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August 6, 2012

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

OPINION AND AWARD

In the Matter of the Arbitration Between	)	
	)	FMCS No. 11-53373-6
	)	
Council of Prisons Locals (AFL-CIO)	)	
American Federation of Government	)	
Employees, AFGE Local 1034	)	
	)	
and	)	
	)	
	)	
U.S. Department of Justice	)	
Federal Bureau of Prisons	)	
United States Penitentiary	)	
Pollock, Louisiana	)	
	)	
ISSUE: JOSH GASPARD SUSPENSION	)	

Hearing: April 18 and 19, 2012

Briefs Filed: July 6, 2012

Date of Award: August 6, 2012

APPEARANCES: FOR THE UNION: Jack K. Whitehead, Jr, Attorney at Law; John-Ed Bishop, Attorney at Law; Josh Gaspard, Grievant; Brian Richmond, President, Local 1034

FOR THE EMPLOYER: Whitney A. Coleman, Labor Relations Specialist; Scott Clarkson, Human Resources Manager

INTRODUCTION

This arbitration case arises pursuant to collective bargaining agreement between The Federal Bureau of Prisons (hereinafter referred to as The Agency or the Employer) and the Council of Prison Locals AFGE (hereinafter referred to as the Union). The Collective Bargaining Agreement (or "contract" or "CBA") was effective March 9, 1998 through March 8, 2001 (Joint Exhibit 29, hereinafter referred to as J-29). Grievant Josh Gaspard appeals the disciplinary penalty by the Employer, pursuant to a grievance procedure in the parties' Agreement culminating in binding arbitration.

I was selected by the parties, under the auspices of the Federal Mediation and Conciliation Service (FMCS), to conduct a hearing and render a final and binding arbitration award. The hearing was held on April 18 and 19, 2012 in USP-Pollock facilities in Pollock, LA. At the hearing, the witnesses were sworn-in, the parties were afforded the opportunity to examine and cross-examine the witnesses and to introduce relevant exhibits. A court reporter was utilized. I recorded the hearing for my personal use, to be destroyed after the award is made. Both parties chose to file written post hearing briefs as their closing arguments. Briefs were filed in a timely manner on July 6, 2012, and the record was closed on that date.

The parties suggested a standard stipulation agreement. Arbitrator has framed the issue as follows:

> Was the disciplinary action assessed Grievant Josh Gaspard for just and sufficient cause, and if not, what is the appropriate remedy?

The Agency expressed concern before the hearing and at the beginning of the hearing regarding the testimony of the deciding official, who was on vacation at the time of the hearing. Arbitrator

decided that telephonic testimony would be acceptable, over the objection of the Agency, who felt not having the official present could be a disadvantage to the Agency. At the end of Warren Sherrod's testimony, he stated that he was comfortable that his testimony need not be kept open and his testimony was closed out.

The Union expressed concern of not receiving all the documents it had requested. After discussion between the parties as to the need for the documents and the clarity of the requests, the Union agreed to defer its concern and cover the areas through testimony.

Arbitrator accepts and entertains each party's objections, in the hearing as well as briefs, to the credibility and bias of certain witnesses that Arbitrator allowed to testify over objections. However, Arbitrator believes these witnesses provided credible and useful testimony worthy of consideration in rendering of a fair and impartial decision. In the end, their testimony aided in getting to the bottom of the issues, but in no case did their testimony sway the decision.

PERTINENT PROVISIONS

In the opinion of the Arbitrator, the following provisions of the Collective Bargaining Agreement and the Employer's policies and rules are relevant in determining the issue in dispute:

THE MASTER AGREEMENT (J-29)

ARTICLE 5- RIGHTS OF THE EMPLOYER

Section a. ...nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106...to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;...

ARTICLE 6- RIGHTS OF THE EMPLOYEE

Section b. The parties agree there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights...

2. to be treated fairly and equitably in all aspects of personnel management;
3. to be free from discrimination based on their political affiliation,... Union membership, or Union activity

4. to direct and pursue their private lives without interference by the Employer or the Union…

5. to become or remain a member of a labor organization;

6. to have all provisions of the Collective Bargaining Agreement adhered to.

ARTICLE 7- RIGHTS OF THE UNION

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

ARTICLE 18-HOURS OF WORK

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, and nexus will apply…

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less…

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

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.

1. when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; …

Section e. When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations.

1. any notice of proposed disciplinary or adverse action will advise the employee of his/her right to receive the material which is relied upon to support the reasons for the action given in the notice.

Section g. The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.

ARTICLE 32- ARBITRATION

Section d. The arbitrators fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

Section h. …The arbitrator shall have no power to add to, subtract from,

disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

ARTICLE 36-HUMAN RESOURCE MANAGEMENT

The Union and the Employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and the Employer to fulfill the mission of the organization.

This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in the daily routine, or during extraordinary conditions. In a spirit of mutual cooperation, the Union and the Employer commit to these principles.

STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES (J-30)
PS 3420.09 Attachment A

1. This table is intended to be used as a guide in determining appropriate discipline to impose according to the type of offense committed. The offenses listed are not all inclusive of all offenses.
2. Ordinarily \, penalties imposed should be within the range of penalties provided for an offense. In aggravated cases…
3. The deciding official will consider relevant circumstances, including mitigating and aggravating factors, when determining the appropriate penalty.The range of penalties provided for most offenses is intentionally broad, ranging from official reprimand to removal.While principles of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to…

PROGRAM STATEMENT- U.S. Department of Justice- Federal Bureau of Prisons (J-32)
DIR 1210.24 5/20/2003 Internal Affairs, Office of

1. **PURPOSE AND SCOPE.** To instruct staff on the procedures for reporting allegations of staff misconduct to the Office of Internal Affairs(OIA) and for conducting investigations of allegations. It is the Bureau's policy to strive for professionalism, efficiency, effectiveness, responsiveness, productivity, and integrity.This requires the identification of mismanagement, waste, fraud, and abuse, as well as the investigation of violations and allegations of violations per the Standards of Employee Conduct…
3. **PROGRAM OBJECTIVES.** The expected results of this program are:
   a. Waste, fraud, abuse, mismanagement, and staff misconduct will be reduced.
   b. The security of Bureau facilities and protection of the public will be enhanced by sound investigative procedures practiced by knowledgeable professionals.
   f. Reports will be completed accurately and promptly.
   g. All cases will be tracked to ensure they are resolved promptly…
9. **INVESTIGATIONS.** OIA is responsible for oversight of all staff investigations, whether they are conducted by OIA or non-OIA personnel.
   e. **Duration.** OIA will be sent a status update every 60 days on local investigations which staff are unable to complete within the 60 day time frame. Additionally, employee subject(s) who were interviewed as part of the investigation will be notified as to whether their particular cases are still active, upon rquest, but no more than every 30 days.

