
In the Matter of the Arbitration

OPINION AND AWARD

between

OF THE

**American Federation of Government
Employees (AFGE) Local No. 1034**

ARBITRATOR

and

**FMCS Case No. 13-59338
Houston Winegeart**

**Department of Justice,
Federal Bureau of Prisons,
Federal Correctional Complex
Pollock, Louisiana**

ARBITRATOR: Louise B. Wolitz

Date of Hearing: October 8, 2014
Place of Hearing: Federal Correctional Institution, Pollock, Louisiana
Briefs Filed: January 30, 2015
Date of Award: April 22, 2015

APPEARANCES:

For AFGE Local 1034:
John-Ed Bishop, Attorney

For the Bureau of Prisons:
George Cho, Attorney

RELEVANT PROVISIONS:

MASTER AGREEMENT

***Federal Bureau of Prisons and Council of Prison Locals American Federation of
Government Employees***

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS

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,....

....

Section h. When an employee exercises his/her right to orally respond to a proposed disciplinary or adverse action, the reply official will allow ample time for the employee to respond at this meeting....

THE HEARING:

The hearing on this matter was held at the Federal Bureau of Prisons, Federal Correctional Complex, Pollock, Louisiana on October 8, 2014. Each party had a full opportunity to present its evidence, witnesses and argument and to cross examine each other's witnesses. The Agency called witnesses Shawn Tipton, SIS; Price Eben, Lieutenant; Bobby Crawford, Lieutenant; Hilton Washington, Assistant Food Service Administrator; Kevin Joyce, Food Service Administrator; and Michael D. Carvajal, Warden. The Union called witnesses Houston Winegeart, Cook Supervisor and Grievant; and Richard Logan, Senior Officer Specialist and Executive Vice President of AFGE Local No. 1034. The parties entered into evidence Joint Exhibit 1, the Master Agreement; Joint Exhibit 2, Invocation of Arbitration; Joint Exhibit 3, Proposal Letter; Joint Exhibit 4, Oral Response; Joint Exhibit 5, Written Response; Joint Exhibit 6, Suspension Letter; Joint Exhibit 7 A, Houston Winegeart Affidavit; Joint Exhibit 7B, Kevin Joyce Affidavit; Joint Exhibit 7C, Bobby Crawford Affidavit; Joint Exhibit 7D, Shawn Tipton Affidavit plus Referral of Incident; Joint Exhibit 7 E, Memorandum of Video Timeline; Joint Exhibit 7F, compact Disk Video Surveillance dated January 18, 2013; Joint Exhibit 8, Change Notice; Joint Exhibit 9, Acknowledgement of Receipt; Joint Exhibit 10, Position Description; Joint Exhibit 11, Winegeart Training Records; Joint Exhibit 12, Winegeart Employee Performance Appraisal; Joint Exhibit 13 (A through F) Dining Hall Photographs; Joint Exhibit 14, Daily Assignment Roster-FCC Pollock; and Joint Exhibit 15, General Post Orders. A transcript of the hearing was reported by Renee Megison-Billingsley, Certified Court Reporter on December 12, 2015. The parties filed briefs and citations timely on January 30, 2015. The arbitrator has carefully studied the Exhibits provided by the parties, the transcript, her notes on the testimony, and the briefs and citations offered by the parties.

THE ISSUE:

The issue before the arbitrator is: Was the Five Day Suspension issued to Grievant Houston Winegeart on August 8, 2013 for *Failure to Respond to an Emergency Situation* issued for just and sufficient cause, and, if not, what should the remedy be? The parties stipulated that the issue is properly before the arbitrator.

BACKGROUND:

On January 18, 2013 at approximately 5:34 p.m., a fight broke out between three inmates in the USP Dining Room. Houston Winegeart was on duty as a Cook Supervisor. There is a video, Joint Exhibit 7F, which depicts the inmate fight and the immediate staff reaction which prompted the investigation into Mr. Winegeart's actions. The Agency alleges that Mr. Winegeart failed to respond to the inmate fight.

Instead of running toward the fight to assist in breaking it up and restraining the inmates, Mr. Winegeart ran away from the fight, toward the serving line. Mr. Winegeart and the Union argue that by the time Mr. Winegeart became aware of the fight, the inmates were already separated and restrained, and Mr. Winegeart was concerned with securing the serving line, making sure extra food was not given out, and securing any implements which could be misused by inmates. Mr. Winegeart appears on the video to be responding to something at the nine second mark in the video. The Agency asserts that response shows that he was then aware of the fight. That was before the fight was contained. Mr. Winegeart testified that he was gesturing to move the inmates along in the kitchen and did not become aware of the fight until 27 seconds in, when Lieutenant Eben announced it on the radio. By that time, the fighting inmates were under control and he was concerned with securing the kitchen and his inmate workers. Warden Carvajal did not accept the Union's invitation to view the video in the presence of the Union and Mr. Winegeart, so Mr. Winegeart could explain what was happening. Warden Carvajal said he would prefer to watch the video by himself and call the Union for clarification if he needed it. Warden Carvajal did not ask for clarification, but ultimately concluded that Mr. Winegeart was aware of the fight at the nine second mark.

POSITION OF THE AGENCY:

Lieutenant Shawn Tipton testified that the day after the incident, Lieutenant Crawford told him to view the video. The video showed a fight between inmates belonging to two different enemy gangs. Mr. Winegeart's response was not appropriate. It was evening, about 5:34. There were around 150 inmates in the dining hall and probably five or six staff. They are short staffed on the evening watch compared to the day watch. The video shows Mr. Winegeart stepping away. He didn't respond to the emergency. He put staff safety at risk. Lieutenant Tipton said that he reported his concern to Jeffrey Troutman. He provided an Affidavit.

On cross examination, Lieutenant Tipton said that it took 24 seconds for the first staff to respond to the fight. At 45 seconds, only two staff members responded. At 53 seconds, a third staff member responded. At one minute, there were now five. The inmates were standing up against the wall. Lieutenant Tipton said that he did not talk to Mr. Winegeart. His opinion on what he did is based on the video. He does not know where Mr. Winegeart was going when he ran off. He should have been assisting the two staff members who responded. He was doing nothing. Lieutenant Tipton said that he never asked Mr. Winegeart when he became aware of the fight.

Lieutenant Price Eben testified that he was the evening watch Operational Lieutenant on January 18, 2013 when he became aware of the fight. He heard loud voices. He saw two inmates fighting. He started running toward the incident. There were two inmates on one. He used OC4, a chemical agent. It was approximately 5:30 p.m. There were approximately 80 to 90 inmates in the dining hall. Mr. Winegeart was inside the dining hall. Lieutenant Eben said that he called control. Lieutenant Eben said that he ran across Mr. Winegeart on his way to the inmates. He expected

Mr. Winegeart to be there and help, but he did not. He did not see him. He was focused on the fight. It is the duty of all staff to respond to a fight, based on their training. Mr. Winegeart was not using sound professional judgment. Lieutenant Eben said that he expected him to respond. Lieutenant Eben said that he had no involvement in the referral or the subsequent investigation. He did not know there was a referral.

