THE MATTER OF ARBITRATION BETWEEN

Federal Bureau of Prisons (Agency)	§	
	§	
and	§	**FMCS # 14-5920-3**
	§	
AFGE Local 1298 (Union)	§	

Representatives:	For the Agency:	Mr. Adam Boyer Assistant General Counsel U.S. Department of Justice
	For the Union:	Mr. Patrick M. Flynn Attorney

Introduction:

Arbitration was invoked by memo effective August 4, 2014. (Joint Exhibit 3) The hearing in the above captioned matter was held in Fort Worth, Texas on March 26, 2015 pursuant to the CBA-Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals (AFGE). (Joint Exhibits 1/2) The parties stipulated that the matter was properly before arbitration. The hearing was transcribed and the transcript is made a part of the official record. Post-hearing briefs were submitted and the hearing was declared closed on May 18, 2015.

On August 4, 2014 Correctional Officer Robert Warner was suspended for three calendar days (Inattention to Duty) and Correctional Officer Joseph Savell was suspended for seven calendar days (Failure to Exercise Sound Correctional Judgment). (Joint Exhibits 6/4) The suspensions were reduced to one and two days respectively due to mitigating factors.

Officer Warner was assigned the Rear Gate Officer on June 28, 2013 and allegedly failed to properly search an MRI truck before allowing the truck to enter the secure perimeter. While in the secure area, a nylon bag containing a cell phone and civilian clothing was subsequently discovered in the truck by Lt. Christie. Officer Warner conducted a visual search of the truck and he did confiscate one cell phone and other contraband but failed to locate a second cell phone and the clothing. (Agency Exhibit 3) Warner was cited for violation of Program Statement 3420.09, Standards of Employee Conduct which states, in part, "...inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours". Furthermore, the Rear Gate Special Instructions state, "All vehicles will be thoroughly searched both

entering and leaving the institution to prevent introduction of contraband and the use of the vehicle as a means of escape by inmates". (Joint Exhibit 6)

Officer Savell, while assigned as the Compound 2 Officer, allegedly failed to properly secure the MRI truck after escorting the truck to the Lubbock Unit which is located inside the secure perimeter of the institution. Keys were discovered in the ignition of the truck along with the driver's window down, and a bag containing a cell phone and civilian clothing. Officer Savell was charged with violation of Program Statement 3420.09, Standards of Employee Conduct-Failure to Exercise Sound Correctional Judgment. (Joint Exhibit 4)

Warden Chandler noted that the severity of the misconduct could affect the security of the institution, safety and security of inmates and fellow officers. The Agency asks the Arbitrator to deny the grievance and to sustain the imposed discipline.

The Union contends that the Agency does not have just cause to effect the imposed discipline of the officers. Both officers accepted responsibility for their actions. Both Warner and Savell had no prior discipline and both had exemplary performance appraisals (Union Exhibits 2/3) as well as other mitigating circumstances. The Union asks the Arbitrator to sustain the grievance and to deem the suspensions to be unjust and without cause and to make the officers whole. Additionally, the Union asks to be awarded reasonable attorney's fees.

The Arbitrator frames the questions as mutually agreed by the parties and as stated in the CBA (Joint Exhibit 2) as follows:

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

Discussion and Findings:

There is no contest as to the salient facts in this case. Officers Warner and Savell were involved in a breach of security by failing to secure the keys and contraband in the MRI truck. Evidence of the breach was corroborated by several witnesses and expressed in their testimony and written statements. Lt. Christie testified that he discovered the keys in the ignition and he discovered a bag containing a cell phone and clothing. (Agency Exhibit 1) Likewise, Thomas Buchberger, (Agency Exhibit 2) who relieved Officer Savell, witnessed Lt. Christie taking the keys and the bag of contraband from the MRI truck. Officers Warner (Agency Exhibit 3) and Savell (Agency Exhibit 4) were forthright in their admission of the breach. Officer Warner acknowledged that not discovering the duffel bag "was an oversight on his part." (Joint Exhibit 6) Officer Savell acknowledged that he overlooked taking the keys from the driver (Agency Exhibits 1 /4) and that "he just didn't use sound correctional judgment." (Joint Exhibit 4) The Standards of Employee Conduct (Agency Exhibit 5) note the prohibition of contraband entering the correctional facility and lists cell phones among the items of contraband. The Standards also cite the Responsiveness expected of officers as follows: "Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Therefore, employees are required to remain fully alert and attentive during duty hours." Officer Warner violated this standard. Although the Standards do not specifically define `Failure to Exercise Sound Correctional Judgment' Officer Savell violated this common-sense

