IN THE MATTER OF ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1030, **Grievant,**	)	
Vs.	)	**FMCS No. 09-51053**
BUREAU OF PRISONS HOUSTON FEDERAL DETENTION CENTER, **Employer**	)	**T. Zane Reeves Arbitrator**

BACKGROUND

The Houston Federal Detention Center and the American Federation of Employees, Local 1030 ("the Parties") selected T. Zane Reeves to be their arbitrator under auspices of the Federal Mediation and Conciliation Service. The Arbitrator convened arbitration hearings on the following dates: April 9, May 13, May 14, June 24, June 25, and September 2, 2009, at the Federal Detention Center (FDC) in Houston, Texas in the matter of , a Senior Corrections Officer who was appealing her removal. The FDC was represented by Jennifer Montgomery, Labor Relations Specialist and Rachel de Luna, Labor Relations Specialist. The Grievant and Union were represented by Bryan Lowry, President of Council of Prison Locals 33 and Reynaldo Osorio, Jr., Vice-President of Local 1030. The Court Reporter was Dorothy Rull. The parties submitted post-hearing briefs by October 16, 2009.

STATEMENT OF THE ISSUE AND REQUESTED REMEDY

The issue considered by the Arbitrator was whether the Agency had just and sufficient cause to remove the Grievant from employment with the Agency and if not, what should be the appropriate remedy?

Union's Requested Remedy

The Grievant petitions to be reinstated to her former position and reimbursed with full back pay, benefits, seniority, and expurgation of the removal from her personnel file.

Preliminary motion to exclude evidence

During the Agency's case-in-chief and cross examination of witness Special Investigative Agent Diego Leal, the Union advocate began examining Leal regarding information contained in Chapter 10 of the Special Investigative Supervisor's Manual (SIS Manual). The Agency objected to this line of questioning because it contended that the SIS Manual is a "highly classified internal security document" and therefore excluded from being admitted as evidence in an arbitration proceeding. Conversely, the Union argued that it had prevailed in a prior Unfair Labor Practice (ULP) case that had been filed before the Federal Labor Relations Authority (see United States Department of Justice, 2007). Thus, the Union contended that it was entitled access to the entire SIS Manual. However, the Agency argued that this decision covered only Chapter 9, not Chapter 10 of the SIS Manual.

The Union then requested that the Arbitrator conduct an *in camera* review of Chapter 10 of the SIS Manual to determine its admissibility and allow the Union line of

questioning to continue, which would elicit testimony disclosing material contained in Chapter 10. The Arbitrator declined to conduct an *in camera* review and directed the Parties to submit evidence and argument, via written briefs to be received on or before May 26, 2009 regarding the disclosure of Chapter 10 of the SIS Manual. The Parties submitted briefs by the deadline and the Arbitrator provided a ruling, which was forwarded electronically to the Parties prior to reconvening the arbitration hearing on June 24, 2009. The Arbitrator allowed the admissibility of Chapter 10 of the SIS Manual within certain limitations as follows:

PRELIMINARY MOTION: FINDINGS OF FACT AND DISCUSSION

The Arbitrator is confronted with the Agency's need to protect the privacy of Confidential Informants and Correctional Officers against the Union desire to provide the best possible representation of the Grievant. Such representation includes challenging the credibility of certain Agency witnesses. However, this issue is not similar to "final offer arbitration" wherein the Arbitrator must only accept one of the last best proposals submitted by the parties. Both claims are legitimate and understandable to a reasonable person. The Arbitrator seeks to balance both interests with a decision that meets certain objectives of both parties.

Determining witness credibility

Determining witness credibility is often critical in arbitrations involving removal (discharge) and the Union has the right to attack witness credibility, especially during cross examination. The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 MSPR 280, established a "just cause" criteria that Management must consider in determining an appropriate penalty to impose for an act of employee misconduct. Among the 12 *relevant factors that must be considered* is No. 11, which

reads, "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."

In this Arbitrator's opinion, the best summation of appropriate standards for determining witness credibility was written by Arbitrator Richard Mittenthal in a paper published in the *Proceedings of the National Academy of Arbitrators* (1978). Briefly, Arbitrator Mittenthal delineated the following standards by which the credibility of a witness may be assessed by the Arbitrator:

1) *Demeanor.* Arbitrator Mittenthal states (p.63):

> "By demeanor, I refer to the manner in which a person testifies. That relates to his appearance, his gestures, his voice, his attitude—in short, his conduct as a witness. There are situations in which a man's testimony is completely undermined by his own demeanor."

2) *Character of Testimony.* Arbitrator Mittenthal defines this concept (p. 64) as follows:

> "Closely related to the witness's demeanor is the character of his testimony. The arbitrator sometimes gets a feeling about the witness's veracity from the overall manner in which questions are answered. If he is forthright and open, his testimony is strengthened. If he is evasive, his testimony is weakened."

3) *Perception, Recollection, and Communication.* Arbitrator Mittenthal considers these as three distinct elements to any testimony (p. 65):

> "There are three distinct elements to any testimony. First, the witness must have received sense impressions. He saw, heard, or experienced something. This is commonly called "perception." Second, the witness must have recalled these impressions. He remembers what he saw, heard, or experienced. This is known as "recollection." Third, the witness must state his recollection to the arbitrator or some other tribunal. He explains what he remembers. This is referred to as "communication."

