22, 2013, Howard responded to the charges in a written memorandum to Michael Carvajal, Complex Warden and Deciding Official. (Jx 19). Regarding **Charge I**, Howard asserted that his time and attendance reports were correct. (Jx 19). Regarding **Charge II**, Howard took "full responsibility for knowingly accepting the eight hours of overtime pay" that he did not work on November 23, 2012. (Jx 19).

On October 23, 2013, Howard made an oral response to the charges in a meeting with Carvajal at which Tyler Meeker, HRS, took notes. Meeker's notes were provided in memorandum format to Howard by email later that day. (Jx 18).

On October 28, 2013, Howard emailed Meeker stating,

> The information within these minutes portray numerous inaccurate analogies and omits information on which I relayed to the Warden during my oral response. I wish to disregard these minutes as part of my official Record. Please refer to the written response if needed. (Jx 18).

On January 16, 2014, Carvajal issued a decision letter (*Final Decision*) to Howard. (Jx 6). Carvajal decided "not to take disciplinary action with respect to [**Charge I**]." (Jx 6, p. 1). Carvajal found that **Charge II** "and the specifications were sustained and fully supported by the evidence in the adverse action file." (Jx 6, p. 1). Carvajal decided, "[w]hile I believe the sustained charge would normally warrant removal, it is my decision that you be suspended for thirty (30) calendar days, which should have the desired corrective effect." (Jx 6, p. 1-2).

On February 10, 2014, AFGE grieved Howard's 30 calendar day suspension. (Jx 2). On March 14, 2014, Carvajal denied the grievance.

On March 14, 2014, AFGE invoked arbitration. (Jx 4).

III. Contention of the Parties

A. BOP contends as follows:

Citing Merit Systems Protection Board (MSPB) precedents, BOP asserts the facts and circumstances fully support Howard's 30 calendar day suspension. In response to AFGE's assertion of disparate treatment, BOP asserts that in this case the putative comparators did not act for financial gain like Howard. For this reason, BOP argues they are not proper comparators to Howard.

BOP asserts that the delay in processing Howard's disciplinary action does not warrant further mitigation of the 30 calendar suspension. BOP argues that the scope and duration of **Charge I**, and the complicated investigation of **Charge II**, necessarily protracted Howard's disciplinary action. BOP argues that some delay was the result of AFGE concerns about the March 9, 2013 ***first*** adverse action proposal which BOP withdrew. For these reasons, BOP argues delay in the processing of Howard's adverse action does not warrant further mitigation of the 30 calendar day suspension.

BOP asserts Carvajal considered and applied the applicable and appropriate *Douglas* factors to Howard's admitted misconduct.[3] BOP argues that Carvajal's decision demonstrates that he considered all twelve *Douglas* factors. BOP argues that Carvajal's conclusion was to mitigate the proposed removal to a 30 calendar day suspension which, Carvajal found, "should have the desire corrective effect."

BOP asserts that Luke's testimony concerning his efforts to reach Lieutenant Draves does not support further mitigation of Howard's 30 calendar days suspension. BOP argues the Carvajal mitigated the discipline from removal to a 30 calendar day suspension based on the relevant factors and the Arbitrator should sustain the adverse action as taken by BOP. Therefore, BOP concludes that Luke's testimony offers no further basis to mitigate the penalty.

For all these reasons, BOP asserts that the Arbitrator should affirm Carvajal's decision to impose a 30 calendar day suspension and deny AFGE's grievance.

B. AFGE contends as follows:

AFGE argues that there are only two questions for the Arbitrator to resolve.

First, was the adverse action timely? Second, was the Grievant treated fairly and equitably as other employees for falsifying a document? AFGE also asserts that Carvajal did not properly apply the *Douglas* factors.