MEMORANDUM FOR ALL CHIEF EXECUTIVE OFFICERS October 31, 2006 (J-35)
From: Kathleen M. Kenney, Assistant Director/General Counsel
SUBJECT: Review of Local Staff Misconduct Investigations

Page 4 Time Guidelines

For Classification 1 and 2 allegations should be completed and the investigative packet forwarded to the OIA within 120 calendar days of the date a local investigation was authorized by the OIA.

For Classification 3 allegations…120 calendar days…

THE DOUGLAS FACTORS

In *Douglas v. Veterans Administration* (1981), the Merit Systems Protection Board (MSPB) identified 12 relevant factors that agency management needs to consider and weigh in deciding an appropriate disciplinary penalty. The Douglas factors are:

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;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with the applicable agency table of penalties (which are not to be applied mechanically so that other factors are ignored);
8. The notoriety of the offense or its impact upon the reputation of the agency;
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;
10. The potential for employee's rehabilitation;
11. Mitigating circumstances surrounding the offense, such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

THE BACK PAY ACT

Section 5596 Back Pay due to unjustified personnel action

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law…or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect-

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action…

(2)(A) An amount payable…shall be payable with interest

FACTS

This summary of facts, derived from testimony at the hearing and exhibits of the parties, is presented to illustrate as simply as possible how events pertinent to the situation unfolded.

BACKGROUND SUMMARY

On November 15, 2007 at approximately 6 p.m. Grievant Josh Gaspard, was assigned to Unit C-1 at the Federal Correctional Complex in Pollock, Louisiana. At this time, the complex was under an "open movement", meaning that the inmates were entering and leaving their respective housing units to eat evening meal. Grievant was the only correction officer assigned during this time to the some 130 inmates housed in Unit C-1. During the period of open movement, Inmate B… entered into housing unit C-1. Grievant recognized that Inmate B… was not housed in C-1 and verbally directed him to leave the housing unit, which he did. On leaving, Inmate B…was stabbed just outside the entrance to C-1 by another inmate. This action was not visible by the Grievant from his assigned station underneath the stairwell.

After being stabbed, Inmate B… reentered C-1, clutching his abdomen area and subsequently lowering himself to the floor in front of the Grievant's station. The Grievant radioed for medical assistance that arrived in less than four minutes. The supervising officers then took charge of the

situation. The stabbing of the Inmate ultimately led to his death.

After the November 15, 2007 incident, Grievant was informally notified that he would not be permitted to work in situations with inmate contact or inmate supervision. An investigation of the incident was begun and on January 23, 2008, Gaspard was interviewed by an Agency representative and provided an affidavit as to the events on November 15, 2007. On October 5, 2010 Grievant received discipline of fourteen days, charged with failure to exercise sound correctional judgment.

SUMMARY OF RELEVANT TESTIMONY and EVIDENCE

A Chronology of Key Events and Related Testimony and Evidence

July, 2005	Grievant Gaspard began employment with BOP. Signed Acknowledgment of 3420-09 Standards of Employees(J-6)
June, 2007	Gaspard became a Senior Officer, USP Pollock
November 15, 2007	Date of Incident. Gaspard Report of C-1 Assault to Operations Lt. LaBorde (J-11): "While monitoring I/M traffic during mainline near the C-1 Unit entrance door, at approximately 5:42 p.m., I/M B... walked into C-1 holding his stomach and complaining of severe abdominal pain with no apparent signs of an assault. I/M B... then fell to the ground still holding his stomach complaining of severe abdominal pain. I immediately notified the Operations Lieutenant and Medical Services of what I perceived to be a medical emergency in C-1 Unit. Upon arrival of responding staff, I/M B...was taken into the C-1 Unit Sallyport area, were (sic) upon removing I/M B... jacket, it was discovered that he had in fact suffered an apparent stab wound to his chest. I/M B... was taken by responding staff out C-1 Unit."
January 22, 2008	Operations Lt. LaBorde Affidavit as Responder to the Incident (J-10). "When I got to...20 yards from the unit door, Gaspard called me again and said the inmate had been assaulted...when I entered the unit, Gaspard informed me that the inmate appeared to have injuries and when I got to the inmate, he moved his arms up over his head and that's when his jacket opened and I saw blood. The blood was all across his shirt. I asked Gaspard what happened and he did not know. I asked B...what happened and he didn't say anything either. I told Gaspard to secure the unit...it is standard procedure to secure the unit. The inmates in unit C-1 should have been secured somewhere. They should not have been going in and out of the unit and walking around during this time...that B...did not live in Unit C-1, he was from Unit A. He should not have been in that unit and the unit officer should have known that...That I have just reviewed the

surveillance video for the first time regarding the B...incident. I see that after B...was assaulted, he came into the unit and laid down in front of where the officer was standing. I see that, as a supervisor, the staff member should be securing the unit. He should have locked the front door, and started getting the inmates out of the area. The video looks bad, it is taking a long time. He is standing there...It is only a matter of time that we will put a staff member on that stretcher, and I don't want that. There is no money and no staff. Having no staff does handicap you during an incident like this. I lost most of the staff I had on duty that night because they had to escort the inmate to the hospital. After this incident, we had an inmate suicide later that night and I lost staff to his escort. I had no staff." Arbitrator note: Lt LaBorde clearly was not shown the video of inside Unit C-1 just prior to the assault showing I/M B... entering the unit and then leaving after being told by Officer Gaspard to leave because he was not a member of the unit.

