IN THE MATTER OF THE ARBITRATION

BETWEEN

THE COUNCIL OF PRISON LOCALS 33, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1030, HOUSTON TEXAS

AND

U.S. DEPARTMENT OF JUSTICE FEDERAL BURUEAS OF PRISONS FEDERAL DETENTION CENTER, HOUSTON, TEXAS

FMCS CASE NUMBER 08-59619
GREGORY CULPEPPER TERMINATION

APPEARANCES

FOR THE UNION

BRYAN LOWREY, COUNCIL PRESIDENT

FOR THE AGENCY

MICHAEL A. MARKIEWICZ

BEFORE

OTIS H. KING, ARBITRATOR

On October 28 and 29, 2009, the United States Department of Justice Federal Bureau of Prisons Federal Detention Center Houston, Texas (hereinafter referred to as the "Agency" "Employer," or "Management") and the Council of Prison Locals 33, American Federation of Government Employees Local 1030, Houston, Texas (hereinafter called the "Union") appeared through their representatives and presented the following issues to the duly authorized undersigned Arbitrator:

> Was the removal of the Grievant, Gregory Culpepper, for just and sufficient cause? If not, what shall be the remedy ?

A hearing on the issues was conducted in a hearing room of the Federal Bureau of Prisons in the federal building at Capitol and Rusk, Houston, Texas. Both Parties appeared Before the Arbitrator, participated fully in the hearing, and presented witnesses and evidence bearing on the case. The official record was kept by a certified reporter. Both parties have presented written post hearing briefs.

STATEMENT OF FACTS

The action taken by the Agency against the Grievant grew out of information it received during the course of an investigation concerning another matter. During that investigation, Special Investigation Agent (SIA) Leal had an occasion to take an affidavit from an inmate named Karina Manriquez-Zapien (Manriquez). In this affidavit, Manriquez accused the Grievant, Gregory Culpepper, of having touched her inappropriately, kissed her on several occasions, sent her a love poem, provided her an address where she could contact him and engaging in a number of other improper acts.

After investing these allegations by taking affidavits from two other inmates and the Grievant, himself, the Agency, through Support Service Supervisor Peggy Saputo, issued a Proposal of Discharge letter to Culpepper. In relevant parts, that letter stated:

Charge: Inappropriate Relationship With an Inmate

Specification A: While working as a Materials Handler Supervisor, you wrote and mailed an unauthorized poem to inmate Karina Manriquez-Zapien, #14834-180. The poem was entitled "Tender Sweet". This poem expressed love, touches and kisses. In your affidavit, dated October 1, 2007, you admitted that you sent the inmate this poem. You also admitted you thought you had feelings for the inmate. . . Program Statement 3420.09, Standards of Employee Conduct, states that employees may not give an inmate any article which is not authorized in the performance of his duty. It also states that employees may not allow themselves to show partiality toward, or become emotionally, physically, sexually, or financially involved with inmates.

Specification B: While working as a Materials Handler Supervisor, you gave a name and address where inmate Karina Manriquez-Zapien, #14834-180, could write you letters. . . In October 2006, a returned envelope shows that inmate Manriquez attempted to send you mail at the name and address you gave her. . . Program Statement 3420.09, Standards of Employee Conduct, states that employees may not give an inmate any article which is not authorized in the performance of his duty. It also states that employees may not allow themselves to show partiality toward, or become emotionally, physically, sexually, or financially involved with inmates.

On June 19, 2008, Warden Al Haynes issued a decision of removal of the Grievant effective midnight that date.

POSITIONS OF THE PARTIES

The Agency

It is the Agency's position that as the Grievant did not testify at the hearing, his affidavits stand as they were written. In this regard, the Agency points out that the Grievant admitted that he wrote and sent a love poem to Manriquez which he also acknowledged was mailed from outside the institution. According to the Agency, the Grievant also admitted that he had feelings for the female inmate. These facts, standing alone, asserts the Agency is proof that Culpepper engaged in an inappropriate relationship with an inmate by committing the acts with which he was charged under Specification A.