On cross examination, Lieutenant Eben said that he was at the entrance of the dining hall. As soon as he saw the fight, he radioed control and started running toward it. He does not know how long it was going on before he became aware of it. A compound officer responded next. Other inmates were watching the fight. It is normal for inmates to try to get away from the area. They went to the wall. As Operations Lieutenant that day, Lieutenant Eben said he was responsible for making sure everything was running correctly. There were about 45 staff members working that day. Unit officers are supposed to remain in their unit. Compound officers are supposed to respond. Lieutenant Eben said that he locked up the three men involved in the fight. It took 15 to 20 minutes to secure them.

On redirect examination, Lieutenant Eben said that he was the one that called control. He observed the fight first hand. He distributed the OC (gas). The inmates try to run away from the gas. Mr. Winegeart did not assist him. Mr. Winegeart was already in the room. Lieutenant Eben ran across him. He walked away. He was supposed to run with him. He was not supervising contractors or volunteers. Lieutenant Eben said that he does not know what he was doing. He was in the dining hall. He had to respond because he was already there.

On re-cross examination, Lieutenant Eben said that Mr. Winegeart was supervising an inmate work detail.

Lieutenant Bobby Ray Crawford Jr. testified that on January 18, 2013 he was the PM Activities Lieutenant. He recalls the disturbance. He did not do the investigation. He did an Incident Report. He reviewed the video surveillance. Mr. Winegeart failed to respond to the incident. He should have responded towards the incident and called the control center to report it. That is based on their training, initial and annual training. The time stamp on the video shows that the incident occurred at 17:34. He estimates that over 100 inmates were in the dining hall and about 20 staff. The video was placed in the 583 Report of the Incident packet and shown to the Captain. Lieutenant Crawford said that he was between the Central tower and the recreation unit. He responded to the tower to retrieve less than lethal munitions. That took two to three minutes. He directed traffic to and from the dining hall. He reported to the dining hall. Lieutenant Eben and Officer Tyler were escorting the fighting inmates to the special housing unit. He did not observe Mr. Winegeart in the dining hall. Lieutenant Crawford said that he did not have any part in the investigation. He submitted an Affidavit.

On cross examination, Lieutenant Crawford said that he reviewed the video the night of the incident. In his Affidavit, he answered the questions that he was asked. There are six cameras in the dining hall area. It is the responsibility of the person reviewing the incident to get the best video. This video was taken from about 12 feet from the floor, on the ceiling, angling downward. You don't see where Mr. Winegeart was rushing off to at the end. Lieutenant Crawford said that he never asked Mr. Winegeart where he was going. If there were 20 staff members present, they were expected to respond. The General Post Orders apply to everyone at the institution. You are expected to read them once a quarter. The supervisor of an inmate work detail is not a first responder (p. 45). Securing inmates is a first priority. Mr. Winegeart had an inmate work detail assigned to him. Lieutenant Eben was the first responder to this incident. Lieutenant Crawford also responded by going to the tower and getting the munitions and then going to the incident. He is required to respond because he is a lieutenant. Lieutenant Crawford acknowledged that at the top of p. 49, General Post Orders, it says that food service staff should respond if not during mainline. This incident was during mainline. One staff member must be available to secure the area. Lieutenant Crawford said that he does not know if another staff member was available. It also says one staff member will stand by for food service. He never talked to Mr. Winegeart about his actions that day.

Lieutenant Crawford said on redirect that he was not reviewing the video for a staff investigation, but he was doing a Report of Incident. All staff are law enforcement officers and receive law enforcement training. The dining hall was a secure area. The last part of the General Post Orders says that each officer must exercise his own judgment. Lieutenant Crawford said that doesn't apply if there is an emergency in the dining hall and the staff member is there.

Lieutenant Crawford said on re-cross that Mr. Desplaines was a food service officer but he does not know where he was working at the time. For him to respond, he would have had to exit the door and re-lock the door for it to be secure. It is only secure if it is locked. You can only see if it is locked from the other side. The General Post Orders does say that one staff member should secure the area. Lieutenant Crawford said that in his opinion, if there is a major incident, all officers should have responded to the incident and secured the area. If the area is not secured, another officer should have responded to the incident. If an incident is occurring, they expect staff members to respond to the incident initially.

Lieutenant Crawford said on re-direct that he does not know if it was secured or not and he does not know if there was an emergency response plan.

On June 3, 2013, Assistant Food Service Administrator Hilton Washington served Mr. Winegeart with a notice of proposed discipline. The notice said:

This is notice that I propose that you be suspended for a period of seven (7) calendar days for Failure to Respond to an Emergency Situation, which is a violation of program Statement 3420.09, Standards of Employee Conduct,

dated February 5, 1999, which you acknowledged receipt for on October 27, 2008.

Specifically, on January 18, 2012 (sic. should be 2013), at approximately 5:34 p.m., while working as the USP Dining Room Officer, you failed to respond to an emergency situation when you did not assist responding staff in separating inmates who were fighting in the dining room. In your affidavit dated March 15, 2013, after viewing video footage of the incident, you admitted that as other staff responded to the incident in the dining room, including another staff member from behind the serving line, you ran to the serving line and not the inmate fight.

Program Statement 3420.09, Standards of Employee Conduct states, in relevant part, that "because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employee respond immediately and effectively to all emergency situations." As a Correctional Worker, you are responsible to respond immediately and effectively to emergency situations in the institution. Your actions in this matter constitute Failure to Respond to an Emergency Situation and form the basis for this charge.

The Warden will make the final decision concerning this proposal. You may reply to the Warden orally, in writing, or both orally and in writing. This reply may include affidavits or other documents in support of your response. Any reply which you may make must be received by the Warden within ten (10) working days from the date you receive this notice. No final decision will be made to effect this proposal until after your response is received and considered, or after the expiration of the ten (10) days....

You may have a representative of your choice to assist you in the preparation and presentation of any reply you wish to submit....

Mr. Washington testified that he is Mr. Winegeart's first line supervisor. He testified that he has never given Mr. Winegeart any instructions about responding to emergencies. Mr. Winegeart gets IF training and annual refresher training. He saw on the video Mr. Winegeart running away from the fight. Mr. Winegeart should have called the fight in and gone to the fight to help break it up. Mr. Washington testified that he did not write the letter above, which he gave to Mr. Winegeart, but Human Resources wrote it. Mr. Washington testified that he has not had any training in writing disciplinary proposals. Human Resources does that.

On cross examination, Mr. Washington said it is his understanding that SI contacted Human Resources to write the proposal letter. They presented him with the proposal letter to give out. Mr. Washington said that if he had seen the video, he would have asked for more days. Mr. Winegeart should have made a call to get help. Mr. Washington said that he saw the film yesterday for the first time. Mr.