January 22, 2008 — Senior Officer Matherne Affidavit as Responder with Lt. LaBorde(J-8). "When I arrived, I saw inmate B... lying on the floor in front of the C-1 shower. I also observed Bullock move his arms and his jacket opened and I saw blood on his chest. It was announced on the radio that B...had abdominal pains...we learned in Glynco, we are taught not to approach too close because you don't know what he had or what is going on...There was an incident when an inmate was told to leave the unit and that inmate came back and assaulted the staff member. You don't know what to think anymore. The inmate may have tried to lure the officer in with abdominal pain so he can assault him. Your safety is more important, a lot of things go through your head."

January 23, 2008 — Grievant Gaspard Affidavit (J-9) "I had previously told B...to leave the unit because it was not his unit and he was out of bounds. We received training at Glynco that inmates will play games and I thought he was mad because I told him to leave. I thought he may , have come back and wanted to hurt me...At no time did I notice any signs of an assault. I did not make a second radio call to inform staff that B... had been assaulted. There were no physical signs that he had been assaulted, so I did not have a reason to call...I was trained to not approach the inmate if I don't know exactly what I have, and secure the scene until a supervisor came. How did I know the inmate was not playing opossum. This is the exact scenario that they trained us on in Glynco. The training showed the inmate had fallen on the ground saying he had been stabbed, and he was just trying to lure staff in so he could assault them. We were trained to secure the scene and keep inmates away, and that is what I did. The training is in the initial 3 weeks training we all receive, it was September 2005...At no time did B...tell me he had been stabbed or assaulted. The only thing he told me was that his stomach hurt...I see on the video surveillance tape that I did come over to B... and see myself using my radio...I stood there and did not approach B...and touch him while he was on the ground...I told

	inmates to get back. I did not put my hands on them but with direct verbal commands. They were not in the immediate vicinity, but they were walking around behind me…I locked the inmates in their cells. That was LaBorde's orders and I did that. I viewed the video surveillance from unit C-1 and see when B… enters the unit and turns around and goes to the door…comes back into the unit holding his stomach…in the video I see I did not get closer than 6-8 feet of B…because that is the way I was trained…There is one man and 130 inmates in that unit and its hard to pay attention to them and B…too. I see I did tell some inmates to back away, but I also see there were a lot of inmates in the area. I did not want to leave B…in case another inmate came and assaulted him while he was on the ground…I did not secure the door after B…was on the ground because I did not want to leave him and because staff were responding and they would need to get in the door…I have been told by the investigator that I had no sense of urgency during the incident, and she is right. I was not going to run up on the inmates without knowing. What was I supposed to do? I did what I was trained to do. If I would have seen blood, I may have approached him but would still be very cautious. But with no reason to think he was hurt, I was not going to put myself in that kind of danger…since the incident I have not been allowed to work in the penitentiary, I work in the Camp, the Towers, the Front Lobby."
January 24, 2008	Frazier Affidavit as Medical Responder (RN)(J-7). "…He was not bleeding so no pressure was required, as a matter of fact, for those wounds putting pressure on it may have caused him to bleed internally faster…we do not have any special training at Pollock regarding responding to medical situations. We should have that, it would be great…We need more staff here…"
February 6, 2008	Investigative File by Leslie Jones RE Telephonic Interview with Michael Stephens, Supervisory Instructor, FLETC, Glynco, GA. (J-5). "…during the course Assessment Sizing Up, students are taught to size up the situation as they approach and to keep a safe distance until they have determined it to be safe…taught to look at the inmate to determine injuries, weapons in the area, other inmates in the area, and to decrease their distance to the inmate as they are assessing the situation. If it is not safe…staff are taught do not approach…" Stephens confirmed the role playing exercise used in training where the inmate tries to lure staff close, training intended "to specifically show the students why you should not just run up on an inmate." Grievant's responses to the interview are included.
December 9, 2009	E-Mail Chain Request for Morning Watch (J-16)
December 11, 2009	Memo Grievant to Ma'At Requesting Morning Watch (J-14)
December 18, 2009	Email Chain Between Ma'at and Grievant(J-15)
April 23, 2009	Commendation Email Grievant (J-17)

January 6, 2010	Email from Union president Richmond to McKinney requesting status of case and expressing concern about restrictions to Grievant. McKinney's response was that "The case is still open." (J-12)
April 13, 2010	4th Quarter 2009 Grievant's Exemplary Evaluations (J-20,28)
June 15, 2010	Proposal Letter for 30-Day Suspension Deputy Captain Cohen to Grievant Gaspard (J-1). " ...for Failure to Exercise Sound Correctional Judgement, a violation of the Program Statement 3420.09, Standards of Employee Conduct dated February 5, 1999...you failed to to render assistance or ascertain the circumstances to why inmate B... was lying on the floor in Housing Unit C-1...Although you stated you cleared the immediate area of inmates, a review of the institution's video...revealed inmates were still moving about and the unit door unsecured. Your failure to render assistance or even attempt to assess whether or not inmate Bullock was seriously injured constitutes failure to exercise sound correctional judgement and forms the basis for this charge..."
August 4, 2010	Letter of Response (J-2) from Grievant Gaspard to Cohen Proposal Letter (J-1). Grievant's response is essentially the same as in his January 23, 2008 Affidavit (J-9), with the addition of comments regarding family financial strains.
August 9, 2010	Memo for Record by B. Riles of Grievant Oral Reply Meeting with Warden Sherrod (J-33)
August 11, 2010	Gaspard Correction of Memo for Record (J-23)
October 5, 2010	Letter from Warden Sherrod to Grievant Gaspard (J-3) assessing a 14 calendar day suspension. "...Your acceptance of this responsibility (for your actions) is noteworthy, however it is concerning that you continue to believe your response was appropriate. You failed to render assistance or even attempt to assess whether or not the inmate was seriously injured. I am not convinced that you would exercise sound correctional judgement in event you were presented with a similar incident..."
November 15, 2010	Grievance filed (J-3). Violation of Master Agreement (Articles 6 B2-6; 7b; 18;30B,C,D; 36); Program Statement 3420.09; Douglas Factors; 107 LRP 29665; 107 LRP 50311/02-09481. Remedy: (1) Removal of the 14 day suspension and Officer Gaspard's record cleared of any charges in this case (2) Restore Officer J. Gaspard with 14 days back pay plus interest and attorney fees for his time lost (3) Officer Gaspard be granted backpay with interest for overtime hours denied during the periods of November 15, 2007 through June 15, 2010 (4) The arbitrator retain jurisdiction over the case to ensure no reprisals, harassment, intimidation, or coercion against any employee affected by their participation in the grievance (5) All fees for this arbitration be paid by the agency (6) Have all Supervisors trained on the language of the Master Agreement and Bureau Policy specifically dealing with Code of Conduct (7) The affected employee and Local 1034 be made whole.