---

[3] *Douglas v. Veterans Administration*, 5 MSPB 313 (1981) (*Douglas*). Succinctly stated, the *Douglas* factors require that the deciding official when determining the appropriate disciplinary penalty consider as applicable and in general:

1. Nature and seriousness of the offense;
2. Employee's job level and type of employment;
3. Past disciplinary record;
4. Past work record;
5. Effect of employee's ability to perform and supervisory confidence in the employee;
6. Consistency of the penalty with others;
7. Consistency of the penalty with agency's table of penalties;
8. Notoriety of the offense or impact on reputation of agency;
9. Clarity with which employee was on notice of the rule violated;
10. Potential for rehabilitation;
11. Mitigating circumstances; and
12. Possibility for alternative sanctions.

AFGE asserts that the answer to both questions is "No."

AFGE asserts that BOP failed to timely or equitably discipline the Grievant and therefore, the discipline was without just cause and violated the CBA.

Specifically, AFGE asserts the disciplinary action covered 786 days. AFGE calculates this time from the day of the incident giving rise to the discipline, November 23, 2011, to the final decision, January 16, 2014. AFGE argues that the CBA requires timely disposition of discipline and this time lapse is unacceptable.

AFGE asserts the delay removes any just and sufficient cause from the discipline. AFGE argues that previously, Arbitrator Chang completely reviewed timeliness which is the sole issue in this BOP disciplinary action.[4] AFGE says that Arbitrator Chang held, as have other arbitrators, that the failure to timely discipline an employee is a violation of procedural due process. AFGE argues that in the cases cited by Arbitrator Chang, disciplinary processes of one year, seventeen months and twenty months were deemed to be violations of due process. AFGE argues that another award held a discipline letter which took almost 14 months in an uncomplicated matter was held to be too long and a violation of CBA Article 30.[5]

AFGE asserts that the CBA, Article 30, Section d, requires "timely disposition" of disciplinary and adverse actions. AFGE also argues BOP adopted timeliness guidelines in the 2004 *U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, Review of the Federal Bureau of Prisons' Disciplinary System* (*OIG Review*). (Ux 27).

AFGE argues that the *OIG Review* details the time frames for BOP's two-part disciplinary process of investigation and adjudication. AFGE argues that BOP's responses to the *OIG Review* acknowledge that there is a 120 day guideline for completion of each part for a total of 240 days from start to finish. AFGE argues in the instant case the investigation stage took from November 23, 2011 to November 15, 2012, 359 days. The adjudication stage took from November 15, 2012 to January 16, 2014, 428 days. AFGE

---

[4] *American Federation of Government Employees Council of Prison Locals (AFL-CIO) Local 1218, and U.S. Department of Justice Federal Bureau of Prisons Federal Detention Center Honolulu, Hawaii,* FMCS Case No. 11-54214, April 5, 2012.

[5] *Federal Bureau of Prisons and AFGE St. Petersburg, 107* LRP *50311 (2003)*.

argues that the entire process took 786 days, 547 days longer than the 240-day guideline. AFGE argues this time cannot be considered timely disposition as required by the CBA.

AFGE asserts that even though Howard's investigation was conducted by the OIG, which BOP may argue is outside its control, BOP presented no excuse or justification for the adjudication phase to take more than a year. AFGE argues that the investigation was concluded and turned over to BOP on November 15, 2012, yet BOP still took more than a year to reach its final decision on January 16, 2014.

AFGE asserts that BOP's first attempt to discipline Howard was the August 15, 2013 rescinded *Final Decision* letter. AFGE argues this rescinded letter should not mitigate the delay since it followed a 274-day adjudication stage. In support of its argument AFGE notes that in the discipline of Charles Davis, a BOP management official, for forging a subordinate's signature, BOP completed the investigation after approximately a month and then Davis received a proposal letter. AFGE notes that Davis was then suspended on June 27, 2013. AFGE calculates that the Davis discipline covered a 98-day investigation stage and a 115-day adjudication stage. AFGE argues the Davis discipline shows that there are no excuses for a long adjudication stage and BOP can timely adjudicate a disciplinary action when it desires.

AFGE asserts Warden Carvajal admitted BOP caused additional delays because two disciplinary actions were pending against Chadwick Luke and Howard. AFGE argues that the Luke and Howard's *Final Decision* letters were issued on November 27, 2013. AFGE notes that Luke served his suspension over the December 2013 to January 2014 period. Yet, Howard received his decision letter later, on January 16, 2014, well after Luke's suspension to keep one of the employees working.