The Agency argues that it was clear from the evidence and admissions of the Grievant that he had given Manriquez the address where she sent a birthday card

addressed to him. The card was returned to her by someone at the North Shore Elementary School which was the location of the address. Specifically, it is pointed out that the Grievant admitted that he knew Robyn Carr, a previous North Shore Elementary School PTA President, that the address on the post-it note, in fact, was that of the school, that he had access to the PTA mail, and his children attended this elementary school. The Grievant, while admitting that the writing on the note looked like his writing, refused to provide a writing sample. This evidence, claims the Agency is sufficient to show that Grievant committed the acts set forth in specification B.

As to the penalty, it is the Agency's position that these actions by the Grievant warranted his discharge and that his satisfactory work record and lack of any prior disciplinary actions did not outweigh the seriousness of his actions. Thus, it concludes, the penalty of removal was reasonable. The Agency rejects the Union's argument that there was disparity of treatment of the Grievant, particularly as compared to that given two Chaplains who had improper contacts with inmates or their families. In these two cases, one of the employees received a one (1) day suspensions and the other was issued a letter of reprimand.

The Union

The Union presents its argument through a discussion of the *Douglas* factors[1] as follows:

> (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.

The Union argues the offense could not possibly have been considered that serious by pointing out that approximately five months passed between the time that Manriquez

[1] Douglas v. Veteran's Administration, 5 M.S.P.R. 280

gave her affidavit to SIA Leal, wherein she stated that Culpepper had mailed her a poem, and his meeting with the Grievant. The Union argues that Warden Al Haynes lodged lesser charges and assessed only three day suspensions against two other offenders who had committed acts that were equivalent in nature to those of the Grievant.

The Union points out that SIA Leal admitted that the sole basis on which he substantiated the inappropriate relationship was because Culpepper admitted sending the poem to Manriquez.

(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

The Union argues that the Grievant's position was not one that would cause him to be held to a higher standard than any other employee.

(3) The employee's past disciplinary record.

The Grievant had no prior discipline

(4) The employee's past work record, including length of service, performance on the job ability to get along with fellow workers, and dependability.

The Grievant, at the time of his discharge, had approximately 8 years of service. It is argued by the Union that he was an outstanding employee, receiving numerous awards, including Correctional Worker of the Year 2006

(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.

The Union points out that the Grievant's immediate supervisor continued to have complete confidence in him even after the issuance of the letter proposing his termination, as he was chosen by her in several instances to act in her capacity during her absence.

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

The Union claims that two other employees, Chaplain Guenter and Supervisory Chaplain Carroll both had committed acts similar to those of the Grievant, yet ultimately received far less severe non-adverse sanctions. Guenter was assessed a letter of reprimand for failure to report contact with an inmate and Carroll received a one (1) day suspension for calling the common laws wife of an inmate.

(7) Consistency of the penalty with any applicable agency table of penalties.

The Union cites the argument presented under standard (6) that the Agency failed to apply the same range of penalties to the Grievant as it did to the two Chaplains.

(8) The notoriety of the offense or its impact upon the reputation of the Agency

It is argued by the Union that the Agency failed to introduce any evidence that the incident ever was reported to the media or in any way affected the Agency's reputation.

(9) The clarity with which the employee was on notice of any rules that were violated on committing the offense, or had been warned about the conduct in question.

The Union admits that Culpepper knew and understood the rules he violated, regarding improper contact with an inmate and admitted his violation, and knew he was subject to discipline for such a violation, however, it is argued he had no reason to assume he would be removed for such conduct.

(10) Potential for the employee's rehabilitation.

The Union contends the Grievant clearly demonstrated his capacity for rehabilitation as he continued to perform his duties, including being frequently called upon to act in his supervisor's capacity after the proposal for removal was given.

(11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of the others involved in the matter.

The Union claims that by not producing testimony from the deciding official, Warden Al Haynes, the Agency failed to articulate its rationale for determining how and why the discipline imposed was fair and equitable. Such failure, it is argued makes it impossible to determine whether the Douglas Factors were considered.