December 10, 2010	Letter from Warden Sherrod to Richmond denying the Grievance (J-4) "...The actions of Mr. Gaspard were investigated under the authority of the Federal Bureau of Prisons, Office of Internal Affairs. The investigation revealed that Mr. Gaspard's actions were in violation of Bureau of Prisons' policy..."
December 27, 2010	Arbitration invoked(J-24)
February 17, 2012	Gaspard Acknowledgment of File Receipt (J-34)
April 18, 2012	Arbitration Hearing Commenced

POSITIONS OF THE PARTIES
EMPLOYER

The agency argues that it acted properly in this matter. Josh Gaspard's suspension was for just and sufficient cause and to promote the efficiency of the service. The Grievant did not use sound correctional judgment on the evening of November 15, 2007. For his own safety, he was placed in an assignment that limited his contact with inmates. It is highly suspect that it was at that very time he elected to sign up for overtime nearly every single day when he had not signed up for overtime prior to then and now expects the agency to pay him for work he did not perform. The investigative process was not punitive nor was his assignment. For these reasons, the agency respectfully requests the arbitrator affirm the decision of the agency sustaining the fourteen day suspension of Josh Gaspard for failure to exercise sound correctional judgment.

The agency provided more specific justification to substantiate the agency's actions, as follows:

- The agency adhered to the principles of due process in all aspects of the disciplinary proceedings taken against the grievant.
    - Notice of the Charges-The proposal letter to the grievant clearly indicates the grievant violated Program Statement 3420.09, Standards of Employee Conduct, and, as such, was charged with failure to exercise sound correctional judgment. Additionally, the grievant was well aware that such failure could lead to the discipline imposed. Nowhere was the grievant charged with failure to render medical assistance as was proposed by the grievant's representative.
    - Meaningful opportunity to respond-The grievant was afforded the opportunity to respond during the investigation, as well as, after receiving the notice of proposed discipline. The grievant was provided all information contained within the disciplinary action file and upon which the disciplinary action was based. During the hearing, the grievant and his representative attempted to prove a discrepancy between the video portion of evidence by implying that the video the grievant received was not the same video as was used in the disciplinary proceedings. The video offered

into evidence by the grievant's representative at hearing was obtained through their request for information that was part of the criminal proceedings involving the homicide. No evidence existed to prove anything other than what was provided to the grievant as part of the disciplinary file was used in the disciplinary process.

- Fair Investigation- The investigation into the grievant's misconduct was thorough and unbiased. The grievant along with those witnesses who had knowledge of the misconduct were interviewed. Likewise, and perhaps most incriminating, was the inclusion of the video footage clearly depicting the grievant's failure to take action, whether that action was to render medical assistance or to secure the area.
- Timely Employer Action-The investigation was initiated promptly after the alleged misconduct occurred. That the investigation took far longer than the *suggested* 120 days is most certainly to be expected where a murder is being investigated. One cannot compare the investigation into misconduct for uttering a curse word, as was the case in the Honolulu case referred to by the grievant's representative on numerous occasions, to that of a murder investigation. Twenty-two months may certainly be too lengthy for the investigation of an instance of cursing but to attempt to place a rigid and short time limit on an agency where the investigation deals with a man's death is unreasonable. Moreover, the 120 days has been suggested as that length of time by which an investigation should be concluded. That language is included because the factors surrounding each individual case can vary greatly. Nowhere in Department of Justice or Bureau of Prisons policy does it indicate that an investigation must be concluded within 120 days.

- Regarding the charge of failure to exercise sound correctional judgment, the grievant failed to use sound judgment when he failed to take whatever action he deemed appropriate in this matter. Certainly one of his choices was to provide medical care but when the grievant indicated he was fearful for his safety, his actions dictated otherwise. Meandering around an inmate whom he feared, even placing his back to him, is in no way indicative of sound correctional judgment. Allowing inmates to come within inches of an inmate who may be injured is also not indicative of sound correctional judgment. Allowing inmates to circle around the grievant when he indicated they may have intended intend to harm him was also not indicative of sound correctional judgment. The truth is after calling for assistance, nothing the grievant did in this matter was indicative of sound correctional judgment. The grievant testified that his training taught him never to approach an inmate without assessing the situation and indicated that he had done so. However, the grievant did fail to act further in the manner, whatever manner, he deemed

appropriate. The point is, he failed to act at all.

- Testimony from an expert witness in first responder training indicated that employees are, indeed, instructed not to approach an inmate until they have assessed the situation and, after doing so, either render medical assistance or, if the individual perceives a potential threat, secure the area or position themselves so they are safe. Employees are taught the importance of taking whatever action is appropriate in a given situation but that inaction is never an option, and certainly not when other inmates are present. That same expert witness testified that he saw none of this occur when he viewed the video footage. In fact, that witness testified that said video would be an instructional video for what NOT to do. Further testimony from the emergency preparedness instructor reiterated much of the same with regards to assessing the situation and then taking whatever action is necessary to control or gain control of a potential emergency situation. That witness indicated that, after viewing the video footage, the grievant did not act appropriately and in accordance with the teachings of the Bureau of Prisons.

- During the hearing testimony was provided by the deciding official who had twenty-five years of correctional experience, the first responder trainer who had fourteen years of correctional experience, and the emergency preparedness trainer who had twenty-four years of correctional experience. All agree that the grievant did NOT act appropriately and with sound correctional judgment.

- In deciding what disciplinary action was appropriate, the deciding official considered the Douglas factors, including, the nature and seriousness of the charge, the agency's table of penalties, and the fact that the grievant was aware of the agency's standards of employee conduct, as well as, the policies and procedures for first responder and emergency preparedness. The deciding official, who had recently arrived at Pollock, testified he had absolutely no preconceived notions about the grievant or the facts of the case. Originally the agency proposed to suspend the grievant for thirty days. After taking into consideration the aforementioned and the fact that the grievant had no prior discipline, the deciding official suspended the grievant for a period of fourteen days.