AFGE notes Carvajal testified he was doing Howard a favor since he was not suspended over the holidays. AFGE argues Carvajal was disingenuous because most persons seem to prefer time off during the holidays to spend time with family. In addition, AFGE says Howard's first *Final Decision* letter and last two proposal letters stated he would be terminated and he was terminated for a few hours. For this reason, AFGE argues, since Howard expected to be terminated. AFGE says that not letting him know the *Final Decision* was for a suspension is not beneficial to Howard. AFGE says, Howard was entitled to know he would not be terminated, but only suspended. For all these reasons, AFGE concludes Carvajal's decision to hold the *Final Decision* after more than two years for an extra 30 or more days is not and cannot be "timely disposition" of the investigative

or adjudicative stages. AFGE argues that BOP's delays denied Howard procedural due process and removed just cause from his discipline in violation of the CBA which requires timely disposition of disciplinary actions.

AFGE asserts Howard's discipline is also disparate treatment because BOP failed to impose a similar penalty on him as other employees for similar offenses. AFGE argues BOP is required to treat disciplined employees equitably with consistent penalties. AFGE argues the CBA requires personnel actions be imposed in a "fair and equitable manner" and that discipline be for just cause. AFGE argues that the *Douglas* factors require an analysis of consistency of the penalty imposed on other employees for the same or similar offenses.[6] However, AFGE argues that Carvajal, the Deciding Official, testified regarding the consistency of Howard's penalty, "I have not decided a penalty for a similar charge, therefore, there are no past situations in which to compare." (Jx 60).

AFGE's asserts that a review of the FCC Pollock disciplinary logs from 2011 to 2013 reveals that three other employees have been disciplined for falsification of documents. (Ux 24, 25 and 26). AFGE notes in two cases, a 5-day suspension was imposed by BOP. In addition a supervisor, who forged the name of a subordinate after the subordinate refused to sign the form, was disciplined with a 1-day suspension. (Ux 26). AFGE notes that Carvajal testified that he never considered or saw these cases when he decided to suspend Howard for 30 calendar days. AFGE argues that BOP may argue that money was involved in Howard's misconduct, but all parties acknowledge that BOP never lost any money.

AFGE next argues that all twelve *Douglas* factors should have been considered by Carvajal but only eight factors were considered by him.[7] For example, AFGE argues there

---

[6] *Douglas vs. Veterans Administration*, 5 MSPB 313, 5 MSPR 280 (1981).

[7] *Douglas vs. Veterans Administration*, 5 MSPB 313, 5 MSPR 280 (1981) requires that the deciding official when determining the appropriate disciplinary penalty consider in general:

1. Nature and seriousness of the offense;
2. Employee's job level and type of employment;
3. Past disciplinary record;
4. Past work record;
5. Effect of employee's ability to perform and supervisory confidence in the employee;
6. Consistency of the penalty with others;
7. Consistency of the penalty with agency's table of penalties;
8. Notoriety of the offense or impact on reputation of agency;

is no reference in Carvajal's *Final Decision* as to whether Howard had a prior disciplinary record. AFGE argues that Carvajal did not properly consider the consistency of the penalty that other employees facing the same, or at least similar, charges. Yet, AFGE argues, these employees received lesser discipline.

AFGE concludes that a review of the *Douglas* factors shows BOP failed to apply and consider all the factors and misapplied the factors that were considered. Therefore Howard's discipline should be rescinded or, at a minimum, mitigated to a consistent penalty for like-offenses at FCC Pollock.

AFGE argues that pursuant to the *Back Pay Act*, 5 USC § 5596, *et seq*, once the Arbitrator finds that BOP violated CBA Article 30, Article 6 Section b(2) or Article 30, then there is a concurrent finding that Howard was subjected to an unjustified or unwarranted personnel action. AFGE maintains the Arbitrator must determine the appropriate remedy includes 30 calendar days back pay plus statutory interest. In addition, AFGE argues Howard is entitled to other pay he would have earned, including overtime pay, but for the suspension. AFGE says a fair and reasonable amount of overtime for Howard, in the absence of BOP offering contradictory evidence, is 176 hours.