4) *Consistency or Inconsistency.* Arbitrator Mittenthal stressed the importance of consistency/inconsistency in assigning credibility to witnesses (p. 66):

> "Statements by a witness at the arbitration may be consistent (or inconsistent) with what he said earlier in the investigation of the case or in the grievance meetings. His statements on direct examination at the arbitration hearing may be confirmed (or contradicted) by what he says on cross-examination. A consistent story will strengthen his credibility; an inconsistent one will weaken his credibility."

5) *Fact, Confirming or Contradicting.* Arbitrator Mittenthal asserts that parol evidence can either confirm or contradict the facts as stated by the witnesses (p. 67):

> "The witness states the facts as he understands them. To the extent to which those facts can be shown to exist, independent of his testimony, his credibility is strengthened. To the extent to which these facts can be shown not to exist, his credibility is weakened. This is simply a means of measuring the quality of testimony against an immutable standard of fact."

6) *Inherent Probability.* Arbitrator Mittenthal applies this standard as follows:

> "When two witnesses give conflicting testimony, their accounts will ordinarily intersect at different points. There will, in other words, be some agreement between them. Those areas of agreement may be crucial, for the arbitrator can, to a limited extent, extrapolate from what is known to what is unknown. He can use the agreed-upon points as guideposts around which to construct the most plausible picture of what happened. He then finds credible the witness whose testimony most closely conforms to that picture. His extrapolation helps lead him closer to the truth."

7) *Bias, Interest, or Other Motive.* Arbitrator Mittenthal puts forth this standard (p. 68)

> "A witness should not be discredited because he has a bias or interest in the matter about which he testified. But such an interest is cause for suspicion and tends to weaken credibility. By the same token, a witness should not be considered truthful merely because he has no bias or interest in the matter about which he testified. But his lack of interest tends to strengthen his credibility."

8) *Character.* Arbitrator Mittenthal addresses the character or reputation of the witnesses in weighing their respective credibility (p. 70):

> "The witness's character is an aid in measuring credibility. If he has a reputation for honesty and veracity, his credibility is strengthened. Indeed, his prior conduct in the work place may speak to the question of his character."

9) ***Admission of Untruthfulness.*** Arbitrator Mittenthal's final standard in weighing witness credibility is an admission of untruthfulness (p. 70):

> "Occasionally the witness will admit at the arbitration hearing that he has been untruthful in some respect."

Any witness sworn to testify to the truth is subject to Mittenthal's "tests of credibility."

In the instant matter, the credibility of management witnesses who relied on information produced by a Confidential Informant(s) must be subject to examination by the Union's advocate. In that respect, no witness can be permitted "protected" or considered immune from tests of credibility. Against that right, is the goal of limiting any collateral damage that could accrue to Confidential Informants or those who might come forward with information in the future? Finally, it is an arbitrator's duty "to examine the testimony of each witness on its own merits" (Elkouri and Elkouri, 415) in order to decide how much weight should be accorded. This can only be none if each witness is subject to the same rules of examination and cross-examination.

Chapter 10

The issue in the instant matter is whether a Special Investigative Agent can be questioned in order to probe the extent to which a particular Confidential Informant was *reliable* and his/her information *valid*. Agency guidelines for the "Handling of Confidential Informants" is set forth in Chapter 10 of the Special Investigative Supervisor's Manual (SIS Manual) and it is this chapter that the Agency asserts is a

"highly classified security document" and therefore should not be admitted as evidence in the arbitration hearing.

"Limited Official Use Only" As a point of departure, Chapter 10 is not listed a "highly classified security document." Rather, each page of Chapter 10 is stamped "Limited Official Use Only," which is a much lower standard than "highly classified security document" (Department of Defense, no date).

> "For Official Use Only (FOUO) is a document designation, not a classification. This designation is used by Department of Defense and a number of other federal agencies to identify information or material which, although unclassified, may not be appropriate for public release... Some agencies use different terminology for the same types of information. For example, Department of Energy uses Official Use Only (OUO). Department of State uses Sensitive But Unclassified (SBU), formerly called *Limited Official Use (LOU)*. The Drug Enforcement Administration uses DEA Sensitive. In all cases the designations refer to unclassified, sensitive information that is or may be exempt from public release under the Freedom of Information Act." [emphasis added]

Thus, Chapter 10 has the document designation of "For Official Use Only", which is not a classification rating level. Therefore, it may legitimately be used for "official" uses, one of which would reasonably include an arbitration proceeding between the Agency and Union representing the Grievant.

As an overview, Chapter 10 *requires* staff dealing with Confidential Informants to comply with certain requirements for the stated purpose of "effectively document[ing]" the use of Confidential Informants. After reviewing Chapter 10, the Arbitrator now sets forth the following guidelines for the instant arbitration proceedings

that will protect the Confidential Informant while promoting the Informant's *reliability* as well as the *validity* of the information provided by the Informant:

1001. Protect the Informant's Identity. The Confidential Informant's name already has been identified in the arbitration. It is not clear that the Informant is still housed in the facility or anywhere else in the federal system. However, the names of Confidential Informants will ***not*** be permitted in the future. Instead, the name of an Informant will be redacted and each informant will be referred to in testimony as "Inmate A, B, C, etc."