Washington said that he never asked Mr. Winegeart about his actions taken in the film. Mr. Washington said that the food slots are unsecured unless they are locked. The inmate servers are using scoops, spatulas, ladles and a dough cart. They use a spatula for enchilada casserole. The tools and equipment are not secured or tethered. At the end of a shift, they gather all the tools in the tool room and clear the tool board before they release the inmates. There were inmate line servers assigned to Mr. Winegeart.

The parties stipulated that the Agency is unaware of specific post orders for cook supervisors.

On redirect examination, Mr. Washington testified that the inmate food service workers are searched at the end of their shift and pass through metal detectors when they return to their housing unit. There is no life safety issue if inmates are serving extra food. A fight is more important than extra food issues.

Witness Kevin Joyce, Food Service Administrator, testified that if an emergency occurs outside of food service, the food service staff does not respond. If the emergency occurs within food service, including the USP dining hall everybody responds. He has given those instructions to the staff several times. Utensils are locked and tethered so inmates can't make weapons or steal them. As for tools and equipment, it depends on how they are classified. Class A, such as knives and food choppers, the inmates have to be supervised at all times. Class B can be checked out to an inmate. Equipment, such as serving utensils and mops, can be checked out to an inmate. They don't need constant supervision. The inmate returns them. There are no Class A tools in the serving line area, only equipment.

On cross examination, Mr. Joyce said that he wrote an Affidavit. He made no recommendation for disciplining Mr. Winegeart. No one ever asked his opinion on what discipline Mr. Winegeart should face. He reviews all yearly evaluations. Mr. Winegeart has two front line supervisors, Mr. Washington and Ms. Millet. His overall evaluation for the period including this incident, dated 3/28/2013, was *exceeds expectations*. Mr. Joyce said that he concurred in that evaluation. There were no negative comments. Mr. Joyce said that he was aware of this investigation on that date. His Affidavit was dated 3/18/2013. He has never seen dough cutters or spatulas, both B tools, used behind the serving line. They should not be used by inmates on the serving line. Only equipment should be used.

On redirect examination, Mr. Joyce said that there is a difference between a performance evaluation and a discipline issue. He was not aware at the time of the performance evaluation if the disciplinary investigation was complete or if any discipline had been issued. Misconduct is a violation of policy. It is not part of an employee's performance appraisal.

On re-cross examination, Mr. Joyce said that Mr. Winegeart supervises inmates. He has direct supervision of an inmate work detail.

Warden Michael D. Carvajal testified that he has been Complex Warden at FCC Pollock for 23 months. He has direct oversight and administrative control of the complex. There are three institutions, high security, the U.S. Pen; medium security; and minimum security. He is responsible for about 700 staff members. He knows Mr. Winegeart, a cook supervisor. He was the deciding official on this discipline. This was a conduct issue and referred to Internal Affairs. Warden Carvajal testified that the facts that were presented to him were that there was a gang related assault of two inmates assaulting one inmate. Mr. Winegeart was in the general area of the assault. Pepper gas was used. Mr. Winegeart did not respond to the situation. Warden Carvajal testified that he reviewed the video. The assault occurred at 5.34 on the evening watch. There were 250-300 inmates and 30-40 staff. There is less staff at night than during the day shift. Mr. Winegeart did see the fight in progress. Instead of responding to the emergency situation, he responded to the serving line. Everyone is expected to immediately respond to contain the situation. Staff presence provides command and control. The fight involved two inmates against one. Lieutenant Eben deployed two blasts of pepper spray by himself. Mr. Winegeart's response was not sound professional judgment. The staff is taught to immediately respond. It is a matter of inmate and staff safety. The charges were outlined in the proposal. Mr. Winegeart made an oral statement. Minutes were taken, but not verbatim. Warden Carvajal said that he considered the oral response. The Union was present. Two stewards were there. Mr. Logan asked Warden Carvajal if he had viewed the video. Warden Carvajal told him that he would review it. He did review the video before making his decision. Mr. Winegeart also supplied a written response. Warden Carvajal said that he considered that. He considered the Douglas factors. He considered the seriousness of the conduct. Lives were at stake. Mr. Winegeart did not immediately respond. He considered that Mr. Winegeart had no previous discipline. His work history showed that he was a satisfactory employee. He had the confidence of his fellow employees as a supervisor. Mr. Winegeart stated in his initial response that OC had already been deployed when he saw the incident. Warden Carvajal said that Mr. Winegeart saw the incident before the OC had been deployed. Warden Carvajal said that Mr. Winegeart's written statement didn't match the video. In training and annually, staff are given clear notice of the expectations that they will respond to emergencies. Mr. Winegeart did not immediately respond. Warden Carvajal said that he takes discipline seriously. He believes Mr. Winegeart's behavior could be corrected by the discipline. He did mitigate the Seven Day Suspension recommended in the proposal to five days. This was not an easy decision. It affects people's lives. He looked at the facts. He did what was fair and reasonable to correct the behavior. It would send the wrong message if people think that it is acceptable to not respond to things. Warden Carvajal said that he thought that a Five Day Suspension makes the point and sends the message that this was not acceptable behavior. He contemplated his decision for three to four hours.

On cross examination, Warden Carvajal said that he reviewed Mr. Winegeart's written response, the video, his notes and Mr. Winegeart's disciplinary file. He reviewed the Affidavits in the file, Joint Exhibit 7. He did not see the report by

Special Agent Troutman. He doesn't review the investigative report. On the video, at nine seconds, Mr. Winegeart notices the assault. The inmates are all looking in that direction. Mr. Winegeart is supervising the dining hall, doing his job. Warden Carvajal said that he does not recall asking Mr. Winegeart if he was directing other inmates. He does not recall if he asked Mr. Winegeart when he became aware of the incident. He recalls Mr. Logan asking him to review the video. He does not recall Mr. Logan's request that they all watch the video together with Mr. Winegeart there so that he could explain what was happening. He has done that before. Warden Carvajal said that if Mr. Winegeart was not aware of the fight until after Lieutenant Eben had responded that might have changed his perspective. If Mr. Winegeart chose to control the other inmates in the dining facility, that could have been an appropriate response. Warden Carvajal said that Mr. Winegeart had the opportunity to tell him this during the oral response. That was his opportunity to tell him what he needed to know. He does mitigate things if possible. Warden Carvajal said that he relies on Human Resources to judge if responding incorrectly to an emergency situation is the same as failing to respond to an emergency situation.

On redirect, Warden Carvajal said that he did not issue the proposal. He is presented with a charge. The video shows Mr. Winegeart making a hand gesture and turning around at 11 seconds, so he was aware of the incident. It also is not normal for Lieutenant Eben to be running. It had to be an emergency. The appropriate response of Mr. Winegeart would have been to go toward the fight and back up Lieutenant Eben. The proper response is to call for assistance and make his way to the area. The proper response is to go toward the incident until it is contained.