AFGE requests, as well, that the Arbitrator award attorney fees and expenses pursuant to the Back Pay Act. AFGE argues attorney fees and expenses are appropriate because BOP committed gross procedural error, prolonged the proceeding and prejudiced Howard's rights. AFGE asserts the procedural errors included issuing and rescinding the first termination proposal and decision letters which were flawed by a faulty adjudicatory phase leading to untimely discipline taking an additional 6 months. For these reasons, AFGE argues Howard is entitled to reasonable attorney fees and expenses pursuant to the Back Pay Act.

AFGE asserts that reasonable attorney fees are based on multiplying a reasonable hourly rate times the reasonable hours expended based on a statement of the attorney's customary billing rates with evidence that the rates are consistent with the prevailing community rate. Similarly, AFGE says, attorney fees are warranted for the assisting law clerks, paralegals or law students.

---

9. Clarity with which employee was on notice of the rule violated;
10. Potential for rehabilitation;
11. Mitigating circumstances; and
12. Possibility for alternative sanctions.

For the all of these reasons, AFGE requests that the Arbitrator find that: BOP violated CBA Article 30, Section a and d, and Article 6, Section b(2); BOP must remove the discipline from Howard's personnel record; BOP must pay back pay with statutory interest for the days Howard did not work to include 336 hours overtime pay also with interest; and BOP must pay attorney fees.[8] AFGE also requests that the Arbitrator retain jurisdiction for 120 days to resolve any disputes regarding the implementation of the Award.

IV. Analysis and Award

BOP bears the burden of proof the show that the Howard's 30 calendar days suspension was for just and sufficient cause and to will promote the efficiency of the service. For the reasons discussed below, I find that BOP has not met its burden of proof and AFGE's grievance is sustained.

The facts are not disputed.

The basis of BOP's discipline of Howard is the sustained **Charge II**, asserting that Howard had submitted "a materially inaccurate overtime claim." (Jx 5, p. 7). For his part, Howard admitted the merits of **Charge II** numerous times including: in his statement and affidavit to the OIG investigators; in his oral and written replies to the Proposed Notice of Adverse Action; and in his hearing testimony. (Tr 146-147, 172, 174; Jx. 10, 12, 18 and 19).

When an employee admits to the merits of the charges forming the basis of the employer's discipline, then just and sufficient cause for the discipline is established without need of further proof from the employer to meet its burden of proof on the merits.

For its part, AFGE does not challenge Howard's suspension on the merits.

AFGE's challenge to Howard's suspension is procedural asserting: that BOP's discipline is untimely; that BOP's discipline constitutes disparate treatment and that the Deciding Official failed to correctly apply the *Douglas* factors in determining the appropriate

[8] AFGE argues for 176 hours of overtime pay, but requests a remedy 336 hours of overtime pay. (See: AFGE Post-hearing Brief p. 19 and 23). The difference is the result of AFGE's calculation of the maximum hours of overtime Howard could have worked during his 30-days suspension as opposed to the reasonable number of hours Howard could have worked at 40 overtime-hours per week during his suspension.

penalty.

Timeliness of the adverse action

Turning first to AFGE's assertion that BOP's discipline of Howard's was untimely and therefore, without just and sufficient cause.

It is a well established doctrine, arising out of collective bargaining agreements, that unreasonable delay by one party to an agreement may prejudice the other. Unreasonable delay, also known by the equitable term *laches*, can bar an employee or union's claim or erode an employer's just cause for discipline. As regards disciplinary actions, unreasonable delay can degrade an employee's memory of the incident giving rise to the discipline. As a result, unreasonable delay denies the employee the due process right to respond to the charges. Unreasonable delay can render the charges meaningless or stale so that the discipline has little or no corrective effect or purpose. For these reasons, parties to collective bargaining agreements often establish express time boundaries for disciplinary procedures and actions. Particularly in the Federal and Public labor relations sectors collective bargaining agreements, the parties set time limits on: the initiation and notice of disciplinary action charges; the employee's response to the charges; the notice of the employer's final decision; and the overall start-to-finish time of the disciplinary action.