1002. Maintain[ing] the Integrity of the Information. In part 1, the SIS is directed to "be concerned with establishing the ***reliability*** of the informant" by addressing five key questions:

a. "*Has the informant provided information in the past? If so, What? When?*"

This question must be answered by the witness in two stages: 1) "yes" or "no" to the first question, 2) and general information may be provided regarding the type of information and facility (federal, state, local) to the "what" and "when" questions. In no instance will specific information obtained or names of facilities be disclosed.

b. "*Has the information proved reliable?*"

This question may be answered with one of three answers: "yes," "no," or "unknown."

c. "*Why is the informant providing this information?*"

This question can only be answered if the witness has firsthand knowledge of the informant's motives. Speculation, gossip, or circumstantial evidence will not be allowed.

d. "*Is the informant expecting favors in return?*"

Again, this question can only be answered if the witness has personal knowledge of the informant's expectations or if something material has been promised or given. Speculation, gossip, or circumstantial evidence will not be permitted.

e. "*How did the informant gain this information?*"

Again, this question can only be answered if the witness has first hand knowledge regarding how the informant obtained the information. Speculation, gossip, or circumstantial evidence is not allowed, nor will actual names of inmate sources be permitted.

2. The SIS is directed to "familiarize himself/herself with the inmate's background and present status" through a variety of means:

a. "*...the review of the intelligence files and the inmate's Central File. Determine if the file reflects any previous instances where the inmate may have cooperated with law enforcement agencies...*"

This question of whether this review was completed can only be answered with a "yes" or "no."

b. "*A local institution global search shall also be considered to obtain all available intelligence information regarding the informant. A current global search should be requested from the Intelligence Section, Central Office, in an effort to obtain any intelligence information which may have been received from other sources.*"

The witness may be asked whether such searches were carried out, but not specific information that might have been produced.

3. *"It is often useful to conduct telephone monitoring on the informants to determine if subject discusses the information on the telephone...They have been known to state they had provided false information to staff."*

The witness may be asked whether telephone monitoring of the informant occurred and if so, did the informant discuss relevant information to the instant matter. Also, the witness may be asked if the Informant stated that the information provided was untrue.

4. *"Information received from confidential sources shall be passed on only on a need-to-know basis...On a normal basis, the SIS should inform the supervisor (Captain) of the nature of the information, reliability of the source, and the SIS evaluation."*

The witness may be asked if information from confidential sources was passed on to the Supervisor. If so, the witness may describe the general nature of the information, its reliability, and his/her evaluation.

1003. Establishing the Validity of the Information. *"The SIS must make every attempt to prove or disprove the information received."* This section indicates the following ways of *validating* that the information received is accurate:

- *"Contact should be made with SIS Staff at the institutions where the inmate was previously assigned and with appropriate local law enforcement agency (sic) to ascertain information they have concerning the subject."*

  The witness may be asked whether other institutions and local law enforcement agencies were contacted and, if so, was information obtained. The witness should not identify which agencies were contacted or the exact nature of the information.

- *"...in order to prove the information valid, he/she must have corroborating evidence."*

The witness may be asked if corroborating evidence was received. If affirmative, the witness may be asked whether the corroborating evidence was physical in nature or independent information. No additional information may be requested.

- *"...the SIS must have at least two independent, reliable, confidential sources prior to charging another inmate with misconduct or infraction violation."*

The advocate may ask the witness whether at least two reliable, confidential sources were obtained prior to any charges being filed. The witness must not be asked to name these sources or their location. Note: this section of Chapter 10 lists two exceptions to this guideline.

1004. Requirement of Identifying Confidential Sources. As indicated, unless previously identified by the parties, the actual names of Confidential Sources will not be used in arbitration proceedings (see response to Section 1001).

1005. Statement of Reliability. The responsible staff person or SIS ***must*** provide a written statement of reliability, which includes the following procedures:

1. *"...a record of past reliability or other factors which reasonably convince the DHO of the informant's reliability."*

A witness may be asked if he/she is convinced of the Confidential Informant's reliability and the factors contributing to that opinion.

2. *"...a written statement of the frequency with which the informant has provided information and the degree of accuracy of the information provided."*

The witness may be asked whether a written statement regarding frequency and degree of accuracy of information was prepared for the DHO and, if not, why? However, the actual information in the statement may not be disclosed in the arbitration hearing.

3. *"All confidential information presented to the DHO shall be in writing and must state facts and the manner in which the informant arrived at knowledge of those facts...shall provide as much detail as possible..."*

The witness may be asked whether his/her report to the DHO stated "facts" and the manner in which the informant became aware of said facts. The witness may indicate how the informant became knowledgeable of these facts, but not the names of sources.

The required Statement of Reliability must be written in a prescribed format as delineated in Chapter 10. The format includes three sections with specific instructions for what must be covered. The witness may be asked if the Statement of Reliability followed the mandated format. However, the contents of the Statement may not be discussed.

4. *"If possible, the statement will be signed by the informant."*

The witness may respond to a question concerning whether the informant signed the statement and, if not, whether the statement closely follow his/her actual statement.

1006. Assigning Confidential Source Numbers. *"In order to maintain accurate accounts of statements provided by confidential sources, their reliability, and related cases/incidents, it is necessary to establish a confidential source number and file system."*

The witness may be asked whether a confidential source number and file system exists and if the Confidential Source was so included.