- The agency is entitled to expect its employees to obey policies and rules established by the agency and is permitted to discipline employees who have violated such rules. The decision of the choice of discipline is generally left to the sound discretion of the agency and a

decision to mitigate a penalty should only be made when the penalty imposed by the agency is shown to have been so unreasonable as to demand a different result. Typically this may be done only by showing the agency failed to follow its own guidelines, if any; it failed to treat the offending employee equally with other employees who have committed like misconduct and been given lesser discipline; or where it is shown that the agency otherwise illegally discriminated against the employee. The agency did follow its own guidelines, it did treat the offending employee equally, and it did not otherwise illegally discriminate against this employee. Accordingly, this is a decision that must be left as it stands.

- With regards to allegations that the employee was not treated fairly and equitably, or that there was a prohibited personnel practice, the agency stands by its decision to reassign the employee until such time as the determination was made that the employee's safety was no longer in jeopardy. The Bureau of Prisons has an obligation to protect its employees, an obligation that takes precedence over all else. In so doing, if the agency is required to change work assignments to accomplish that, then the agency should most certainly NOT be penalized. The grievant asserts that he was taken off the "no inmate contact" assignment only after he testified in the murder trial against the offender who committed the crime. The grievant testified that he was told his reassignment was for his safety and then, during testimony, proffered that the deceased inmate had been a gang member and that perhaps there had been a "hit" out on the grievant. The possible reasons for removing him from harm's way are numerous, including the aforementioned which may have been in response to his testimony OR the fact that inmate's witnessed the grievant's failure to respond in any manner to their friend who lay dying at his feet. However, the grievant and a supervisor testified that the reassignment was for his safety.
- With regards to testimony of the supervisor on shift that night, the lieutenant testified that he was under investigation, as well, and that, through the course of the investigation, he and the grievant had bonded. Further, the lieutenant indicated first that he had not seen the video and then that he had. Based on these facts and his lack of credibility, his testimony that he believed the grievant acted appropriately should NOT be considered.
- Testimony of Jeff Roberts, the local union president from Forrest City, Arkansas, who had no knowledge whatsoever about this case, should not be considered.

UNION

The Union asserts that the disciplinary actions taken against Gaspard should fail for a variety of reasons. These reasons are summarized as follows:

- The Agency violated the due process rights of Gaspard
  - when it failed to produce all material relied upon by the deciding authority in levying the discipline against Gaspard. This violation of applicable law and the Master Agreement unfairly prejudiced the Grievant from responding to the

disciplinary recommendations made against him and denied him the opportunity to fully develop his case during the pendency of the grievance and arbitration.

- The Agency failed to provide Gaspard with the full video tape of the incident in question until less than 24 hours prior to the arbitration.
- Further the Agency admitted the presence of an investigatory file and report, yet failed to produce it to the Grievant or during the course of the arbitration.

- The Agency violated the Grievant's procedural due process rights and committed prohibited personnel practices based on its intentional or negligent delay of discipline evidenced by the Agency's failure to provide a proposal letter to the Grievant until June 15, 2010, thirty one (31) months after the incident in question. The Agency failed to provide any reason for this delay during the arbitration. The delay on the part of the Agency was even more egregious based on the fact that the Agency was subjecting the Grievant to punitive restrictions on "duty assignments" which caused severe financial loss to the Grievant during the pendency of the investigation.
- The Agency further failed to meet its burden that the disciplinary action took place for just and sufficient cause.
  - The record clearly shows that the Grievant properly performed his duties on November 15, 2007. Both the video of the incident and question and the testimony of witnesses throughout the arbitration, including the Agency's own witnesses, show that Gaspard properly provided care to the inmate in question and performed his duties with proper discretion as he had been trained and directed to do.
- Lastly Gaspard suffered extreme financial loss during the course of the disciplinary process and by the imposition of discipline by the Agency. This included not only the lost wages from the fourteen days the Grievant was suspended. The Grievant further suffered financial loss from the arbitrary and unfounded denial of overtime shifts requested by the Grievant and the loss of shift differential pay from a denial of shift change requested by the Grievant extending over the 31 month period of the pending disciplinary action.

The Union asks that the Grievance be sustained and that he be awarded all relief to which he is entitled, including payment for lost wages during the fourteen day suspension, lost overtime pay, lost shift differential pay, and expungement of the discipline from his record. The Union also asks that the Arbitrator maintain jurisdiction over the proceeding until an Amount of Award, if any, may be calculated and agreed upon by the parties, including the award and amount of any Attorney Fees which may be due.

OPINION

PRELIMINARY MATTERS

Much of collective bargaining language and processes focuses on discipline. As could be expected, discipline has led to arbitration and court appeals and consensus views of appropriate perspectives and practices. Those relevant to this case are presented below.

> There are two "proof" issues in the arbitration of discipline and discharge cases. The first involves proof of wrongdoing; the second, assuming that guilt of wrongdoing is established and the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified...arbitrators generally place the burden of proof on the employer to demonstrate just cause for such decisions. Elkouri and Elkouri, How Arbitration Works 948 (6th ed., Alan Miles Ruben ed. 2003)

> The central concept permeating discipline and discharge arbitrations is "just cause." The just cause standard is complex and difficult to define. However, there are two commonly accepted principles on which the standard is based that have evolved over the years, due process and progressive discipline. The essence of due process is one of fairness, that management will, with respect to discipline and discharge matters, not be unreasonable, arbitrary, or capricious in taking action against an employee. For example, was there forewarning that his conduct would lead to discipline, was a fair investigation conducted, were the employer's rules consistently enforced? Brand and Biren, Discipline and Discharge in Arbitration 30 (2nd ed. 2008)

