

In the Matter of Arbitration Between:

Federal Bureau of Prisons)	
Federal Correctional Complex,)	
Forrest City, Arkansas)	
)	
Agency/Employer)	
)	FMCS Case No.: 10-02378
and)	
)	
Council of Prison Locals,)	
American Federation of Government)	
Employees, AFL-CIO)	
Local 922)	
)	
Union)	
)	

ARBITRATOR'S OPINION AND AWARD

Arbitrator: Michael B. McReynolds, selected by the parties
through the procedures of the Federal Mediation and
Conciliation Service

Place and dates of hearing: Federal Correctional Complex, Forrest City, Arkansas
June 24, 2010

Appearances:

For the Agency: Gail L. Elkins, Esq.,
Attorney-Advisor
Federal Bureau of Prisons

For the Union: Gerald A. Coleman, Esq.,
Attorney

Jeffrey Roberts, President
AFGE Local 922

Statement of the Case

The Federal Correctional Complex, Forrest City, Arkansas (FCC Forrest City), the Agency or the Employer, is a facility within the U.S. Department of Justice, Federal Bureau of Prisons. The Council of Prison Locals, American Federation of Government Employees, AFL-CIO, the Union, is recognized as the representative of certain employees of the Bureau of Prisons (BOP), including those at FCC Forrest City. The Bureau granted the Union

exclusive recognition as the representative of all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office, by letter dated January 17, 1968. The parties have maintained a collective bargaining relationship since that time. The present Master Agreement, which is negotiated at the national level, was in effect from March 9, 1998, until March 8, 2001. As of the date of the hearing in this matter, the terms of the Master Agreement had been extended pending negotiations on a new contract.

Jack Orr, Grievant, is employed by the Agency as a Plumbing Worker Supervisor at FCC Forrest City. At the time of the hearing he had worked for the BOP for eight years, seven of them as a Plumbing Worker Supervisor at FCC Forrest City.

On January 12, 2010,¹ Grievant received a notice of proposed indefinite suspension signed by General Foreman Anthony Case and dated January 12, 2010. The notice, set forth in relevant part below, informed Grievant the proposal was based on a pending investigation into allegations of misconduct and to promote the efficiency of the service. Attorney Gerald A. Coleman responded to the notice on Grievant's behalf by letter dated February 9 and addressed to Warden Timothy C. Outlaw. Warden Outlaw issued his decision on February 24. This decision informed Grievant that the charges in the proposal were fully supported. Citing several reasons set forth in greater detail below, Warden Outlaw determined that Grievant should be suspended indefinitely as of midnight on February 24. The suspension was to continue while the investigation was pending and/or until there was sufficient evidence to return Grievant to duty or to support subsequent administrative action. Grievant received the decision on February 24.

By memorandum dated March 10 Union President Jeffrey Roberts notified Warden Outlaw that the Union was invoking arbitration on the decision to suspend Grievant indefinitely. The Union cited Article 31, Section h, of the Master Agreement as the basis for invoking arbitration. In addition, the Union listed the following statutes, directives and orders as having been violated by the suspension:

5 U.S.C. 7501, 7511, 7513, 7513 b 3
Master Agreement Articles 6, 7, 30
5 CFR 752.404, PS 3420.09, PS 3000.03, Whistle Blower Act

The parties were unable to resolve the matter, and these proceedings followed.

This opinion and award is based on my consideration of all the evidence presented by the parties, including my assessment of the testimony of the witnesses, the documentary

¹ Unless otherwise indicated, all dates herein are in 2010.

evidence, and the extremely helpful briefs submitted by the attorneys, together with their numerous citations of case authority. While I have reviewed all cited cases, not all of the decisions warrant specific discussion herein.

Issue

The parties failed to agree on a statement of the issue presented here. The Union proposed to frame the issue as:

Whether the Warden had just and sufficient cause to enter the indefinite suspension against [Grievant].

The Agency stated the issue as follows:

Whether [Grievant's] placement on indefinite suspension was consistent with applicable MSPB² law.

Because there was no agreement as to a statement of the issue, I informed the parties that I would necessarily define the issue based on what I viewed the evidence to be, based on the terms of the contract and any subsequent arguments by the parties to support their views of the issue. Neither party objected to that approach. I then invited Counsel for the Agency to make an opening statement, noting that this was a discipline case and the employer customarily proceeds first in such cases. Counsel for the Agency then indicated there may be a separate problem, in that Grievant had raised the issue of discrimination. She said that typically it is the Union's burden to prove discrimination.