On re-cross, Warden Carvajal said that Mr. Winegeart said that he was responding to the food line because the inmates were taking excess food and also to secure the equipment.

On August 8, 2013, Warden Carvajal sent Houston Winegeart the following letter of discipline:

On June 30, 2013, you were issued a notice which proposed that you be suspended for a period of seven (7) calendar days for Failure to Respond to an Emergency Situation. In making my decision, I have given full consideration to the proposal, to your written and oral responses of June 10, 2013, and to the evidence contained in the disciplinary action file which has been made available to you.

When considering the charge, I contemplated among other factors; Failure to Respond to an Emergency Situation is a serious charge, especially given your position as a Correctional Worker. In your oral response, you stated that you have never been told what the correct steps are to take in that situation. In your written response, you explained that you instead responded toward the serving line to secure the area that had serving equipment. Although noteworthy, this does not outweigh the

seriousness of your misconduct. As a Correctional Worker, you are expected to respond immediately and effectively to all emergency situations. It is imperative in a correctional environment to respond by providing assistance to other staff during time of emergency. Failure to respond could result in escape, assault, or other harm to staff or inmates.

I find the charge fully supported by the evidence in the disciplinary action file. Your suspension is warranted and in the interest of the efficiency of the service. In determining the appropriate penalty, I considered among other factors, you have no prior discipline to consider. Therefore, it is my decision that a suspension of five (5) calendar days should have the desired corrective effect. You will be suspended effective August 12, 2013, through August 16, 2013. You are to report for duty at your regularly scheduled hour on August 20, 2013.....

In its brief, the Agency argues that the Agency has established by a preponderance of the evidence that the Grievant Failed to Respond to an Emergency Situation on January 18, 2013, in violation of the Standards of Employee Conduct. First, the video evidence clearly established the Grievant's *Failure to Respond to an Emergency Situation*. The video evidence is clear, unambiguous and speaks for itself. It shows the Grievant coming up by the salad bar, then the inmate fight breaks out in the back corner of the USP Dining Hall, with Grievant appearing to see it and then walking away and allowing Lieutenant Prince Eben to respond to the fight by himself. Warden Carvajal testified that he observed on the video the Grievant make a hand gesture/signal pointing in the direction of the inmate fight, indicating his awareness of the inmate disturbance going on in the corner of the USP Dining Hall, and then turn around and go off in a direction away from the fight. The Grievant, however, despite acknowledging that the video evidence shows his head going towards the directions of the inmate fight, testified that he was not aware of a fight going on at the other side of the dining room, because the salad bar is about 5-plus feet high and the noise in the dining hall during main line is extremely high. Instead, the Grievant testified that he only became aware of the fight in Food Service when Lieutenant Eben called it on the radio and ran toward the fight.

However, the Grievant admitted that while he is 5'9" tall, Lieutenant Eben, who managed to observe the inmate fight from outside the USP Dining Room, is actually shorter than the Grievant, maybe 5'4" tall. Further, Lieutenant Eben testified that upon observing the inmate fight from outside the USP Dining Hall, he radioed Control, and then started running toward the incident and across the Grievant, who was already in the dining hall. Lieutenant Eben testified that he expected the Grievant to be there and assist him in responding to the inmate fight because the Grievant was already there in the dining hall.

Secondly, Agency policy and training requires all staff, including the Grievant, to properly respond to an emergency situation. Immediately upon entry into service, Grievant and all employees receive instruction on the Standards of Employee

Conduct, a policy which outlines the Agency's expectations of its employees (Joint Exhibit 8). This policy defines the penalties for sustained misconduct. It also provides instruction to all staff to report any behavior by staff or inmates which is in violation of the Standards, particularly if it is a threat to the security and safety of the institution.

The grievant was put on notice by the Standards, which he acknowledged receipt of on October 27, 2008, as to management's expectations and the possible penalty for failing to properly respond to an emergency situation. Specifically, the Standards clearly state that *"because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately and effectively to all emergency situations."* Grievant's failure in this instance to respond endangered not only the lives of the fighting inmates, but also the life of Lieutenant Eben, who expected the Grievant to respond to the inmate fight with him in case an inmate turned against Lieutenant Eben. Staff receive training on this duty to respond to any emergency annually. Staff are taught to immediately respond where there is potential for someone to be hurt. Staff safety is a priority which requires appropriate, immediate, and effective response to all situations.

Hilton Washington, the Grievant's first line supervisor, testified that instead of running away from the fight, the Grievant should have called the fight in and went to the fight. Kevin Joyce, Grievant's second line supervisor, testified that he has previously instructed the Grievant and all Food Service staff to not respond to emergencies outside of Food Service if they have inmate work details they are supervising at the time of the emergency. However, if an incident happens within the Food Service Department, including the USP Dining Hall, everybody responds.

The Grievant initially asserted during the investigation into the incident, by affidavit, that he ran away from the inmate fight in order to try and stop food service inmate workers from giving extra food to the inmates through the tray slot. In his subsequent written response, the Grievant stated that he responded toward the serving line instead of the inmate fight, in order to secure serving tools and equipment that could have been potential weapons. The evidence presented at the hearing shows that serving tools were either behind a locked door and food slots or tethered to a food bar. Both Food Service Administrators Washington and Joyce testified that no Class A tools, such as knives and blades, which require staff supervision at all times, are kept in the serving line area. Instead, only Class B tools, such as scoops, spatulas and ladles are kept and used by inmates on the serving line.

There is no question that Grievant was aware of, or should have been aware of, and violated the Agency's training and expectations as outlined in its Standards, as well as his immediate Food Service supervisors' instructions, in failing to respond to the emergency that took place on January 18, 2013 inside the USP Dining Room.

Thirdly, the Agency argues that the penalty of a five (5) day suspension is reasonable and consistent with the Agency's Standards and Schedule of Disciplinary Offenses and Penalties. Those Standards state that failure to respond to an emergency situation may result in a penalty anywhere from official reprimand to removal from federal service for the first offense, with the potential danger to safety of persons and/or damage to property being a primary consideration in determining the severity of the specific penalty in each case.

The Grievant's suspension of five (5) days for *Failure to Respond to an Emergency Situation* was for just as sufficient cause. The deciding official considered all the relevant factors and exercised his discretion within tolerable limits. The Arbitrator should give due deference to the Agency's discretion in exercising its managerial function of maintaining employee discipline and efficiency. The Arbitrator should not displace management's responsibility in determining appropriate discipline, but only assure that its judgment has been properly exercised.

With regard to mitigating factors, Warden Carvajal testified that he considered the fact that the Grievant had been with the Agency for approximately seven (7) years, had no previous disciplinary record, and is a satisfactory employee. Accordingly, Warden Carvajal decided to mitigate Grievant's proposed 7-day suspension down to a 5-day suspension, giving Grievant the benefit of the doubt as a tenured employee with no previous discipline record. With regard to the Grievant's potential for rehabilitation, Warden Carvajal testified that he didn't think his failure to immediately respond is anything that can't be corrected.