> Due process is an integral part of just cause, requiring employers to treat employees fairly during the disciplinary process...Unfair treatment of an employee during the disciplinary process may lead an arbitrator to reverse or modify the penalty...Employers must impose discipline within a reasonable time after learning of misconduct...An unreasonable delay subjects employees to suspense or uncertainty...deprives the union and the employee of an early opportunity to investigate, gather evidence, prepare a defense...Whether the employer's action is timely depends upon the facts of each case and a review of any relevant contract language. In one case a five-month delay was deemed timely, while in another a one month delay in bringing charges was not...If the employer provides an acceptable reason for a delay, however, arbitrators may excuse tardy imposition of discipline...delayed notice of discipline was excused where the investigation was performed by an outside entity, and the employer took prompt action upon receiving the investigative report. Brand and Biren, Discipline and Discharge in Arbitration 36 (2nd ed. 2008)

The Union provided several cases in its brief dealing with Federal Bureau of Prison timeliness issues. One such case was that of Arbitrator Lou Chang (Federal Bureau of

Prisons, Federal Detention Center, Honolulu, Hawaii and AFGE Local 1218, FMCS Case 11-54214, (2012)), in which he found that the imposition of discipline 22+ months following the date of the incident was not timely and violated the Master Agreement, calling for the suspension to be rescinded and expunged from the Grievant's personal files and system records, with reimbursement for lost wages. Arbitrator Chang also performed an examination of four other Bureau of Prison cases (dated 2010, 2010, 2009,and 2003) where arbitrators sustained grievances and rescinded the penalty because of unreasonable time between the incident and the decision letter. The delayed times were 44 months,17 months, over a year, and 14 months.

THE MERITS

At issue in this case is a grievance filed on November 15, 2010 protesting unfairness to the Grievant. The key issue in the grievance was that the Grievant was suspended for fourteen days, charged with failure to exercise sound correctional judgment.

The overall issue to consider was stipulated as follows:

Was the disciplinary action assessed Grievant Josh Gaspard for just and sufficient cause, and if not, what is the appropriate remedy?

. Arbitrator focused on the issue by asking two key questions:

Did the Employer meet its burden to prove that there was wrongdoing?

Did the Employer meet its due process procedural responsibilities in its disciplinary actions?

Arbitrator finds the answer to both questions in the negative. Arbitrator finds the Employer violated the Collective Bargaining Agreement (J-29), especially Rights of the Employee (Article 6, Section b), Disciplinary and Adverse Actions (Article 30), and Human Resource Management (Article 36). Discussion follows.

EMPLOYER BURDEN TO PROVE WRONGDOING

Failed to Render Assistance

The reason for discipline given in the Warden's letter to the Grievant, charged with failure to exercise sound correctional judgment, was stated as follows:
"... Your acceptance of this responsibility is noteworthy, however it is concerning that you to believe your response was appropriate. You failed to render assistance or even attempt to assess whether or not the inmate was seriously injured. I am not convinced that you would exercise sound correctional judgement in the event you were presented with a similar incident in the future..." (J-3)
To meet this burden, the Employer would have been required to meet, at minimum, the preponderance of evidence that there was wrongdoing. Arbitrator was not convinced there was wrongdoing.

First, the Grievant provided credible testimony, supported by video of the incident, augmented by his account of training received at Glynco of a role play very similar to the subject incident. In that role play the inmate falls to the floor in apparent pain, and when the officers approach him, he pulls a weapon for attacking them, having successfully lured them within range. In the subject incident, the inmate had wrongly entered Unit C-1, was properly confronted verbally by the Grievant and told to leave, and did so displaying confrontational body language. Walking out the door he was stabbed, unbeknownst to the Grievant, and returned into Unit C-1, stumbling to the floor and complaining of stomach pain. The Grievant did not rush to the inmate, as he was so instructed at Glynco, and he properly called for assistance immediately. The Grievant moved out of his stairwell-protected space, decreasing his distance to the inmate, while observing and talking to the inmate. Grievant's testimony was that the inmate continued to complain of stomach pain and never explained what had happened. There was no evidence of blood, as confirmed on the video.

Secondly, There was corroborating evidence that the Grievant did the right thing. The supervisor at Glynco interviewed by the OIA investigator indicated as much, in Arbitrator's opinion, even though the investigator spent considerable effort getting the supervisor to respond to the supposed language of the Grievant being taught to "never approach an inmate." In his response,

to the interview, Grievant indicated he did not say "never approach an inmate." The Gynco supervisor did confirm the training role play described by the Grievant and others. Arbitrator's opinion, reading between the lines, is that the supervisor at Glynco would have behaved almost identical to the Grievant in terms of approaching the inmate in the situation where there was a prior confrontation with the same inmate. The first responders both testified that the blood on the inmate did not appear until the inmate raised his arms in the C-I unit and his coat fell open. They also testified that the inmate only complained of stomach pain and never indicated he had been stabbed. The nurse testified that the inmate was clearly bleeding internally and any pressure placed on the wound would probably have increased the rate of bleeding.

Although the Grievant did not display a sense of urgency in the video, he quickly placed the calls for assistance to his supervisor and to medical such that assistance arrived in under four minutes, the target time to beat according to testimony. He observed the inmate carefully for medical evidence from a safe distance and responded to the inmate verbally, asking questions and talking to him. He did not rush over to the inmate and place himself in danger, although he decreased his distance to the inmate from his protected stairwell.

With no specific rules, policies, or guidelines provided by the agency to suggest a different behavior for "rendering assistance and assessing whether or not the inmate was seriously injured," with memorable Glynco training that would seem to call for Grievant caution in approaching this inmate, with varying testimony as to the right thing to do coming from those seeing differing versions of the videos, and with a decision from a deciding official almost three years after the incident, who was not working at the facility at the time of the incident, Arbitrator is not convinced the evidence shows the Grievant did not use sound judgment in that four minute period in terms of rendering assistance to the inmate.

Failed to Secure Area

In the June 10 Proposal of Discipline letter, written by Captain Cohen , he stated "Although you stated you cleared the immediate area of inmates, a review of the institution's video...revealed inmates were still moving about and the unit door unsecured." The final

disciplinary letter from the Warden did not contain this language. Although the Agency delved into this issue during the hearing, and both sides presented testimony as to whether or not the officer was securing the area and protecting himself during the 3 minutes 51 seconds before help arrived, Arbitrator finds that the Warden decided the issue when he eliminated that language from the charging document. For what it is worth, Arbitrator does not believe the Employer met its burden to prove wrongdoing on this issue anyway.