In the discussion that followed the Union made it clear that it was not arguing a claim of discrimination based on Grievant's race or any other prohibited basis. The Union pointed out that it had invoked arbitration under Article 31, Section h, of the Master Agreement. This provision, set forth in full below, provides that a deciding official's decision in disciplinary or adverse actions will be considered as the final response in the grievance procedure. The parties may then proceed directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?" The Union further stated that one element of its claim that the Agency lacked just cause for the suspension was that Grievant had been treated differently from other employees. This disparate treatment claim, however, did not amount to a separate claim of discrimination on a prohibited basis. Rather, the Union

² Merit Systems Protection Board, herein referred to as "MSPB" or "the Board".

maintained that it was proceeding solely on the claim that the disputed suspension was not for just and sufficient cause, as specified in the contract.

Counsel for the Agency then stated that the Agency viewed the discrimination argument as a threshold issue. She further stated that the matter should have been filed through the grievance process because it involved two distinct analyses.

The Agency renewed this argument in its post-hearing brief. The Agency's position and supporting arguments will be discussed fully in this opinion and award. For the reasons set forth in greater detail below, however, the undersigned has determined that the issue in this case is properly stated as follows:

Did the Agency have just and sufficient cause to issue Grievant a Notice of Indefinite Suspension, dated February 24, 2010? If not, what shall be the remedy?

Relevant Provisions of the Collective Bargaining Agreement

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. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) 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; and
2. employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of

this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.

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.

...

ARTICLE 31 – GRIEVANCE PROCEDURE

...

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or
2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

....

OTHER APPLICABLE STATUTES OR REGULATIONS

The Agency issued the disciplinary suspension disputed here under the provisions of 5 CFR §752.404. The relevant portions of this Section are as follows:³

Sec. 752.404 Procedures.

(a) Statutory entitlements. An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. 7513(b).

(b) Notice of proposed action. (1) An employee against whom an action is proposed is entitled to at least 30 days' advance written notice unless there is an exception pursuant to paragraph (d) of this section. The notice must state

³ This is the language in the Code of Federal Regulations, Title 5, Volume 2, Revised as of January 1, 2010, and effective February 2, 2010. The Union's brief recited a different, perhaps older, version of §752.404 (b).

the specific reason(s) for the proposed action, and inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.

....

OTHER RELEVANT DOCUMENTS

Of particular relevance here is the notice issued to Grievant by General Foreman Case on January 12 in which he proposed that Grievant be suspended indefinitely. This notice contains the specific reasons that formed the basis for Grievant's suspension. The relevant portions of the notice are as follows:

This is notice that I propose that you be suspended indefinitely from your position as Plumbing Worker Supervisor, WS-4602-08, at the Federal Correctional Complex, Forrest City, Arkansas, no sooner than thirty (30) calendar days from the date you receive this notice. I am proposing this indefinite suspension, in accordance with 5 C.F.R. 752.404, which permits the placing of an employee in a temporary status without duties and pay pending an investigation or inquiry and pending any subsequent agency action as a result of that investigation or inquiry. The reason for this proposal of indefinite suspension is the pending investigation into allegations of misconduct and to promote the efficiency of the service. If sustained, your suspension shall remain in effect during the investigation, including the completion of any related criminal proceedings, and/or final determination of whether subsequent administrative actions are warranted.

Specifically, you are being investigated for the introduction of contraband into the facility. Based upon the nature of these allegations, the matter is being investigated by the Office of Inspector General and has been referred for possible criminal prosecution. The evidence discovered on or about July 30, 2008, include large quantities of tobacco. This contraband was hidden in a locked plumbing pipe chase of the Facilities Department staff restroom, where you had access, and the seized packages contained your fingerprints.

...