DECISION

Having heard argument and weighed the evidence, the Arbitrator holds that Chapter 10 of the SIS Manual may be admitted as evidence in the proceedings. Furthermore, the Union may pursue this line of questioning strictly within the guidelines set forth herein.

MERITS: POSITIONS OF THE PARTIES

The Agency position

On February 9, 2007, while off duty, the Grievant received a telephone call on her personal cell phone from , an inmate housed at the Federal Detention Center. The Grievant was required by policy to report any contact from an inmate to the chief executive officer or Warden as soon as practicable. She failed to do so. The Grievant also was required to be truthful during an investigation when she was being questioned about the phone call. Again, she failed to do so. The Grievant was far from being honest and truthful. Initially, the Grievant denied receiving a phone call from inmate But when Investigator Leal played an audio recording of the phone call, the Grievant's story quickly changed and she admitted to receiving the call. Further, the Grievant then stated that she had no idea how inmate got her phone number. However, after providing two affidavits, one on February 15, 2007 and the other or March 8, 2007, the Grievant finally admitted in her third affidavit on May 23, 2007, that she gave her phone number to the inmate. And the dishonesty doesn't end there. The Grievant also made the claim that she never had any conversations with the inmate about anything other than at work. However, during the recorded telephone conversation, the inmate makes comments such as, "This is Jay. Holler at your boy" and "I love you." Clearly, these comments were not work related.

The position of a Federal law enforcement officer requires that one's word is above reproach. The general public expects the highest standards from its law enforcement officers. Therefore, Federal law enforcements officers are held to a higher

standard of conduct than others. In addition to the Grievant's blatant disregard to be truthful during the investigation and failure to report contact with an inmate as required by policy, the Grievant also violated policy when she admittedly used a government computer during duty hours to look at pictures on the Internet of another inmate, a male inmate housed at FDC Houston, who was dressed as woman. The Grievant further admitted that she was able to access this inmate's picture and profile on Yahoo after the inmate gave her his user name and password. This type of behavior is strictly prohibited by the Agency standards of employee conduct. Not only did she use a government computer for unauthorized purpose, which is a violation of policy, but she obtained a password and user name from an inmate.

Staff of the Bureau of Prisons are trained and required to maintain only professional relationships with inmates. It is absolutely imperative to the security and the orderly running of the institution that staff interact with and treat inmates equally and impartially at all times. By obtaining a user name and password from one inmate to access his picture on a social website, she singled out that one inmate. Her actions constitute preferential treatment. Preferential treatment of an inmate in a correctional work environment is a violation of Bureau policy and it can have serious implications.

The Union position

The Union contends that the Agency did not meet its burden of proof to demonstrate just cause through a preponderance of evidence to remove the Grievant. When considering the tests of just cause, as enumerated through the Douglas Factors adopted by the MSPB, the Agency completely failed to conduct a fair and neutral investigation prior to taking disciplinary action and thereby deprived the Grievant of her due process

rights. Article 10 of the SSI Manual sets forth guidelines to ensure the integrity of information obtained by inmate Confidential Informants. These guidelines are not to be followed at the discretion of a Special Investigator; they are mandatory requirements designed to enhance the reliability of individuals who serve as Confidential Informants as well as the validity of the information that they provide, especially when such information is derogatory of prison staff members. Because these measures were not followed by the Special Investigator at the Houston FDC, the Agency's primary case against the Grievant is a stack of cards supported by circumstantial evidence and malicious hearsay spread by inmates.

FINDINGS OF FACT AND DISCUSSION

The Grievant, , was a Correctional Officer with the Houston Federal Detention Center from December 5, 1999 to the date of her removal on July 31, 2008, at which time she received a Notification of Personnel Action, also known as SF 56.

On January 5, 2007, Captain Scott Fauver wrote a memorandum through Associate Warden Marion Feather for Warden Al Haynes. The intent of this memo was to report that on January 4, 2007, at approximately 2 p.m., Fauver received a telephone call while on duty from an unidentified female who stated that he should see inmate immediately regarding a serious problem. Fifteen minutes later, Fauver met with inmate in the Captain's office; began by telling Fauver that, "I [Fauver] know why he is here (compromising a staff member at FCC Beaumont) and we have a staff member here that...is dirty." Inmate identified the individual as Officer , and alleged that Officer was attracted to him and that he could have her do anything he wanted. Inmate made several more allegations that

Officer . had brought food in for other inmates, and stated he gave her his sister's cell phone number. Captain Fauver then stated, "I believe he told me she [Officer] gave him hers." Inmate also stated that he had not done anything sexual with her, but she is 'prime' and he could if he wanted to." Fauver added that finished up their interview by stating that he did not like the way OIG [Office of Inspector General] handled him and he should be going home but that he had to let me and OIG know about the staff member [ ]."

On January 11, 2007, Captain Fauver instructed Supervisory Special Investigator Diego Leal, Jr. to undertake an investigation. Leal began the investigation by drafting a memorandum for Warden Al Haynes to that effect. The memo stated that inmate had exhausted his 300 phone minutes for the month of January and Leal was requesting an additional 100 minutes "pursuant to a sensitive investigation". Leal stated that inmate "cannot provide assistance to SIS staff without the additional minutes requested" (UE #9). In response to Leal's request, the memorandum was approved by Captain Fauver, Associate Warden Marion Feather, and Warden Haynes.