As regards timeliness of disciplinary and adverse actions negotiated between AFGE and BOP, CBA Article 30 states:

> 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 CBA does not expressly define "timely disposition of investigations and disciplinary/adverse actions." Therefore, it remains for the Arbitrator to determine if BOP's disposition of Howard's adverse action was timely. For this reason, and absent specific and express statutory, regulatory or contractual time limits, the Arbitrator must apply a reasonableness standard, based on the facts and circumstances, in determining whether BOP's disposition of Howard's adverse action was timely or constituted unreasonable delay.

Simply stated, the Arbitrator must determine whether BOP investigated and adjudicated Howard's adverse action within a reasonable time under the circumstances

and complexities of this individual case. If so, then based on Howard's admission to the merits of sustained **Charge II**, AFGE's grievance must be denied. If not, then BOP's adverse action against Howard was without just and sufficient cause and AFGE's grievance must be sustained.

However, the Arbitrator is not without guidance on what constitutes reasonable time for the processing of adverse actions by BOP. The record contains evidence of BOP's aspirational policy guidance on what generally constitutes a reasonable time for the disposition of an adverse action.

In September 2004, the DOJ OIG, Evaluation and Inspections Division, issued a *Review of the Federal Prisons' Disciplinary System*, Report Number I-2004-008 (*OIG Review*). (Jx 27). The *OIG Review* "reviewed whether BOP employees properly reported misconduct; whether investigations were thorough; and whether BOP disciplinary actions were reasonable, consistent, and timely." (Jx 27, p. I).

The *OIG Review* states that BOP's,

> disciplinary system consists of two distinct phases: the investigative phase, when the BOP investigates alleged employee misconduct, and the adjudicative phase, when discipline is proposed and imposed for sustained misconduct allegations. The BOP's Office of Internal Affairs (OIA) in the Executive Office of the Director oversees the investigative phase. The Labor Management Relations (LMR) branch in the Human Resources Management Division oversees the adjudicative phase. (Jx 27, p. 2).

The *OIG Review* states that BOP has not established written time frames for the investigative or adjudicative phases. (Jx 27, p. 37). However, the OIA Chief reported that OIA investigations should be completed with 90 days and local investigations, conducted at the institution, within 60 days. (Jx 27, p. 38). The *OIG Review* notes that, when comparing average investigative phase times, additional investigative work by external law enforcement, Federal Bureau of Investigation, OIG or local law enforcement, may result in additional time during the investigative phase.

As regards the adjudicative phase, the *OIG Review* states that "[a]ccording to the Assistant Chief of LMR, a range of 60 to 70 days to adjudicate a disciplinary action case and a range of 75 to 90 days to adjudicate an adverse action case are acceptable." (Jx 27, p. 39).

The *OIG Review* states that BOP proposed expectations regarding time limits for the disciplinary/adverse action investigative and the adjudicative phases as follows:

> [T]he BOP proposed its own internal time "expectations" for investigative work. The upper limit would be 120 days fo local investigations and 180 days for OIA investigations. The BOP also said that it would establish and upper limit for completing the adjudication of misconduct cases at 120 days. (Jx 27, p. 60-61).

The record establishes that the time line for the investigation and adjudication of Howard's adverse action is as follows:

Howard Discipline Timeline

11-22-11: CSO Andrew E. Howard, the Grievant, signs up for overtime assignment midnight to 8:00 a.m. at Cabrini Hospital (Cabrini assignment), but his friend, CSO Chadwick Luke, works the overtime assignment. (Jx 5, p. 7-8).

11-23-11: Howard submits a falsified overtime authorization for overtime Cabrini assignment for the midnight to 8:00 a.m. shift at Cabrini Hospital which Luke worked. (Jx 12).