Based upon the available evidence at this time, there is cause to believe the allegations against you are credible. Due to the nature of these allegations, the investigation will be comprehensive and may be lengthy. To retain you in a paid duty status during this time frame would be both costly and inefficient for the agency, and your continued presence in the institution could pose a threat to its orderly operation. Allegations that a Plumbing Worker Supervisor, whose primary duties involve the supervision of inmates, has engaged in the introduction of contraband are quite serious and must be treated accordingly. Based on the seriousness of these allegations, I find that it is not in the best interest of the public or the Bureau to retain you in an active duty status while the investigation of these matters is pending and before disposition of criminal and/or administrative action against you. Your specific duties require the exercise of a considerable degree of discretion and independence, and I find that it would be inappropriate to allow you to continue with these responsibilities until the allegations against you are resolved. Therefore, I

have concluded that proposing your indefinite suspension for the efficiency of the service is wholly warranted.

...

(The notice went on to identify the Warden as the individual who would make the final decision on the proposal and to state Grievant's rights during the process.)

(Joint Exhibit 4.)

Grievant's written response to the proposed indefinite suspension was in the form of an affidavit. Because that affidavit essentially frames the underlying points in issue here, it is set forth below:

1. I object to this proceeding. Under Federal law and my contract of employment, I have a right to review "all material" that is relied on by the Warden and his staff in coming up with this recommendation. I have not been given any information except one letter that contains conclusions that they found some baggies of tobacco in an area with my fingerprints on them. I have not seen the baggies. I have not seen the fingerprint evidence. I have not seen any witness statements. I know there are pictures of those items and interviews with witnesses that were relied on, and the letter specifically states there is "other evidence".
2. I object to this proceeding because I am being discriminated against on the basis of my race, being white. Other employees who were black and/or Hispanic have been charged with similar offenses, but were not suspended without pay during the investigation, and were allowed to keep their job and work. This action against me is based solely on my race.
3. In response to the conclusions contained in the letter, I would state that I did not smuggle any tobacco into the facility. I have no idea how tobacco came into be in baggies in the facility in the place in question, although many people had access to it. If my fingerprints are on the baggies, I have no idea how they came to be there unless the baggies were some that I carried that contained my lunch and food brought from outside that I threw in the trashcan. I am completely innocent of all charges and allegations that I have read in the letter.
(Joint Exhibit 5.)

Grievant's affidavit was dated February 9.

After receiving Grievant's written response to the proposed indefinite suspension Warden Outlaw issued his decision letter on February 24. The relevant portions of Warden Outlaw's letter are as follows:

...

When considering your charge, I also considered, among other factors, allegation of introduction of contraband is serious, particularly in light of your position as a federal law enforcement officer working in a correctional environment. The allegation of introduction of contraband strikes at the very heart of the mission of this agency. It is the mission of the Bureau of Prisons to protect society by confining offenders in the controlled environments of prisons. As a federal law enforcement officer, you are expected to conform to a higher standard of conduct and to obey both the spirit and the letter of the law. As a Bureau of Prisons' employee, it is imperative to maintain the public trust and confidence in the integrity of this agency and in the United States Government.

While you state in your written response that this matter was initiated because you are being discriminated [against] based on your race, you failed to provide names of employees whom you claim are similarly situated. You also claim that you have not been provided all the information relied upon to initiate this action.

You have been provided the documentation relied on by the agency. Finally, while you state in your written response that you are "innocent of all charges and allegations," the allegation is so serious, the agency cannot risk your continued presence in the workplace until they are fully resolved. Your presence in the institution would jeopardize the orderly running of the institution and is detrimental to the interest and mission of the Bureau of Prisons. Reassigning you to another nearby facility does nothing to alleviate these concerns.

After careful consideration, I find your indefinite suspension fully supported by the evidence in the adverse action file. As such, your suspension is warranted and in the interest of the efficiency of the service. It is my decision that you be suspended indefinitely effective as of midnight on February 24, 2010.

Your suspension will continue while the investigation is pending and/or until there is sufficient evidence to return you to duty or to support subsequent administrative action. Should subsequent administrative review and determination be warranted, a proposal may be made to remove you from your position and from the Federal service while you are in an indefinite suspension status.

You have the right to appeal this decision under any of the following procedures:

- a grievance under the grievance procedure contained in the Master Agreement (negotiated grievance procedure);

- an appeal with the Merit Systems Protection Board (MSPB);

- a formal complaint under the Department of Justice Equal Employment Opportunity Commission complaint procedures (EEO).

If you appeal this decision, you must elect to do so under only one procedure. You are considered to have made an election when you timely file, in writing, a grievance under the negotiated grievance procedure or a formal complaint with EEO. Please ensure you elect under which procedure you wish to proceed because, if you file under more than one procedure, the procedure under which you timely file first shall be considered to be your elected procedure.