On the following day, January 12, 2009, the telephone number , which belonged to Officer , was added to inmate phone list with the approval of the staff phone monitors..... At approximately 11:20 a.m. on the same date, inmate tried to call Officer cell phone number for the first time, unsuccessfully. Over the next three weeks, phone records indicate that he attempted to call the Grievant ninety-five (95) times and only reached her on two occasions (although the first call lasting one minute may have been a recorded message).

Finally, on February 9, 2007, the Grievant stated that she received a phone call from someone who called himself, "Jay" and she subsequently learned the caller was inmate . The Grievant stated that she answered the call, even though she knew from caller ID that the call originated from a federal prison. The Grievant indicated that she had a number of relatives in prison and thought it might be someone she knew.

On February 15, 2007 the Grievant provided Investigator Leal with the first of three affidavits. At first, the Grievant denied receiving the phone call from , but later in the interview admitted receiving it (AE #7, items 11 & 14).

As background, the staff disciplinary process is the final culmination of a management process that begins when the special investigative agent sustains a charge of Misconduct, which in turn results an investigative file that is then delivered to the personnel office. There the Employee Services Manager (ESM), in the instant matter Wendy Burton, oversees the preparation of a Proposal Letter, in which the employee's immediate supervisor or department head proposes a disciplinary action. This action must supported by a specific description of the employee's wrongdoing, explaining why it violates the position held by the employee. The proposal letter informs the employee that he/she has a right to prepare a verbal and/or written response to the proposal letter. The response goes to the warden, who is the deciding official. The warden is supposed to examine the entire disciplinary file, the proposal letter, and employee's response before making a decision, whereupon the employee is issued a decision letter.

In the instant matter, ESM Wendy Burton drafted the proposal letter and subsequently was present and took notes when the Grievant presented her oral response to warden Alphonso Haynes.

It is important to note that the BOP actually has two separate employee files. A disciplinary file contains *evidence*, which is typically defined as affidavits, memos, tangible facts, and statements of facts. An *investigative* file also includes the evidence, which has been copied, as well as the examination and cross examination of various witnesses. It also has the conclusions of the investigator, which are not put in the disciplinary file. In 2008, Wendy Burton testified that the prevailing practice was that the Warden reviewed the investigative file before making a final decision.

On September 27, 2007 Captain Fauver prepared a proposal for removal letter that was signed by the Grievant on October 10, 2007. The only charge noted in the letter was "Failure to Follow Policy," with numerous specifications listed under this charge. However, this original proposal for removal was rescinded by Captain Fauver some six months later and a second removal notice was re-issued on April 21, 2008.

During this period, the Grievant continued to perform her duties at several posts, but primarily in the front lobby area as a front lobby officer and worked without incident. When asked how critical the front lobby post was, ESM Wendy Burton responded (vol. II, pp. 59-60):

> Q. "Now, would you consider the front lobby post to be a critical position in the Bureau of Prisons?
> A. One of the most critical, yes, sir.
> Q. Would that be more critical than -- although none are noncritical, would it be more critical to the security or orderly running of the institution than, let's say, a housing unit basically?

A. To the overall running of the institution, yes, sir.
Q. And can you tell me why?
A. The front lobby officer is in charge of---it's the first line. They're in charge of entrance and exit from the institution. Those of you who are not Bureau of Prisons employees will respect the entrance and the exit, particularly to a Federal prison, is of supreme importance. They also deal with phone calls. Phone calls quite often in reference to inmates. So the front lobby officer is charged with that critical responsibility, too, how to route the phone calls, what information to relay, and what information to restrict. They also deal, again, first line, with visitors. Folks coming into the institution to visit our inmates, with attorneys coming in to the institution to visit our inmates, with the general public seeking information. They're essentially a public information component within correctional services just because of that prime spot. They answer the phone. They control the doors. They control the entry and exit to the institution."

The Grievant's supervisor on April 2, 2008 gave the Grievant a performance evaluation with an "excellent" rating in 4 of 5 job elements during the period she was assigned as a front lobby officer.

One must conclude from this performance evaluation that Management trusted the Grievant to perform one of most sensitive jobs in the Bureau of Prisons. Certainly a commonly used option when an employee is being investigated for possible wrong doing is to place him/her on administrative leave with pay while the investigation takes place. During the investigation, the employee is typically removed from the office and sent home. In some situations, the employee under investigation is allowed to remain in the work place, usually when the charges against him or her are not so serious. In the instant matter, the Grievant was not considered a threat to the facility's security and allowed to stay in a critical position until her termination.

The Grievant was provided with an opportunity to respond orally and in written to the proposal letter on May 30, 2008. The Union also drafted a written response dated the same day.

No official reason was stated for rescinding the first proposal letter. Wendy Burton testified that the letter was revised because, "...the Agency was reassessing their proposal letter and thinking we really need to tighten this up a bit, make the charge -- the charges didn't essentially change. But the details of the charges were more explicitly described, much more explicitly described in the second letter" (trans., vol. II: 51-52). As Burton explained, "The first proposal letter was insufficient because it, "...called everything failure to follow policy. By its name alone, failure to follow policy does not warrant removal" (trans., vol. II: 68)

The revised proposal letter by Captain Fauver on April 21st listed four charges against the Grievant:

Charge #1. Failure to Report Contact with an Inmate

The Grievant failed to report a telephone call on February 9, 2007 on her personal cell phone from inmate . In her affidavit on February 15, 2007, the Grievant admitted, "I received the telephone call from inmate I did not report receiving the telephone call from inmate to anyone." The Grievant was further accused of accepting "the call even after the recording advised you that the call was from a federal prison" (AE #16). This was asserted by the Agency of being a violation of Program Statement 3420.09.