On the other hand, Warden Carvajal emphasized the nature and seriousness of the Grievant's offense, that lives are literally at stake in situations like this and that another staff member, Lieutenant Eben, was left on his own for a few seconds without assistance.

Warden Carvajal concluded, in consideration of all relevant Douglas factors, the proposal letter, investigation, and oral and written response from the Grievant and the Union, that mitigation to a five (5) day suspension was appropriate. He contemplated his decision for 3 or 4 hours, watched the video several times, and looked at the record. He concluded that a five (5) day suspension would make the point without hurting the Grievant and send a message that this is not acceptable behavior. This decision is within the bounds of reason, within the range of penalties for the charged offense, and promotes the efficiency of the service. Therefore, the decision must be left undisturbed.

The Grievant received all his due process rights throughout the disciplinary process. His failure to respond to an emergency was observed on video surveillance and reported by Lieutenant Tipton resulting in a referral of the incident on January 23, 2013. An investigation was initiated, affidavits were taken, and the video evidence was examined. The Grievant was issued a proposal letter on June 3, 2013, granted time to review the evidence and provide any additional information he

deemed appropriate including a written and/or oral response. He provided both oral and written responses, accompanied by his Union representatives, to Warden Carvajal on June 10, 2013. A decision letter was issued to the Grievant on August 8, 2013. The deciding official, Warden Carvajal, appropriately considered the entire record before him. Warden Carvajal provided a thorough analysis and explanation of each of the relevant Douglas factors and explained how each weighed in his decision process. The Grievant was provided a written decision letter outlining the reasoning behind the Agency's decision and identifying his appeal rights. The penalty imposed does not exceed the range established in the Agency's Table of Penalties for which Grievant acknowledges receipt on October 27, 2008.

The Agency concludes that it has established by a preponderance of the evidence that the Grievant Failed to Respond to an Emergency Situation on January 18, 2013, in violation of its Standards of Employee Conduct. The Grievant's five (5) day disciplinary suspension for *Failure to Respond to an Emergency Situation*, issued on August 8, 2013, should be upheld.

POSITION OF THE UNION:

Grievant Houston Winegeart testified that he has been working for the Bureau of Prisons since October 26, 2006 at the FCC in Pollock, Louisiana. He is a cook supervisor. He is responsible for the quality and timeliness of three meals a day for the inmate population. He works all positions in the FDI and the Pen. They bid quarterly for their post, according to seniority. In January, 2013 he was a PM dining officer. He was responsible to lay out the cold bar, the hot bar, the hot boxes during main line dinner. He patrolled the dining room area. He prevented double backs. Only one serving line was running on January 18th. He was walking up and down, keeping the flow of traffic going. He was not aware, at 11 seconds in the video, of a fight. He was gesturing his inmates to move on. The inmates are in white in the video. Lieutenant Eben called in the fight at 26 minutes. That was when he became aware of the fight. He saw Lieutenant Eben break and run. He had called the fight in on the radio. Lieutenant Eben had already administered the OC. Mr. Winegeart said that he was getting the inmates to move out of the way of the situation, against the wall. He was clearing the inmates from the area. The responding officers had the situation under control. The OC was already administered. The fighting inmates were already on the floor. Another officer was also responding. He thinks it was officer Desplaines. Mr. Winegeart said that he went to secure the serving line area. The serving area was unsecure because the tray slots were open. So he broke and ran to the serving area. There is equipment back there. They were serving enchilada casserole, so there were spatulas. There were grey scoops to service ice cream. The spatula has plastic over metal. There were dough knives, which are 6 inches long and 4 inches wide to cut the enchilada casserole in place of a knife. Dough knives and spatulas are often used on the line. Things stick to the pan. There were 6 to 8 inmates behind the serving line on that evening. The dining room was his work detail. There were 25-30 inmates. He got the inmates against the wall. He was running to the main line. He accounted for the tools. He secured the slots. He kept

the inmates confined back there. Dough knives could have been taken and used as a weapon. He didn't know whether it was food, tools or what coming out of the slots. No one discussed his actions within the next few days. One day he came into work and Mr. Logan said that he was representing him as a union rep. He became aware that there was an investigation on March 15th (Joint Exhibit 7A). They wanted to talk to him in the Special Investigators Office (SIA). Mr. Logan told him that they had questions. He was coming in to go to work on his shift, 12 – 8. A gentleman in a blue blazer, glasses, white hair, told him that he had some questions about January 18th. He asked him if he recalled the fight. He remembered it was Mexicans in a fight. He asked him about his actions. They walked through the video and he explained himself to them. He was feeling apprehensive because it was making him late to work. He would not be relieving his co-worker on time. He wanted to get out of there and get to work. He supplied the affidavit, Joint Exhibit 7 A. He didn't type it. He is not sure who prepared it. He signed it. Everything he stated is true and correct. He was responding to the prepared questions the investigator had. He heard nothing further until he received a letter dated June 3rd that they were considering a suspension. Mr. Washington gave him the letter. He was called into Mr. Washington's office. He signed the letter. He had ten days to respond. He did both an oral response and a written response. In his written statement (Joint Exhibit 5), dated June 7, 2013, he said:

On June 10, 2013 I received a proposal for a (7) day suspension. The charge on the proposal is Failure to Respond to an Emergency Situation.

Specifically; I would like to explain my actions during the situation in question. At the time of the incident, mainline was being conducted and the dining hall was full of inmates. I also had inmate workers behind the serving line. When the fight was called, I initially saw the two inmates fighting and saw staff had already administered OC. Due to my training and experience; I immediately began ordering inmates to get back from the area while also maintaining visual contact of the serving lines. There was several staff at the scene and more responding to the scene. I felt that the two inmates fighting were under control and that my immediate attention needed to be focused on the large amount of inmates in the surrounding area. I then noticed the cook foreman responding from behind the line. Realizing that the inmates serving food were in possession of serving tools that could have been potential weapons I used sound correctional judgment and responded toward the serving line to secure the area that had serving equipment in the hands of inmates by locking the tray slots and securing the inmates behind the line. Due to my training and experience, I believe I did what was correct in maintain security of the foodservice dining hall I did not fail to respond, I responded to an area of the dining hall that I felt, at the time, was in jeopardy of being compromised.

I take my job very seriously as a Correctional Officer responsible for the safety and security of staff as well as inmates housed at FCC Pollock. I have

always taken pride in my position with the Bureau of Prisons. In my time with the Bureau of Prisons I have never received any disciplinary action. I have always received excellent to outstanding on my evaluations.