Conclusion

Both issues are complicated because not everyone saw the same videos. Some saw all of the videos, including the confrontation between the inmate and Grievant just prior to the inmate's stabbing. It was not clear that those who saw that video made the connection that it was the same inmate who was stabbed. Some only saw the 3 minute 51 second video when the stabbed inmate stumbled back into Unit C-1. Knowing about the previous confrontation most probably would have led to a different conclusion about the degree of urgency the Grievant should have displayed with the inmate.

The issues are complicated because the officer on the scene must make judgmental decisions quickly in a stressful situation, as in this case with one officer and 130 inmates free to wander around the unit. (There was testimony that the institution has changed the meal arrangement with inmates, staggering meal times, resulting in much less opportunity for inmates entering off limits units, a common occurrence). True, there seem to be general rules/objectives about securing inmates and rendering aid to inmates and protecting oneself, and the training at Glynco seems to be effective and memorable for participants from both sides; nevertheless, no clear cut rules or policies were provided as evidence that could be used to show the Grievant was careless or negligent in his response. It seems to Arbitrator that it has to be a judgment call by the officer at the scene to size up the situation and respond accordingly.

Arbitrator finds the Employer did not meet its burden to prove wrongdoing.

EMPLOYER BURDEN TO SHOW DUE PROCESS

The Employer failed to show it acted responsibly in imposing discipline within a reasonable time after the incident. The incident occurred on November 15, 2007 and was formally investigated in January 2008. Discipline was proposed June 15, 2010 and finalized October 5, 2010. The Employer provided no acceptable reason for the tardy imposition of discipline, other than that a murder investigation should be expected to take more than the suggested maximum 120 day time guideline (J-35). Arbitrator finds such explanation insufficient, especially since the Grievant was clearly not a part of the murder itself. Arbitrator expected that the Employer would provide a reasonable explanation, but even the Deciding Official testified that he did not know why the delay occurred. The relative silence on the reason for the delay gives the Arbitrator little choice but to draw negative inferences.

The 2012 work of Arbitrator Chang discussed earlier, including his case and four other Bureau of Prison cases focusing on untimely due process, lends support for the decision in this case. Even though Arbitrator finds that the Employer did not meet its burden to show wrongdoing, Arbitrator finds this unfair treatment of the Grievant would have been reason enough itself to reverse the penalty assessed.

CONCLUSION

The Arbitrator has fully considered the transcripts of all testimony, all exhibits introduced by both parties, the arguments and objections presented by both parties during the hearing, the arguments presented by both parties in their post hearing briefs/memorandums including all submitted statutes, rules, regulations, contract provisions, past arbitral and FLRA decisions and Court holdings in deliberating and formulating this Award. The Arbitrator has reached his conclusions in this matter by weighing the facts presented on all matters that the parties disputed at hearing, whether or not discussed herein, and the determinations so made by the Arbitrator are upon all of the actual matters raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, the grievance is sustained, with remedies presented below.

REMEDY

Remedy as specified in the Grievance: (1) Removal of the 14 day suspension and Officer Gaspard's record cleared of any charges in this case (2) Restore Officer J. Gaspard with 14 days back pay plus interest and attorney fees for his time lost (3) Officer Gaspard be granted backpay with interest for overtime hours denied during the periods of November 15, 2007 through June 15, 2010 (4) The arbitrator retain jurisdiction over the case to ensure no reprisals, harassment, intimidation, or coercion against any employee affected by their participation in the grievance (5) All fees for this arbitration be paid by the agency (6) Have all Supervisors trained onCode of Conduct (7) The affected employee and Local 1034 be made whole.

PRELIMINARY MATTERS

As might be expected, there exists substantial arbitral past practice regarding establishing a remedy for inappropriate discipline. Follows are some general considerations, including case examples more specific to the situation at hand:

> Arbitrators have broad authority to fashion remedies for inappropriate discipline. They are constrained only by the contract and the Supreme Court's admonition that the remedy must draw its "essence" from the collective bargaining agreement... Arbitrators almost uniformly award a make whole remedy where there is no just cause for discharge. They may also award a make whole remedy where the employer fails to provide procedural due process, even where there might be just cause for discharge or discipline. Brand and Biren, Discipline and Discharge in Arbitration 462 (2nd ed. 2008)
>
> ...Arbitrators may interpret the make whole concept to include compensation for lost overtime...Lost overtime may be awarded unless it would be too speculative to assume that the employee would have worked overtime during the back pay period...In determining whether lost overtime is available, arbitrators generally require the party requesting overtime to show that overtime would have been offered and accepted. In addition, whether the overtime is optional or mandatory is one factor in determining whether damages for lost overtime would be speculative. Also relevant are the grievant's attendance record and record of working overtime in the past. Nonetheless, lost overtime

pay may still be denied even where a grievant had worked significant overtime in the past, if it would require the arbitrator to speculate that the grievant would have accepted the overtime offered. Brand and Biren, Discipline and Discharge in Arbitration 482 (2nd ed. 2008)

An award of backpay is authorized under the BPA only when an arbitrator finds that: (1) the aggrieved employee was affected by an unjustified and unwarranted personnel action; and (2) the personnel action resulted in the withdrawal or the reduction of an employee's pay, allowances, or differentials. *United States Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Atwater, California and American Federation of Government Employees, Council of Prison Locals, Local 1242 66 FLRA No. 137(2012)*

The Union provided in its brief an FLRA ruling on exceptions to Arbitrator awards(United States Department of Justice, Federal Bureau of Prisons Federal Correctional Complex Coleman, Florida and American Federation of Government Employees Council of Prison Locals Local 506 65 FLRA No. 217(2011)). In this ruling, FLRA references several cases where lost overtime opportunities were denied, for example, for being contrary to Back Pay Act, speculative, and/or not based on arbitrator's factual findings. In the referenced case, FLRA, largely based on the arbitrator's demonstration of factual findings, denied the Agency's exceptions.

IMPLEMENTATION OF REMEDY

(1) Removal of the 14 day suspension and Officer Gaspard's record cleared of any charges in this case

Arbitrator directs that the above action be completed by the Agency and the Institution within 30 days of the date of this award.