Charge #2 Lack of Candor

"Specification A: On February 15, 2007, you knowingly provided untruthful information during the course of an official investigation when you initially stated that you did not receive a telephone call from inmate ... on February 9, 2007. However, when Agent D. Leal played a recording of that telephone conversation for you, you acknowledged receiving the call and knowing it was made by inmate

Specification B: On February 15, 2007, you provided untruthful information during the course of an official investigation, when you initially stated that you never provided inmate ... with your personal cell phone number. However, in another affidavit, dated May 23, 2007, you admit that you did, in fact, provide your telephone number to inmate .

Specification C: On February 15, 2007, you provided untruthful information during the course of an official investigation when you stated that you had never had any conversations with ..., about anything other than work. However, a transcript of your February 9, 2007 telephone conversation with inmate reveals he made such statements as 'holla at your boy' and 'I love you' topics which clearly cannot be construed as having anything to do with work, as you had claimed."

The Agency asserts that all three specific charges are violations of Program Statement 3420.09, Standards of Employee Conduct.

Charge 3: Failure to Follow Policy

"Specification A: On January 17, 2007, you failed to properly record the extra duty you assigned to inmate ...on an informal resolution form. In your affidavits, dated February 15, 2007, and March 8, 2007, you admit to keeping inmate out of his cell after you had locked all other inmates in their cells on January 17, 2007. Your

admission is supported by videotape. You state that this was because you imposed extra duty, specifically cleaning the television room, upon him for his earlier infraction of returning timely to his cell for the 4 p.m. count. However, you failed to note inmate ' extra duty on an informal resolution form, as required by Program Statement 5270.07, Inmate Discipline and Special Housing Units, which states in relevant part, '...a record of informal resolutions shall be maintained...'

Specification B: On or about January 21, 2007, while working as Unit 6 East Officer, you used your government computer to view a photo and profile of inmate Milligan, Dwan...who was previously housed in your unit. In your affidavit dated May 23, 2007, you state 'Inmate Milligan gave me the password to get into the website'. Program Statement 3420.09 Standards of Employee Conduct, states in relevant part, 'An employee may not show favoritism or give preferential treatment to one inmate...over another...Employees shall not participate in conduct which would lead a reasonable person to question the employee's impartiality.' By your admitted acceptance of a personal computer password from an inmate, you have singled him out and extended preferential treatment which could well disrupt the orderly running of the institution. Your actions in this matter constitute Preferential Treatment of and Inmate and form the basis of this charge.

On July 31, 2008, approximately ten (10) months after the first Letter of Proposed Removal, Office, was issued a decision letter from Warden Al Haynes removing her from her position with the Bureau of Prisons.

Credibility of inmat

Much of the evidence relied upon by Management to assert "just and sufficient cause" to remove the Grievant rests upon the credibility of Confidential Informant and the extent to which he is reliable and his information valid.

The first time Investigator Leal spoke to Inmate was on January 5, 2007, a day after Captain Fauver interviewed . Prior to interviewing inmate and before considering whether he was a reliable Confidential Informant, Investigator Leal was obligated to follow the guidelines provided in Article 10 of the SS Manual. Specifically, an assessment of the inmate *reliability*, delineated in Policy 1005, "Statement of Reliability" must be achieved by carrying out the following assessment procedures and reported in writing:

> 1. "*...a record of past reliability or other factors which reasonably convince the DHO of the informant's reliability.*"
>
> 2. "*...a written statement of the frequency with which the informant has provided information and the degree of accuracy of the information provided.*"
>
> 3. "*All confidential information presented to the DHO shall be in writing and must state facts and the manner in which the informant arrived at knowledge of those facts...shall provide as much detail as possible...*"
>
> 4. "*If possible, the statement will be signed by the informant.*"

Special investigators also are required to adhere to Policy 1006, "Assigning Confidential Source Numbers" in order:

> "*to maintain accurate accounts of statements provided by confidential sources, their reliability, and related cases/incidents, it is necessary to establish a confidential source number and file system.*"

Special Investigator Leal provided the following response when asked whether he complied with requirements for ensuring the reliability of Confidential Informant

Q. "As an investigator when you determine the reliability of an inmate, is part of your job to seek out information of why they provided information as a confidential informant in the past?
A. That's probably what I should have done. Did I do it? Probably not. I don't believe I did.
Q. Do you know if policy requires that?
A. I believe it's in Chapter 10, yes.
Q. But you didn't do it in this case?
A. Well, I think it says you should do it. I don't think it says you must do it."