When he met with Warden Carvajal, he had the opportunity to read this statement to him. He offered to walk him through the video. He had a copy of the video with him. Warden Carvajal said that he wanted the opportunity to review the video by himself. He said he would call Mr. Winegeart if he had any questions. Mr. Winegeart testified that he didn't speak to Warden Carvajal again until August 8th. He was given his suspension on August 8th. Warden Carvajal made him watch the video with him on August 8th. Mr. Winegeart testified that he realized that Warden Carvajal thought that he had seen the fight at 9 seconds in the video, when he made a hand gesture and turned his head. Based on that perspective, he understood where Warden Carvajal was coming from. Based on what Warden Carvajal thought he saw on the video, he understood his action. If Warden Carvajal had known everything that Mr. Winegeart had tried to explain to him in June, Mr. Winegeart said that he believes that the warden would have decided differently. Mr. Winegeart believed that it was too late to change anything on August 8th. August 8th was a Thursday. He was supposed to start his suspension on Monday.

Mr. Winegeart testified that on his performance evaluation, he had at least an excellent ranking in all categories (Joint Exhibit 12). Typically he has 4 excellents and 2 outstanding. He is rated excellent or outstanding in his ability to supervise inmates and security. Inmate accountability and tool accountability is important. Based on the information he had at the time on January 18th, he believes that he did the right thing. He secured the tools. You do not want to run out of food during mainline. The camera that took the video is mounted directly on the ceiling, about 20 feet up. There are more cameras there than just that one. He never saw the videos from the other angles.

On cross examination, Mr. Winegeart said that Lieutenant Eben would have been up near the main line where the tray slots are at. They did not cross paths. He was on the other side, closer to the fight. He was on the cold end of the salad bar, on the side of the serving line that they were not using. Mr. Winegeart said that he is 5'9". Lieutenant Eben is 5'4". Lieutenant Eben was able to get to the fight. Two tray slots were closed, one was open. There was only one officer behind the line. He had the cook shift. Mr. Winegeart had the dining room. There was only one serving line that evening. When they became aware of the inmate fight, as food servers, they are second responders. Lieutenant Eben had sprayed OC. The inmates who were fighting had begun to cooperate. They got down on the ground. Another officer came running from behind Mr. Winegeart. There were inmates sitting at the dining table all around them. Mr. Winegeart said that he addressed the inmates to the left. There were some to the right. Mr. Winegeart agreed that in his Affidavit, Joint Exhibit 7A, he did not discuss his concern with tools being possibly used as weapons or that he did not see the fight when it started. Mr. Winegeart said that he did say that he did not see the fight start. He did not address his request to review the video with the

Warden. Mr. Winegeart said that dough knives are often sharpened. Mr. Winegeart agreed that they are expected to respond when they see a fight among inmates. They are supposed to observe, assess, determine a course of action and assure the safety of themselves and others. Mr. Winegeart said that it is not unusual at the Pen to see staff running.

Witness Richard T, Logan testified that he is a Senior Officer Specialist, and has worked at the Bureau of Prisons since 1998 and at Pollock since 2001. He is Executive Vice President of the local union. The Union represents staff employees. Mr. Winegeart wrote his affidavit in response to questions from the investigator. They don't normally add information. In fact, the Union tells the employees to answer only the question asked and not to elaborate. They can elaborate when they talk to the warden. They have ten days to respond. He recalls the Winegeart case. He was assisting Mr. Winegeart. He was present when Mr. Winegeart gave his oral statement to the warden. The Human Resources Specialist at the time was taking minutes, not verbatim. They had a meeting with the warden when Mr. Winegeart presented his written statement. Mr. Logan said that he told the warden that they had a video with them. He told the warden that he thought that they should play the video and let Mr. Winegeart explain. The warden said that he did not want to be prejudiced when he watched the video. He wanted to view the video by himself. Mr. Winegeart was not able to see the fight from where he was. He had to assess the situation from where he was at and make the environment safe. If staff is responding, you don't jump into a fight. You assess the situation. You look around. The fight could be a diversion. Mr. Logan said he has seen many disciplinary decisions made that resulted in less than the recommended penalty. It happens half the time.

In its brief, the Union raises two issues: 1. Did the Agency meet their burden of proving that Mr. Winegeart failed to respond to an emergency situation on January 18, 2013; and 2) Did the Agency violate Mr. Winegeart's due process rights when it failed to allow him to explain his actions to the decision maker in response to the video of the incident? The Union acknowledged that the facts that surround this case are not in dispute. All parties agree that the video, Joint Exhibit 7F, depicts the inmate fight which took place in the dining facility on January 18, 2013 ("*emergency situation*") and the immediate staff reaction which prompted the investigation into Mr. Winegeart's actions. However, the Union argues, there are three factual determinations to be reached: 1) When did Houston Winegeart become aware of the inmate fight on January 18, 2013? 2) Did Houston Winegeart respond to the emergency situation on January 18, 2013? 3) Did the deciding official, Warden Carvajal, deny Winegeart the opportunity to explain the video and Winegeart's actions during the video during his oral response on June 10, 2013?

The Union argues that, based on a review of the facts and evidence presented, it is apparent that Mr. Winegeart was disciplined based on a misunderstanding by the deciding official as to when Mr. Winegeart became aware of the inmate fight. After Mr. Winegeart became aware of the incident, the video plainly shows Mr. Winegeart

moving inmates from the fight location and running off-screen to secure inmates. However, Warden Carvajal, the deciding official, still found that Mr. Winegeart "*failed to respond to the emergency situation.*" The charge proposed and decided on for Mr. Winegeart was "*failure to respond to an emergency situation.*" This is not the same as "*failure to exercise sound correctional judgment*" or other like charges. In other words, the Agency charged Mr. Winegeart with no action and not with a failure to correctly act.

After the discipline was proposed against him, Mr. Winegeart was given his contractually and statutorily guaranteed opportunity to give an oral response to the deciding official. However, despite Mr. Winegeart and the Union official, Richard Logan, requesting that Warden Carvajal watch the video with them and allow Mr. Winegeart to explain his actions, the Warden denied Mr. Winegeart the opportunity to explain his actions and thus denied him proper due process.

A review of the evidence demonstrates that the Agency failed to prove that Mr. Winegeart failed to respond to the emergency on January 18, 2013. The evidence demonstrates that Mr. Winegeart did in fact respond to the emergency. The evidence further shows that Mr. Winegeart and his Union representative attempted to explain Mr. Winegeart's actions during the video to Warden Carvajal and were denied that opportunity. The Union argues that this denial was in violation of the Master Agreement and U.S. law.