12-1-11: Armenda Boteler, Supervisory Correctional Systems Specialist, and Howard's first-line supervisor, sends a Memorandum to M. Medina, Warden, notifying him that Luke worked the November 23, 2011 Cabrini assignment for Howard. (Jx 12). An investigation begins which is ultimately conducted by Department of Justice, Office of Inspector General (DOJ OIG).

3-29-12: Special Agents Sandra D. Barnes, DOJ OIG, receives November 23, 2011 Cabrini Hospital log book. (Jx 11).

7-11-12: Special Agents Sandra D. Barnes and William C. Gates, DOJ OIG, interview Howard regarding allegation of time and attendance fraud, and Howard admits falsification of overtime authorization. (Jx 10).

3-26-13: Howard receives ***first*** Notice of Proposed Removal from Jeffrey Bowe, Associate Warden. (Jx 21).

4-23-13 Howard submits his Written Response and Oral Reply to ***first*** Notice of Proposed Removal. (Jx 21).

4-23-13: Scott Clarkson, HR Specialist, prepares a Memorandum describing Howard's April 23, 2013 Oral Reply. (Jx 21).

8-14-13: Howard receives the ***first*** Final Decision for Removal from Kim Ask-Carlson, Pollock FCI Warden, sustaining the Charges and Specifications, and sustaining Howard's removal. (Jx 21).

8-16-13 BOP issues a *Memorandum For Andrew Howard, Correctional Systems Officer* rescinding the August 14, 2013 ***first*** Final Decision for Removal prepared by G. Beasley, Associate Warden. The Memorandum states, "[a] new proposal letter will be issued at a later date. (Jx 21).

9-9-13: Howard receives ***second*** Notice of Proposed Removal from Ralph Hanson, Associate Warden. (Jx 5).

10-22-13 Howard submits a Written Response and Oral Reply to his ***second*** Notice of Proposed Removal, (Jx 19).

10-23-13: Tylar Meeker, HR Specialist, prepares a Memorandum of Howard's October 23, 2013 Oral Reply. (Jx 18).

1-16-14: Howard receives ***second*** Final Decision reducing the proposed removal to a 30-calendar day suspension from M.D. Carvajal, Pollock FCI Warden. (Jx 6).

2-10-14: AFGE, Local 1034 submits a CBA grievance challenging Howard's 30-calendar day suspension to BOP. (Jx 2).

3-14-14: BOP issues a denial of AFGE, Local 1034's grievance. (Jx 3).

3-14-14: AFGE, Local 1034 submits an Invocation of Arbitration to BOP. (Jx 4).

Turning first to an analysis of the investigative phase of Howard's adverse action, this record establishes that BOP was aware of Howard's misconduct regarding the Cabrini assignment on December 1, 2011. The first sign of investigative activity in the record is on March 29, 2012 when Special Agent Barnes received the Cabrini log book. Barnes interviewed Howard on July 11, 2012 and Howard received the ***first*** Notice of Proposed Removal on March 26, 2013. At that point, it fairly may be said that BOP's investigative phase ended and the adjudicative phase began.

The total time from when BOP's became aware of Howard's misconduct to his receipt of ***first*** Notice of Proposed Removal is 481 days. Allowing for the fact that the investigation was conducted by the OIG, which may have delayed the investigative phase from December 1, 2011 to March 29, 2012, thereby tolling the time limits, results in a total time for the investigative phase of 362 days. This is well beyond the *OIG Review* recommendation of 180 days to complete the investigative phase.

The adjudicative phase began with the ***first*** Notice of Proposed Removal on March 26, 2012 and ended with the ***second*** Final Decision on January 16, 2014 for a total of 296 days. Allowing for BOP's withdrawal of the ***first*** Notice of Proposed Removal, which may have delayed the adjudicative phase from March 26, 2012 to August 16, 2013 thereby tolling the time limits, results in a total time for the adjudicative phase of 153 days. This is also well beyond the *OIG Review* recommendation of 120 days to complete the adjudicative phase.