In addition, Article 10, policy 1002, directs the Special Investigator to establish the reliability of the informant by answering five key questions:

a. *"Has the informant provided information in the past? If so, What? When?"*(names of facilities will not be disclosed).

b. *"Has the information proved reliable?"*

c. *"Why is the informant providing this information?"*

d. *"Is the informant expecting favors in return?"*

e. *"How did the informant gain this information?"*

However, Special Investigator Leal stated that he did not make an effort to assess whether inmate previously had provided information at other federal facilities:

Q. "Is there verifications you made on Inmate to look into his past history before you used him as confidential informant?
A. No, I didn't look into his past history.
Q. Do you know if there are victims and they have his name on a victim notification list of past involvement with -- with other inmates or staff?
A. No, I'm not aware of that."(trans., v. II)

The investigative file contained the following entries for Inmate disciplinary record at other federal facilities (trans., vol. v, pp. 25-26):

- A walk away from a camp, on escape status.
- Using the phone or mail without authorization, he was given 20 hours of extra duty.
- Using the phone or mail without authorization, he received 10 hours of extra duty and inmate Grier admitted that the phone call was forwarded, i.e., a three-way call made from him to an outside party.

Captain Fauver testified that an unauthorized call by inmate to the Grievant also would be a similar violation of policy.

Investigator Leal indicated that he did not attempt to determine from inmate what he hoped to gain or if he had been promised favors for his cooperation. When Investigator Leal was asked by the Union Advocate whether inmate ever asked for, expected, or received any favors in return for providing information to him? Leal replied, "Inmate did not receive any favors from me" and "....to my knowledge, Inmate did not receive any favors from anyone (trans. Vol. IV: 41).

The Special Investigator also is directed to "familiarize himself/herself with the inmate's background and present status" through a variety of means:

> a. "*...the review of the intelligence files and the inmate's Central File. Determine if the file reflects any previous instances where the inmate may have cooperated with law enforcement agencies...*"
>
> b. "*A local institution global search shall also be considered to obtain all available intelligence information regarding the informant. A current global search should be requested from the Intelligence Section, Central Office, in an effort to obtain any intelligence information which may have been received from other sources.*"

3. "*It is often useful to conduct telephone monitoring on the informants to determine if subject discusses the information on the telephone...They have been known to state they had provided false information to staff.*"

4. "*Information received from confidential sources shall be passed on only on a need-to-know basis...On a normal basis, the SIS should inform the supervisor*

(Captain) of the nature of the information, reliability of the source, and the SIS evaluation."

1003. Establishing the Validity of the Information. *"The SIS must make every attempt to prove or disprove the information received."* This section indicates the following ways of *validating* that the information received is accurate:

- *"Contact should be made with SIS Staff at the institutions where the inmate was previously assigned and with appropriate local law enforcement agency (sic) to ascertain information they have concerning the subject."*

- *"...in order to prove the information valid, he/she must have corroborating evidence."*

- *"...the SIS must have at least two independent, reliable, confidential sources prior to charging another inmate with misconduct or infraction violation."*

Special Investigator Leal testified:

- that he didn't talk to other staff at other institutions in compliance with Chapter 10, section 1003, p. 49

- Leal stated he contacted OIG and that they did a nationwide search on the alleged telephone number belonging to the Grievant.

Daniel Lewis Peña, a correctional counselor at FDC Houston and employee for 16 years, testified regarding inmat ; credibility (vol. VI: 39):

> "When he [ ] arrived here, he was assigned to my case load. And he was -- the reason he stands out is this inmate was very manipulative. He was transferred here from Beaumont for compromising staff. And it stood out because he was in general population and not in a special housing unit where anybody else would have been if they got transferred here for that reason."

Counselor Pena was subsequently asked by the Union Advocate, "Did you know the minute he] got here by looking at his central file that he was actually or had been a confidential informant?" Pena responded, "No. That came up later and the question was why wasn't he in the posted picture file...for compromising staff at last

institution...That's a file that confidential staff use for inmates that have a specific history for staff assaults, compromising staff or high profile inmates." (vol. VI: 40)

MERITS DISCUSSION

Elkouri and Elkouri (931) note, "Most collective bargaining agreements do, in fact, require cause or just cause for discharge or discipline." This standard or one similar, i.e. "justifiable cause," "proper cause," "obvious cause," "cause," or "just and sufficient cause" are negotiated in 92 percent of all collective bargaining agreements. In brief, the standard of just cause constitutes various duties and rights owed by employees and employers as parties to a mutual agreement.

Over the years, arbitrators have developed criteria to assess whether management's disciplinary action was positive or for just cause. Specifically, arbitrators commonly apply certain "tests of just cause." In 1966, Arbitrator Carroll Daugherty (*Enterprise Wire Co., 46 LA 359)* set forth seven (7) tests of just cause, which the National Academy of Arbitrators described as "undeniably influential" (St. Antoine, ed. 2005, §6.12) Volumes have been written about the application of just cause and the seven tests are widely used in materials designed for the training of arbitrators and advocates (Koven & Smith, 2006; Dunsford, 1990).

In 1981, the Merit Systems Protection Board (MSPB), in a landmark decision (*Curtis Douglas v. Veterans Administration,* 5 MSPR 280: 305-306) addressed just cause for Federal employees. In Douglas, the Board made a distinction between the determination of whether any action should be taken (because of wrongdoing) and, if so what should be the appropriate penalty. First, to support taking any action there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. Secondly, to determine

what penalty would then be appropriate the agency must consider a set of twelve (12) *Douglas Factors*, both mitigating and aggravating.