The Agency charged Mr. Winegeart with offense #12 on the Table of Penalties (Joint Exhibit 8), *Failure to respond immediately to an emergency situation*. The Agency feels that since Mr. Winegeart did not rush up on the fight itself, he "*failed to respond.*" However, a review of the evidence, the Agency's post orders, and testimony indicate the fallacy of the Agency's position. The evidence indicates that the Agency's General Post Orders apply to all Correctional Workers, including Mr. Winegeart. All staff are expected to comply with the General Post Orders (Joint Exhibit 15). Pages 44-45 of the General Post Orders discuss various staff who may not immediately respond to a situation, including staff supervising contractors, supervising AA or A tools, or staff supervising inmate work details. Lieutenant Eben acknowledged that this means if a staff member was supervising an inmate work detail, the staff member should secure the inmates prior to responding to an emergency. Lieutenant Eben further admitted that Mr. Winegeart was supervising an inmate work detail at the time of the incident. Mr. Washington, Mr. Winegeart's direct supervisor, also acknowledged that Mr. Winegeart would have had an inmate detail assigned to him at the time, and that those inmates may have been the ones behind the serving line. Mr. Joyce, the Food Service Administrator, acknowledged that his workers were instructed not to respond to emergencies outside of the dining room as they are monitoring inmate details. He could not indicate when he verbally instructed his staff that "*everybody responds*" to emergencies within the dining hall. He also acknowledged that the equipment used by the inmate servers behind the serving line can be used to fashion weapons, just like the equipment chained to the salad bars in the dining room. Both union and Agency witnesses

acknowledged that class B tools, such as spatulas and dough cutters, would have been in possession of the inmates at the serving line. It is undisputed that not all staff should run blindly into a situation because of the possibility that the situation might escalate. Warden Carvajal admitted that *“the mere presence of staff provides some type of command and control of the situation.”*

The General Post Orders provide direction and orders for staff and specifically note that Food Services, other than during mainline, should respond to an emergency, but that one staff member must always be available to secure the area (Joint Exhibit 15, p. 48). The General Post Orders further delineate that *“a staged response should be utilized.”* (Joint Exhibit 15, p. 8) When approaching an emergency situation, staff are ordered to be *“constantly aware of their surroundings when responding to alarms, always remain alert to suspicious circumstances or situations that may be an indication of danger.”* (Joint Exhibit 15, p. 8) Warden Carvajal acknowledged that some staff should be giving direction and order to the inmates not involved in a fight.

A review of the video, Joint Exhibit 7F, in relation to testimonial evidence, shows that Mr. Winegeart did, in fact, respond to the incident on January 18, 2013 in accordance with the guideline above. Mr. Winegeart enters the camera view, checking hot/cold bar at 17:34: 31. At 17:34:37 the Warden assumes that Winegeart became aware of the fight. At 17:34:42 Winegeart exits camera view. At 17:34:52 Lieutenant Eben enters camera view responding to incident. At 17:35:04 Lieutenant Eben arrives at the fight scene and another officer begins response to scene. At 17:35:05 Winegeart reenters camera angle surveying scene and other inmates. At 17:35:16 Winegeart moves inmates from left side of dining hall. At 17:35:28 Winegeart notices inmates in his detail in possession of equipment passing items through the serving line and runs to secure area. The Agency has not proven that Mr. Winegeart failed to respond to an emergency. Only looking at a sixty second clip shows five responses from Mr. Winegeart. First, he became aware of the fight and responded toward the area (*awareness*). Second, he surveyed the scene as directed (*remain alert to dangerous situations*). Third, he provided officer presence in the area of the incident (*command and control over area*). Fourth, he controlled inmate movement away from the incident (*directed inmates away from the situation*). Fifth, he noticed a possible expansion of the incident with the potential for inmates to have weapons and ran to secure the area and equipment (*secured his work detail and prevented the situation from escalating with the addition of equipment that may be used as weapons*).

The Union argues that it is clear that the weight of the evidence does not support a finding that Mr. Winegeart failed to respond to the emergency situation. He did respond to the situation. While Warden Carvajal may not have agreed with the manner of his response or his exercise of sound correctional judgment, those were not the charges proposed. The Master Agreement requires that disciplinary actions be *“taken only for just and sufficient cause.”* The Agency has failed to meet the burden

of showing just cause why Mr. Winegeart was disciplined for *Failure to Respond to an Emergency Situation*. The grievance should be granted.

Futhermore, the Union argues, the Agency likewise violated Mr. Winegeart's due process rights under the law and contract when the deciding official failed to allow him the opportunity to explain his actions during his oral response. Due process guarantees that bargaining unit staff members are to be given the opportunity to verbally explain their actions. Mr. Winegeart was not granted that opportunity. It is undisputed that Mr. Winegeart had a meeting with Warden Carvajal on June 10, 2013 around 1:53 p.m. Present at the meeting were Houston Winegeart, Grievant; Warden Carvajal, Deciding Official; Richard Logan, Union Representative; Jason Shannon, Union Representative; and Tyler Meeker, Human Resource Specialist and minute clerk. At the meeting, Mr. Winegeart and his Union representative, Richard Logan, asked that the parties view the one minute video clip and allow Mr. Winegeart to explain his actions to the Warden. Mr. Logan explained why this was important (Transcript, pp. 209-210): *Because the video is, even though its actual live action, that can be twisted. Unless you're actually there you don't really know what was happening. The video only shows you one angle. It may not be the angle you're looking at and when I first looked at that video I thought it looked bad. Because I'm sitting above looking down. When Mr. Winegeart explained his actions I could see me being down at the level he was at he wasn't able to see the fight. I could see all his actions, everything he explained step-by-step, I understood. And I think Warden Carvahal's (sic) decision would be totally different if he would have actually sat down and let us explain that video to him.* Warden Carvajal acknowledged that he has allowed prior employees facing disciplinary action to watch video of their actions and explain the video to the Warden.

The Union argues that the failure to allow Mr. Winegeart the opportunity to present evidence and explain his actions violated his legal and contractual rights to provide an ample oral response to the decision maker. This led to the decision maker either being mistaken or unsure of various actions taken by Mr. Winegeart which would have easily been resolved if Mr. Winegeart could have explained the video. Warden Carvajal told Mr. Winegeart and the Union that he would ask questions if he felt there was a need for explanation in the video. However, he never asked those questions. When the Union asked Warden Carvajal if there is a possibility that Mr. Winegeart was directing the inmates away from the area, the Warden responded, *You'd have to ask Mr. Winegeart.* He was asked: *Did you ask Mr. Winegeart that?* The Warden responded, *I can't recall.* When asked if he recalled asking Mr. Winegeart particularly when he became aware of the incident, the Warden answered, *No. I asked him to explain to me, you know, it's his opportunity for the oral response, and that time he gave me his memorandum – his written statement.* (Transcript, p. 149).

The Union argues that despite his lack of knowledge concerning when Mr. Winegeart became aware of the fight, what actions Mr. Winegeart was taking in the video, and the reason why he took those actions, Warden Carvajal still rendered a

decision against Mr. Winegeart. Warden Carvajal wrongly suspended Mr. Winegeart for five (5) days without pay. Knowledge of when Mr. Winegeart became aware of the incident and the actions and motivations for Mr. Winegeart are critical for a determination of whether Mr. Winegeart “*failed to respond to an emergency situation.*” Warden Carvajal could not answer those questions. Warden Carvajal specifically denied Mr. Winegeart’s and the Union’s request to explain the video and provide those answers. This violation of Mr. Winegeart’s due process to be granted an ample opportunity to provide an oral response to the proposed discipline removes any just cause from the discipline.