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

It is the Union's position that a less severe disciplinary action, such as a reprimand or suspension of short duration would have been sufficient and in keeping with the Agency's pattern of progressive discipline.

Finally, it is argued that the Agency has failed to meet the test of the *Douglas* factors for establishing that it had just cause for the imposition of the discipline applied in this case. The Union contends, particularly in the absence of any testimony from Warden Haynes regarding the specific consideration, if any, he gave to the Douglas Factors, that the only reasonable conclusion to be drawn is that removal was punitive and too severe in this case.

DISCUSSION

When all is said and done, this is a fairly simple case. The Grievant admitted to committing the acts set forth in Specification A of the Charge of Inappropriate Relationship With an Inmate. The Arbitrator is of a mind, based on the evidence presented and the negative inference he is entitled to draw due to the Grievant's failure to testify, that as to Specification B, he did provide the inmate with the address of the school as being a place where she could contact him. The question then left for consideration is whether, given all the circumstances of the case, this conduct warranted the application of the ultimate sanction of discharge.

There are three things which seriously bother the Arbitrator in this case. One, is the lack of testimony from Warden Haynes, explaining what factors he considered, if any, and how he considered them in reaching his decision that removal was the appropriate penalty. The present warden, Gordon Driver, who was not at the Houston facility during any of the times relevant to this case, did appear and did testify that he had acted in cases similar to this one and in all instances he had fired the employee involved. He gave no examples of any such cases, showing how they were comparable, thus the Arbitrator has no way of knowing just how similar those cases might have been to this one. However, on cross-examination, he did acknowledge that he had not reviewed the facts in this case and, consequently, had no idea how he would have ruled had he been the deciding official. *Tr. Vol. 1, p. 35.*

The second troubling issue is the complete failure of the Agency to present even one piece of testimony or documentary evidence, showing that it had imposed removal and been sustained in that imposition in other cases similar to this one. In that regard, the Arbitrator has considered the Agency's argument in its brief and has reviewed *Hunter v. Department of Justice* 110 M.S. P. R. 219, wherein it prevailed in its removal action before the Arbitrator and the Merit System Protection Board. However, in that case, the discharged employee was found to have had an inappropriate relationship with an Inmate's family members, contact with former inmates and had released "information that could have been used to by inmates to cause or perfect a plan to breach security." That is hardly comparable to the situation in this case nor do any of the other cases the Agency has provided present situations comparable to that which existed here.

In the only other case that appears truly similar to this one, of which the Arbitrator is aware, is *Brown v. Bureau of Prisons Houston Federal Detention Center*, FMCS No. 09-

51053, recently decided by Arbitrator T. Zane Reeves, involving a circumstance quite parallel to this one, wherein a Senior Corrections Officer was charged with "Failure to Report Contact with an Inmate" and "Lack of Candor," the Arbitrator reduced the penalty of removal to a five day suspension on the basis that, "A reasonable person, using judgment must conclude that Removal is punitive and too severe in the instant matter."

The Arbitrator is not challenging the Agency's ability to make determinations, based on the facts in a case, that a certain course of action is warranted. What the Arbitrator is basing his decision on is the failure of the Agency to establish the facts to support its action. It is not sufficient to simply put into evidence facts that prove the commission of the acts with which an employee is charged and, then, jump to the position that it may impose such discipline as it wishes without observing the Collective Bargaining Agreement, or established rules such as those set out in the *Douglas* factors.

In *Hunter*, the Arbitrator notes that the Board, in ruling that the appellant did not supported her assertions that the Agency had not considered the appropriate *Douglas* factors, did find that the Agency did put forth a letter from, DeRosa, the deciding official, "in which he set forth the factors he considered."

In this case, the letter signed by Warden Haynes, made reference to what he considered "among other factors" that he did not reference. He stated that the offense "is a very serious charge" which could be said to go to Douglas factor 1 although it only speaks to the nature of the offense and not to whether it was "committed maliciously or for gain, or was frequently repeated." He states that the Grievant's "past work record has been acceptable" which could be considered as addressing his "past work record" under factor 4, however it makes no reference to his "ability to get along with fellow

workers, and dependability." More important, the facts establish that the Grievant had an *outstanding* work record not simply one that was "acceptable." Haynes brushed aside the Grievant's excellent work record, gave no recognition to his awards and the great trust placed in him by his supervisor and stated that it did "not shield you from your very serious infractions." He summarily dismissed his length of service by saying, "the overall length of your employment with this agency does not mitigate the seriousness of your misconduct."