The Arbitrator's time allowances, tolling the time taken by BOP to conduct the investigative and adjudicative phases, views the circumstances and complexities of the adverse action in a light most favorable to BOP. However, it is significant that even tolling time for the circumstances and complexities of BOP's adverse action against Howard, the total time from when BOP knew of Howard's misconduct to the Final Decision was 515 days. The Arbitrator finds that this is an extraordinary and unreasonable amount of time for BOP to investigate and adjudicate Howard's adverse action particularly when he admitted the facts.

This record also establishes that BOP failed to meet its proposed applicable upper time limits of 180 days for an OIA investigation and 120 days for adjudication. (Jx 27, p. 61-16). Moreover, BOP's investigation and adjudication is untimely even after significant time was tolled by the Arbitrator's calculus.

When taken together, the delays in both phases compound rendering **Charge II** stale so as to vitiate the corrective value of the adverse action. Furthermore, BOP offered no explanation for the delay.

For all these reasons, I find that the time taken for BOP's adverse action against Howard was unreasonable not only in the investigative and adjudicative phases, but also the overall time it took BOP to impose the adverse action from the day BOP knew of Howard's misconduct to the ***second*** *Final Decision*. I also find that BOP's untimely

discipline constitutes a violation of Howard's due process right found in CBA Article 30, Section d.

In conclusion, I find that the Grievant's 30 calendar day suspension was not for just and sufficient cause and to promote the efficiency of the service. AFGE's grievance must be sustained.

Having reached this conclusion, there is no need to consider AFGE's challenges to Howard's adverse action based on disparate treatment or incorrect application of the *Douglas* factors regarding the appropriate penalty.

Remedy

Howard's 30 calendar day suspension must be rescinded and he is entitled to back pay and benefits, including appropriate statutory interest, for that time and to correction of his official personnel record consistent with this Award.

AFGE asserts that Howard is entitled to the lost overtime pay that he would have earned during the 30 calendar day suspension. AFGE also asserts that, pursuant to Pursuant to 5 USC § 5595, *et seq*, as the prevailing Party, it is entitled to attorney fees and expenses. Neither issue is developed sufficiently by the Parties as regards evidence and argument for the Arbitrator to grant or deny the requested remedy.

AFGE's Post-hearing Brief advances a formula for the calculation of Howard's asserted lost overtime pay issue. However, *BOP's Post-hearing Brief* is silent on this issue. For this reason as described below, I will hold the record open for the submission of an *AFGE Petition for Overtime Pay* and a *BOP Opposition to Petition for Overtime Pay* absent the Parties' agreement on the issue.

In addition, *AFGE's Post-hearing Brief* requests reasonable attorney fees and expenses. However, *BOP's Post-hearing Brief* is silent on this issue. For this reason as described below, I will hold the record open for the submission of an *AFGE Petition for Attorney Fees and Expenses* and a *BOP Opposition to Petition for Attorney Fees and Expenses* absent the Parties' agreement on the issue.

Absent agreement on these issues, the *Petitions* and *Oppositions* maybe be made in a combined submission.

AWARD

AFGE's grievance is sustained.

REMEDY

1. BOP's 30 calendar day suspension of the Grievant shall be rescinded immediately;

2. The Grievant shall be made whole with full back pay and benefits, including appropriate statutory interest, and his personnel records shall be corrected consistent with this Award;

3. Unless the Parties resolve the issue of attorney fees and expenses, the record will remain open for AFGE to submit a *Petition for Attorney Fees and Expenses* within 30 calendar days of receipt of this Award; BOP may reply with an *Opposition to Petition for Attorney Fees and Expenses* within 30 days of receipt of the AFGE *Petition*;

4. Unless the Parties resolve the issue of overtime pay, the record will remain open for AFGE to submit a *Petition for Overtime Pay* within 30 calendar days of receipt of this Award; BOP may reply with an *Opposition to Petition for Overtime Pay* within 30 days of receipt of the AFGE *Petition*;

Sean J. Rogers, Esq.
Leonardtown, Maryland
July 3, 2015