tenet. As noted in the standards "While this Program Statement expounds on those regulations to clarify their application in the Bureau, it does not and cannot specify every incident which would violate the Standards of Conduct." (Agency Exhibit 5)

For the reasons above noted, **the Arbitrator concludes that the Agency has proven the underlying misconduct by a preponderance of the evidence and established a nexus between the misconduct and the workplace thus meeting their burden to show good and sufficient reason for meting out discipline.**

Is the discipline imposed appropriate? The CBA (Joint Exhibit 2) recognizes the rights of employees to include fair and equitable treatment in all aspects of personnel management. Most arbitrators, including this one, recognize that the discipline imposed is also an important part of just cause. Absent language in the CBA precluding an arbitrator from modifying discipline, aligning discipline to the offense is a necessary and common undertaking to achieve fair and equitable treatment. As one arbitrator noted "Without notable exception, arbitrators emphasize the word `just' in the term (just cause) compelling employers to tailor discipline to the individual and not only the misconduct. They see `just cause' as job-security language that requires penalties to be corrective rather than punitive. Under such interpretation, the ultimate question ....is not whether the misconduct warranted the penalty, but whether the aggrieved employee deserved the penalty for committing the misconduct" (102 LA 377 (Dworkin, 1994)) (Citing Elkouri How Arbitration Works (6th Ed. 2003; A Ruben Editor) at 958) While that arbitrator spoke to a case involving termination, it is also applicable here since any discipline can affect the employee's tenure.

Arbitrators should always be cautious in substituting their judgment for that of management and they should only modify imposed discipline when it is excessive, disproportionate, arbitrary, capricious, or unreasonable. The Douglas Factors discussed by the parties at the hearing offer a useful construct for examining the appropriateness of the imposed discipline. The Arbitrator will look to those factors he deems relevant to the instant case in light of the evidence presented at the hearing. (*Douglas v. Veterans Administration* 5 M.S.P.R. 280, 305-306 (1981))

1. *The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;* While the security breach is serious because of the first line of defense responsibilities of the Rear Gate Officer and Escort, there is no evidence that the officers acted intentionally or with malice. Every indication is that the officers made a first time mistake rather than a frequently repeated violation. In the case of Officer Warner, he did inspect the vehicle and secured one cell phone and other contraband which indicates that he attempted to follow the Standards albeit failed to discover all of the items of contraband. Prior to and in the intervening time since the violation, no similar offense was conducted by the officers indicating that the offense was not repeated.
2. *The employee's job level and type of employment;* Neither officer are supervisors.
3. *The employee's past disciplinary record;* Evidence shows that both officers had no prior discipline.