Haynes spoke briefly to factor 3, "The employee's past disciplinary record" when he acknowledged, "... you have no prior disciplinary record" which he went on to dismiss with the statement, "your actions in this matter are so egregious as to warrant a substantial penalty." Haynes, for sake of argument will be assumed to be speaking to factors 5 and 10, "Potential for the employee's rehabilitation" when he states, "Your misconduct has caused me to lose confidence in your ability to do your job and you have betrayed the trust placed in you by this agency to carry out your position of responsibility as a correctional worker and law enforcement officer."

By the Arbitrator's count, the Warden addressed, at least in part, factors 1, 3, 4, 5 and 10, five of the 12. This is hardly the kind of detailed careful consideration that must be engaged in when the final person in the decision making process is reaching his determination to terminate an employee who, by all accounts, has had an excellent record but for these incidents..

There was no discussion of factor 2 dealing with the Grievant's job level and the question of whether he had any contact with the public such that his infractions impacted on the public's perception of the Agency. While, it may not have been expected that the Warden would discuss factor 6, the issue of the consistency of the

penalty compared with those imposed upon other employees for the same or similar offenses, it certainly was a requirement that it be addressed at some point in these proceedings before the Arbitrator. On that point, the Agency has argued that the Chaplains cited by the Union as having committed similar acts as those of the Grievant, simply occupied a different relationship to the inmates than did Culpepper and their contacts, while they should have been reported, were not of the same personal nature as his. In that regard, the Arbitrator does not find that the two cases involving Chaplains are exactly the same, but they are close enough that, without further explanation which should have come from Warden Haynes, and could have come from him had he appeared and testified at the hearing, they do raise some substantial questions of disparity.

Due Process Issues

This is the third and controlling area of concern. The Arbitrator appreciates the need for a complete and thorough investigation before action is taken, however, the length of time that an individual works satisfactorily after having committed an act that the Agency considers to be so egregious that he must be dismissed does cast a shadow over the propriety of the dismissal action. The Arbitrator is also keenly aware that he is not to simply substitute his thought process and judgment for that of the Agency's decision makers and apply his own brand of industrial justice. However, he must take quite seriously his role in the arbitral process and require that the proper procedures, the internal process that the Agency, itself, has established, be scrupulously applied. In this case that has not been done. The Agency has provided for a two step process, requiring the discrete actions of both a proposing official and a deciding official. This is consistent with what the Arbitrator has experience in cases with several other federal

agencies. However, in this case, the Agency subverted its own procedure by, in effect, eliminating the proposing official from the process. In fact, in this case, there is a definite feeling that the decision was made and then the process was retrospectively forced into use and made to overlay the case so as to support that decision.

With regard to the lack of proper process, it is most instructive to note the testimony of Peggy Saputo, the Grievant's supervisor, who signed off on the proposal letter. She testified that other than signing that letter, she, in fact, had absolutely nothing to do with it. It was prepared for her by the human resources manager, without any actual input from her whatsoever, as the decision to discharge the Grievant had already been made by someone other than the very person who was in the best position to know and judge him and to, at least, make recommendations as to the factors set out in *Douglas* that might have gone to mitigate his penalty. In a proper process, fairly administered, it is traditionally the immediate supervisor who actually initiates the proposed discipline and, if not actually making the primary decision with regard to the level of punishment to be accessed, is a meaningful participant in that procedure. Instead, in this case, she was simply a straw person whose signature was required and obtained in the process. She had no meaningful role in the issuance of the proposal letter. It is understandable that human resources will be involved in structuring the proposal letter in order to maintain consistency, but in a fair process that letter must be drafted to reflect the actual position of the supervisor and not simply thrust upon her to be signed without her ever having had any initial input into the decision making process.