DISCUSSION:

The problem with video evidence is that it captures only what you can see in a picture. A picture is not necessarily worth a thousand words. It tells you nothing about the myriad possible explanations for what you see. It tells you nothing about what is going on outside of the frame and focus of the picture. We do not know, in this case, what caused Mr. Winegeart to make the gestures shown early in the video, at 9 or 11 seconds. As Mr. Logan acknowledged, it looks bad, in the sense that it looks like he has noticed the fight. However, Mr. Winegeart has consistently said that he was not reacting to having noticed the fight. Mr. Winegeart has consistently said that he was not aware of the fight until Lieutenant Eben called it in on the radio. By that time, Lieutenant Eben had already sprayed the OC, the fighting inmates were on the floor, and another staff member was there. Mr. Winegeart assessed the situation of the fight as under control. He has consistently stated that he then turned his attention to the inmate servers in the kitchen. He said at first that he was concerned with extra meals being given out. He then said he was concerned with securing kitchen tools which may be used as weapons. He further said that he was concerned with controlling the inmates at the serving lines and getting inmate diners to stand away from the fight scene against the wall. All of this was part of his responsibility as cook supervisor. He was in charge of an inmate detail. He did act to control his inmate detail and secure the food slots in the kitchen and the serving implements which had the potential to be used as weapons. So, he did respond to the emergency situation. In his written statement, Mr. Winegeart said:.... *At the time of the incident, mainline was being conducted and the dining hall was full of inmates. I also had inmate workers behind the serving line. When the fight was called, I initially saw the two inmates fighting and saw staff had already administered OC. Due to my training and experience; I immediately began ordering inmates to get back from the area while also maintaining visual contact of the serving lines. There was several staff at the scene and more responding to the scene. I felt that the two inmates fighting were under control and that my immediate attention needed to be focused on the large amount of inmates in the surrounding area. I then noticed the cook foreman responding from behind the line. Realizing that the inmates serving food were in possession of serving tools that could have been potential weapons I used sound correctional judgment and responded toward the serving line to secure the area that had serving equipment in the hands of inmates by locking the tray slots and securing the inmates behind the line....* When this statement was discussed with Warden

Carvajal, Warden Carvajal had not yet seen the video. Warden Carvajal did not want to watch the video in the presence of Mr. Winegeart and Union representative Richard Logan so that they could explain their position. Warden Carvajal said that he wanted to watch the video by himself, without prejudice, and would call if he had any questions. He was persuaded by the picture in the video that Mr. Winegeart was aware of the fight earlier on, before it was contained, as indicated by his gesture and hand movement. No one ever asked Mr. Winegeart to explain that gesture and hand movement. Mr. Winegeart testified that the gesture was directed toward the inmates on the serving line, telling them to move the inmates along. Warden Carvajal concluded, based on his viewing of the video, that Mr. Winegeart was indicating that he had seen the fight. Mr. Winegeart testified that he had not seen the fight at that time. No one ever asked Mr. Winegeart directly when he had become aware of the fight. Warden Carvajal concluded that Mr. Winegeart had seen the fight before Lieutenant Eben had gotten it under control by administering the OC and that Mr. Winegeart should have run to help Lieutenant Eben. Warden Carvajal concluded, based on his interpretation of the video, that Mr. Winegeart's first priority should have been assisting Lieutenant Eben in separating the fighters and getting the situation under control. Lieutenant Eben testified that he had expected Mr. Winegeart to come to his assistance. It is this interpretation, and the view of Mr. Winegeart running towards the kitchen rather than in the direction of the fight, that lead to the charge that Mr. Winegeart failed to respond to an emergency situation. However, the burden of proof is on the Agency to demonstrate that this interpretation of the video is the correct interpretation. In the absence of direct questioning of Mr. Winegeart about when he became aware of the fight and what his gestures in the video meant, the Agency cannot bear this burden of proof.

If Mr. Winegeart, as he testified, was not aware of the fight until after the OC had been administered and the inmates were on the ground, his response might have been judged to be appropriate. If he was no longer needed to help separate the inmates, it was appropriate for him to turn his attention to the kitchen, securing the food slots, securing the serving tools, and directing the inmates to line up away from the fight. In fact, Warden Carvajal said on cross examination that if Mr. Winegeart was not aware of the fight until after Lieutenant Eben had responded that might have changed his perspective. Warden Carvajal said that under those circumstances, if Mr. Winegeart chose to control the other inmates in the dining facility, that could have been an appropriate response.

We understand that Warden Carvajal wanted to view the video himself before he viewed it with Mr. Winegeart's explanations. However, since the interpretation of the video played such an important role in assessing Mr. Winegeart's conduct, and since Mr. Winegeart's written statement seemed to contradict some aspects of the video, we find that a proper investigation would have required Warden Carvajal to allow Mr. Winegeart to explain what was on the video to him. Then Warden Carvajal could have made a proper evaluation of what it showed and Mr. Winegeart would have had a full opportunity to present his position. Since this did not occur, we find

that the investigation did not properly give Mr. Winegeart the opportunity to tell his story. In the absence of that opportunity, the discipline could not be for just cause.

Even if Mr. Winegeart was aware of the fight before the inmates had been separated, the Agency is finding that Mr. Winegeart did not respond appropriately to the fight because his first concern should have been assisting in separating the inmates and backing up Lieutenant Eben. But Mr. Winegeart was not charged with failing to respond appropriately. He was charged with *Failure to Respond to an Emergency Situation*. Even if the Agency determines that he did not respond appropriately, he did respond. The video shows that he ran toward the kitchen. Again, he was never asked directly why he ran toward the kitchen, It is reasonable to accept his explanation that he was concerned with the inmates and the tools in the kitchen and responded to secure them. We have no video of what he did after he ran toward the kitchen.

Therefore, we must find that the Agency has failed to bear its burden of proof that Mr. Winegeart is guilty of *Failure to Respond to an Emergency Situation*. Therefore, the Five Day Suspension was not issued for just and sufficient cause, nor did it promote the efficiency of the service.

DECISION AND AWARD:

We find that the Five (5) Day Suspension issued to Houston Winegeart for *Failure to Respond to an Emergency Situation* was not issued for just and sufficient cause, nor did it promote the efficiency of the service. We hereby render the Five (5) Day Suspension null and void. It shall be removed from all records of the Bureau of Prisons and Mr. Winegeart, as though it had never been issued. It shall never be referred to again. Mr. Winegeart shall be made whole, with interest at the statutory interest rate, for all pay and benefits lost as a result of this Five (5) Day Suspension.

We retain jurisdiction for 120 days for the limited purpose of entertaining any petition that the Union wishes to file for payment of attorney fees. The Union has thirty (30) days in which to file such a petition, if it choses to do so, and the Agency has thirty (30) days in which to file a response, if it wishes to do so, if such a petition is filed.

Louise B. Wolitz, Arbitrator
Travis County, Texas
April 22, 2015