When applied to the instant matter, the Arbitrator makes the following conclusions based on evidence and testimony presented at the arbitration proceeding:

I. Did the Agency demonstrate that the employee's behavior and negatively affected the efficiency of the Service?

The Agency demonstrated through the preponderance of proof that the Grievant committed wrongdoing by engaging in inappropriate conversations with an inmate, viewing inappropriate material on a government computer, and "a lack of candor" during the investigation. However, her actions are substantially mitigated by the following factors:

- The agency's failure to conduct and fair and neutral investigation prior to proposing a removal.
- The Agency's failure to follow its own guidelines in determining the reliability of Confidential Informant and the validity of information he provided.
- The disparate treatment of the Grievant when compared to disciplinary actions for similar infractions imposed on other Corrections Officers.

II. Was the penalty appropriate when measured by the Douglas factors?

(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.*

> One of the charges against the Grievant was that she exhibited a "lack of candor," which is a vague and never before used charge against a Corrections Officer. ESM Burton attempted to explain what "lack of candor" meant (trans., vol. II, p. 73.), "It's just shy of lying, sir. It is basically being less than truthful." Burton also admitted that "lack of candor" is not an official disciplinary charge listed in the Employee Standards of Conduct under policy #3450.09. The Agency could have

charged the Grievant with "dishonesty" or "untruthfulness" if the evidence was sufficiently strong. Instead, it created a new and less serious charge of lack of candor. The Grievant was not accused of giving false information or lying during an official investigation.

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

There were no extenuating factors regarding the Grievant's job level or type of employment that would cause the Grievant to be held to a higher standard than any other Agency employee. She was not a supervisor, held no fiduciary role, had no public contact (except after the first removal letter), and did not hold a position of prominence.

(3) *The employee's past disciplinary record.*

The Grievant has no active disciplinary actions during the past two year "reckoning period."

(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's past work record since beginning employment with the Bureau of Prisons on December 5, 1999 did not produce any indication that she had problems getting along with other employees. As indicated, her final performance evaluation listed four (4) excellent ratings out of five elements. This is particularly noteworthy in that she performed in an environment that ESM Burton termed as "highly stressful" (trans., vol. II, p. 67):

> A. "When an employee is faced with discipline, even if it is just a proposal, that employee -- particularly discipline as severe as a removal -- that employee takes it within. You have got something pending. You've got something incredibly stressful over your head that will affect your job that will affect your life, both in and outside of the workplace. To prolong that makes it very difficult on anybody. It's the stress. It's the challenge. It's the fear of what may come and having it out there.
> Q. So do you believe that the -- the length of time was unfair?
> A. It's my opinion that the length of time was excessive."

(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 fact that the Grievant performed the duties of a front lobby area officer for six months after the first proposed removal and was evaluated by her supervisor at an exceptional level indicates a high level of confidence in her abilities.

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

The Union introduced evidence that at least one other Corrections Officer had committed similar offenses and been disciplined with a far less severe penalty. Specifically, Corrections Officer Manuel Contreras received a proposal letter for a five-calendar-day suspension for preferential treatment of inmates and failure to follow policy. The resulting decision was for a two-day suspension on those charges.

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

There was no agency table of penalties introduced as evidence at the arbitration hearing.

(8) *The notoriety of the offense or its impact upon the reputation of the agency.*

The Agency did not introduce any evidence to demonstrate that the incidents for which the Grievant was accused ever was reported by the media or affected the reputation of the Federal Detention Center or Bureau of Prisons.

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

There is no doubt that the Grievant knew and understood the rules that she violated concerning inappropriate treatment of an inmate and failure to follow certain policies. She also understood that she could be disciplined for committing wrongdoing. However, it is not reasonable to assume that she believed removal would be imposed.

(10) *Potential for the employee's rehabilitation.*

No evidence was introduced to indicate that the Grievant was not capable of reform and rehabilitation to continue a successful career with the Bureau of Prisons. Again, the fact that she performed exceptionally during the six months following the first removal proposal strongly suggests that her reformation already has occurred.

(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 others involved in the matter.*

> The strong mitigating circumstances in the instant matter involve the degree to which confidential informant reliability was unquestioned and the validity of his information unchallenged. The question of why an inmate with a less than exemplary record would be given 100 extra telephone minutes for the purpose of attempting to entice the Grievant cannot be reasonably answered and is a clear mitigating factor on behalf of the Grievant.

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

> The instant matter could have been handled by imposing corrective actions, i.e. counseling, retraining, verbal warnings, etc., or less severe disciplinary actions such as reprimands or a suspension of five days or less. There was no corroborating evidence introduced to support management's claim that removal was its only alternative in this matter.

When the Douglas factors are applied in the instant matter, Management imposition of Removal does not meet the tests of just cause. A reasonable person using judgment must conclude that Removal is punitive and too severe in the instant matter.

AWARD

Having heard argument, considered the credibility of witnesses, and weighed the evidence presented at the arbitration proceedings, the Arbitrator finds that the Employer failed to meet its burden of proof to demonstrate that the Grievant was removed by the standard "*for just and sufficient cause.*" Removal for her wrongdoing is punitive and not commensurate with the seriousness of her offenses.

The Agency is ordered to be reinstate the Grievant to her former position as a Senior Corrections Officer at the Houston Federal Detention Center with back pay, benefits, and seniority to the date of her removal, minus five working days. A five (5) working day suspension, with time already served is to be placed in her employee file.

November 11, 2009
Date

T. Zane Reeves, PhD
Arbitrator
Albuquerque, New Mexico

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