The absolute lack of actual participation in the decision making process by the proposing official, Peggy Saputo, is most graphically demonstrated by the following exchange during questioning of her by the Union's advocate:

At pages 184-186 of the transcript, the following exchange occurred:

> **Q.** Now, back to the first page, did you write this document? Did you draft it or was it drafted for you?
>
> **A. It was drafted for me.**
>
> **Q.** Did you research the Standards of Employee Conduct and come up with the proposed charges for Mr. Culpepper or was that already done?
>
> **A. That was already done.**
>
> **Q.** Do you know who did that?
>
> **A. It came from our human resource manger.**
>
> **Q.** *Did you have* ***any input*** into writing this proposal letter and charges against Mr. Culpepper (emphasis added)?
>
> **A. No.**
>
> . . .
>
> **Q.** So you testified in February you were called up by personnel to come review and issue a proposal letter to Mr. Culpepper?
>
> **A. Yeah. The letter that I issued him they told me they had and I needed to issue it to him.**

It is clear to the Arbitrator that regardless of wherever it was made or by whomever it was made, the proposal for disciplining the Grievant was not made by the proposing official. There was a total breakdown in the Agency's own internal due process in that Saputo, the Grievant's supervisor, and supposedly an independent operative at the proposal level, not only was not permitted any independent judgment, she was totally excluded from the process.

The absolute failure of the Agency to allow the proposing official to exercise any independent judgment, standing alone, is sufficient to warrant setting aside the removal of the Grievant. However, it does not stand alone. It is coupled with the failure of the

deciding official to properly apply the *Douglas* factors, as discussed above, and with his failure to appear and testify during the hearing so that he might be questioned about the manner in which he approached his decision, including his knowledge that the supposed proposing official was excluded from the process.

CONCLUSIONS

By having his supervisor effectively excluded from the process, the Grievant was denied the fundamental fairness to which he was entitled. It was clear she had a very favorable opinion of the Grievant, yet by having her role as proposing official taken away from her, he was denied the opportunity to have the allegations against him measured in that light and the range of penalties honestly considered at that all important first step.

Even in the absence of the findings as to the procedural issues, the removal of the Grievant would still have to be set aside due to the failure of the Agency to establish that the deciding official, Warden Haynes, properly considered all of the relevant *Douglas* factors or, in light of what occurred with Saputo, judged them at all. This is particularly of concern due to the Agency's failure to present him at the hearing to give testimony and be subject to cross-examination on these issues. The mere submission of his decision letter, standing alone, was not sufficient to overcome this deficiency. In this regard, it must be remembered that the proposing official signed a letter also, one that was prepared for her by others, and one in which she had no input. Thus, in addition to the failures manifested in the letter, it was never established by the Agency that the warden actually participated meaningfully in the decision to remove the Grievant.

The Arbitrator believes that a non-adverse Disciplinary action of some kind may have been warranted, based on the Grievant's admission of having sent the poem to Manriquez and the actions taken against the two Chaplains for their inappropriate

contacts with inmates. However, in light of his ruling with regard to the lack of fundamental fairness in this case and without having had the benefit of any testimony from Warden Haynes, and considering rulings by the MSPB in this regard, he is unwilling to dictate what that penalty ought to be other than to specify it should be a Disciplinary and not an Adverse action.

AWARD

The Agency has not met its preponderance burden of proof of showing that the termination of the Grievant was for just and sufficient cause, hence it was not done for sole purpose of serving the efficiency of the service. The Agency is authorized, if it chooses, to assess a Disciplinary action of a written reprimand or suspension of fourteen (14) day or less, citing only Specification A of the Charge against the Grievant.

The Grievant is to be reinstated and made whole except for any Disciplinary action imposed upon him by the Agency pursuant to this decision and award, including back pay, a restoration of seniority and all other benefits to which he would have been entitled had he not been discharged. The Arbitrator retains jurisdiction for the sole and limited purpose of providing such further relief to which the parties may be entitled.

DECIDED THIS 8th day of January 2010.

OTIS H. KING, ARBITRATOR