4. *The employee's past work record, including length of service, performance on the job,...*; Both officers enjoyed exemplary performance appraisals (Union Exhibits 2/3) and both had significant tenure, especially Officer Warner.
5. *The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties*; Both officers made clear their recognition and acceptance of the offense and the Warden recognized their forthrightness and that the incident was a learning experience. There is no evidence to suggest that the officers would repeat such an offense and, to the contrary, their responses indicate learning and development. Moreover, significant time has lapsed since the offenses occurred without repeat violations.
6. *Consistency of the penalty with those imposed upon other employees for the same or similar offenses*; Mike Keen testified, as Union President, that he and other employees were only given written reprimands for similar offenses. This testimony went unrebutted by the Agency. Additionally, the CBA requires a fair and expeditious procedure for handling grievances and the instant case took ten months to adjudicate.
7. *N/A*
8. N/A
9. *The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question*; Testimony indicated that Post Orders were not available at the time of the incident regarding ignition keys and that orders were changed after the incident to include instruction about the escort taking possession of the keys. (Union Exhibit 4) Warden Chandler testified that a vehicle is secure even if the keys are in the ignition if the vehicle is under the control of the officers. (Tr. Pg. 100) There was no evidence presented that the officers were given previous warnings.
10. *Potential for the employee's rehabilitation*; The employees' character of response to the charges leaves every indication that they learned a lesson and were developed by the experience.
11. *N/A*
12. *The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others*. Both the Standards (Agency Exhibit 5) and CBA (Joint Exhibits 1/2) encourage progressive discipline and the administration of the lowest form of punishment to correct the offense. Having no other past discipline, exemplary work records, and given the officers response to the Warden, it is likely that a lesser discipline would have been effective in deterring future misconduct. Discipline in most cases should attempt to correct behavior rather than be punitive.

While the Warden testified that he applied the Douglas Factors in this case, it was useful to again consider those factors in the full light of the evidence presented at the hearing. (the benefit of hindsight) Having done so, the Arbitrator finds that the discipline given was arbitrary, excessive, and disproportionate and he gives significant weight to the following: Witness Keen testified that he received a written reprimand for having a cell phone on the prison grounds and that he was aware or had represented other officers who were similarly charged as in the instant case but for whom only a written reprimand was given. The claim of disparate treatment went unrebutted by the Agency. The Warden's testimony concerning how he differentiated in the disciplines between the two officers was unclear and conflicting. He testified as follows:"...in giving Mr. Savell, you know, one day longer than

Mr. Warner is the fact of the combined nature of the two things, the vehicle, the key, plus the cell phone and the clothes inside the institution." (Tr. Pg. 112) But the Warden contradicted that statement by saying that the keys would not be a problem as long as control of the vehicle was maintained (Tr. Pg. 100) and testimony indicated that the vehicle was secure at all times. The Warden's statement also placed an expectation on Savell that the vehicle be searched by Savell but then he noted that is not a job standard for the escort officer. (Tr. Pg. 102) The Warden's rationale for differentiating between the disciplines given the officers is strained and unclear. The Arbitrator also gives weight to the lack of post orders concerning the disposition of the keys and the length of time it took to adjudicate this case, both mitigating factors not considered by the Warden. While there is no time standard required, the Warden admitted that the 10-months it took to investigate and conclude this case exceeds the 120-day ideal. Every factor noted above suggests that the Warden could likely have achieved the same corrective action with a lesser penalty. **The Arbitrator concludes that just cause does not exist to suspend the officers and that it is better served by the imposition of lesser discipline to serve the tenets of fairness and equity expressed in the CBA.**

The Union argues it is entitled to attorney's fees. (Post-hearing brief) The Arbitrator disagrees. To award fees would not be in the interest of justice. The Agency's actions were not without merit or conducted in bad faith. The officers violated standards and the Agency responded to the breach of security by holding the officers accountable. The Agency acted to secure the security and safety of the prison facility. The Arbitrator agrees with the Agency's position (post-hearing brief) that the Union has not met its burden to show that the Agency engaged in a prohibited personnel practice, committed gross procedural error, or that the Agency knew or should have known that it would not prevail on the merits.

The parties to the hearing were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence bearing on the case. Based upon the entire record, observation of the charged officers and other witnesses, examination of the exhibits and study of the transcript, post-hearing briefs, and proffered arguments, the Arbitrator awards as follows:

Award:

The charges against Officers Warner and Savell are sustained. The discipline of both officers is reduced to a written reprimand. The officers are to be made whole for loss of pay and benefits. Attorney's fees are denied.

Bill Detwiler, Ph.D.
Arbitrator
June 1, 2015