(2) Restore Officer J. Gaspard with 14 days back pay plus interest and attorney fees for his time lost

a. Arbitrator Directs that Officer Gaspard receive, within thirty days of this award, an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the Officer Gaspard normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by Officer Gaspard through other employment during

that period. The amount payable will be payable with interest in accordance with the Back Pay Act, 5596(b)(2)(A)(ii).

b. In accordance with The Back Pay Act, 5596 (b)(1)(A), Officer Gaspard is to receive reasonable attorney fees. Arbitrator shall retain jurisdiction on this matter.

(3) Officer Gaspard be granted backpay with interest for overtime hours denied during the periods of November 15, 2007 through June 15, 2010

Arbitrator finds that the Employer's actions in violation of the Agreement affected the Grievant's overtime opportunities. Accordingly Grievant is justified back pay with interest for lost overtime, in accordance with the back pay act. In determining the amount of overtime due, Arbitrator arrived at findings using the undisputed factual information provided at the hearing, including "Overtime Logs" (J-22) and "Gaspard Daily Assignments" (J-36). Union documents used included "Gaspard Overtime Figures" (J-31) and the document "Josh Gaspard Time Denials" provided by the Union with its brief, as directed by the Arbitrator. Arbitrator also relied on information gained from his study of arbitral practice, some of which is summarized above.

Arbitrator finds that reliance on the Grievant's history of working overtime is not a valid determinant for arriving at a monetary award in this instance. First, the time span from November 15, 2007 to June 10, 2010 is too large to be a reliable indicator. Second, the Grievant testified (Tr236) that he did not work much overtime before 2007 because he was building his home with his father, but that his situation changed when he got married in April, 2007 and had a child in September, 2009. He also testified that his wife, a stockbroker, suffered income loss during the stock market collapse, was off work for two months with childbirth and medical complications (oligohyderamnus), and incurred medical expenses with his child, who also contacted the disease. Third, Arbitrator notes that, in his experience, it is not uncommon for personnel to vary overtime work according to their own financial needs. The Agency questioned the Grievant extensively regarding the possibility that he was putting in for overtime hoping for a settlement on this grievance, to which he denied. Arbitrator notes that the Grievant was signing up for overtime in 2007 and subsequent years and was consistently by-passed.

Arbitrator's analysis of the overtime documents indicates Grievant worked 69 hours overtime in 2008, was by-passed 26 days, and refused overtime seven times. In 2009 he worked no overtime, was by- passed 29 days, and refused overtime twice. In 2010 he was by-passed 88 days, worked no overtime, and refused overtime twice. These records indicate to the Arbitrator that the Grievant was available, willing to work, and would have worked the overtime.

At issue, of course, is the matter of determining a fair and reasonable overtime back pay amount. Arbitrator will make a recommendation to the parties and provide them the opportunity to respond. In a case referenced above (65 FLRA 217) that was appealed to the F.L.R.A. with the arbitrator's decision upheld, Arbitrator Pierson arrived at an overtime workload of forty hours a week based on his analysis, awarding seventeen weeks of overtime at that maximum weekly rate. He had reduced the Union's request based on the idea that a person would not accept all overtime opportunities. In that case, the overtime award was 680 hours total, for $16, 388. In the case at hand, an overtime award for forty hours a week would result in an award of 5, 396 hours.

The Union's suggestion of an appropriate award in this case is for 1328 hours, or $ 44,973.60. Arbitrator analyzed the handout attachment from their brief and found it matched favorably with the undisputed documents provided at the hearing. However, Arbitrator feels a more appropriate figure would be reflected by following Arbitrator Pierson's idea that forty hours of overtime a week is a more reasonable maximum amount of overtime for an employee to work on a regular basis. Accordingly, Arbitrator has limited overtime days to five consecutive days in a seven day period. Additionally, Arbitrator found five instances where the Grievant either worked or refused overtime and on the same day was by passed. Because these logs raise questions to Arbitrator, those days have been excluded in the award, even though there may well be a plausible explanation. Both changes Arbitrator suggests lower the proposed award from 1328 hours to 1064 hours, and the monetary amount from $44,973.60 to $35,952.96.

For determining pay rates, those days excluded for beyond five consecutive days are August 9,10, and December 19, 2009; January 6,27,28; February ,5,11,12,18,27,28; March 23,24,30,31; April 6,7,13,14,20,21,27,28, 2010. Days excluded for Arbitrator questions include September 22, 25, 2008; November 2,22, 2008; and April 30, 2010.

Thus for this portion of the Remedy, Arbitrator proposes that a monetary pay back should not exceed $35,952.96 plus interest for lost overtime opportunities. Interest is to be computed in accordance with the Back Pay Act, 5596(b)(2)(A). Arbitrator will retain jurisdiction in this issue.

(4) The arbitrator retain jurisdiction over the case to ensure no reprisals, harassment, intimidation, or coercion against any employee affected by their participation in the grievance

Arbitrator will retain jurisdiction for 30 days, or more if required, to ensure appropriate remedial action is taken. Beyond the jurisdiction retention period, the parties will need to rely on the Agreement and the Grievance Procedure to address issues that arise.

(5) All fees for this arbitration be paid by the agency

The Agreement seems to be clear to the Arbitrator that the parties pay these fees and expenses equally. Please advise Arbitrator, during the retained jurisdiction period, of language that might grant Arbitrator authority to deviate from Article 32 of the Agreement.

(6) Have all Supervisors trained on Code of Conduct

Arbitrator is certainly a believer in training and education; however, Arbitrator has no authority in this regard. Please advise Arbitrator during the retained jurisdiction period of language that might grant Arbitrator such authority.

(7) The affected employee and Local 1034 be made whole.

Arbitrator intends that the Grievant will be made whole, as directed in remedy items 1-6. Arbitrator knows of no language or precedent for making the Local Union whole. If such exists, please advise Arbitrator during the retained jurisdiction period.

The Arbitrator shall retain jurisdiction in this matter for the sole purposes of determining the proper calculation of the Award, including attorney fees, overtime monetary award, and any other issue(s) exclusively related to the calculation of this Award not resolved by the parties in their implementation of this Award. The jurisdiction of the Arbitrator shall become extended only if requested by either party within 30 days from the date of this Award.

August 6, 2012

/s/David Alexander

David Alexander, Arbitrator
San Angelo, Texas