If you elect to file a grievance under the negotiated grievance procedure, you must file, in writing, no later than forty calendar days from the date you receive this letter. You should file under Article 31 of the Master Agreement. A grievance form may be obtained from any union steward.
[Sic] (Emphasis in original.)

....
(Joint Exhibit 6.)

There is one final document that warrants inclusion here. This is a memorandum dated January 6, 2010, to Warden Outlaw from the Special Agent in Charge, Dallas Field Office, U.S. Department of Justice, Office of the Inspector General (OIG). This memorandum is significant because, as shown below, the Agency contends it formed the sole basis for the decision to suspend Grievant indefinitely. The text of this memorandum is as follows:

SUBJECT: [Grievant]

During the OIG investigation pertaining to allegations that [Grievant] smuggled contraband into the FCC Forrest City, the OIG determined that multiple bags containing large quantities of tobacco were found hidden in a locked plumbing pipe chase of the Facilities Department staff restroom. This secreted tobacco was discovered on or about July 30, 2008.

[Grievant] had keys to access this staff restroom and the seized packages contained [Grievant's] fingerprints. Additionally, the OIG developed other evidence that [Grievant] smuggled this tobacco into the prison for inmates. AUSA Michael Gordon was briefed and agreed to pursue prosecution of [Grievant].

(Agency Exhibit 1.)

Union's Position

It is the Union's position that the Agency did not have just and sufficient cause to place Grievant on indefinite suspension. The Union also takes issue with the Agency's attempt to restate the issue here. Noting that the decision letter gave Grievant three options for appealing the action, the Union points out that Grievant exercised his right to appeal

under the grievance procedure contained in the Master Agreement. Once he elected this avenue of appeal Grievant effectively forfeited any right to appeal the decision to the MSPB or to file a formal complaint under the Department of Justice Equal Employment Opportunity (EEO) procedures. On this basis the Union contends the Agency misstated the issue presented at arbitration.

The Union argues that the Agency failed to comply with 5 CFR § 752.404 (b) in that it did not disclose to Grievant all the records or information it had relied on to reach the decision to suspend him. The Union states that the only information the Agency provided to Grievant to support the suspension was the memorandum from the OIG to Warden Outlaw. According to the Union, there was additional information available to the Agency, including photographs, documents and telephone conversations, that the Warden reviewed but did not provide to Grievant. The Union specifically contends that Grievant should have been allowed to review the OIG investigative file developed during the investigation into Grievant's alleged misconduct. Because Grievant was denied the opportunity to review this information, the Union contends he should be reinstated with back pay.

As to the Agency's basis for indefinitely suspending Grievant, the Union argues that the law is clear that in such circumstances the agency must demonstrate there is reasonable cause to believe the employee has committed a crime that could result in a sentence of imprisonment; that there is a terminating event to the indefinite suspension; and there is a nexus between the alleged misconduct and the suspension. The Union asserts that the Agency has failed to meet any of these elements. The Union points out that Grievant has not been arrested or charged with any criminal act. Moreover, while there is authority holding that acceptance of a case for prosecution by a U.S. Attorney may provide sufficient basis to show reasonable cause, in this case there is nothing to establish that the U.S. Attorney has initiated such action against Grievant.

Next, the Union contends that Grievant did not smuggle the contraband tobacco into the facility as alleged. The Union asserts the Agency did not present any competent evidence to support the charge. In particular, the Union notes that Grievant had been injured on the job seven days before the tobacco was discovered and was still at home recovering when another employee found it. All employees in the Facilities Department have access to the area where the contraband was found. Although the Agency stated that Grievant's fingerprints were found on the plastic bags containing the tobacco, there was no evidence as to how many such fingerprints were found or who else's fingerprints may have been on the bags. Further, the Union contends the delay in the investigation of the contraband is

unconscionable. On this point the Union notes that the tobacco was discovered on July 30, 2008, but it was not until December 16, 2009, that the OIG contacted and interviewed Grievant. During this time, more than 13 months after he returned to work following his injury, Grievant remained at work performing in what the Union described as "an exemplary manner." The delay alone, according to the Union, shows there is no just and sufficient cause for the suspension.

As to the Agency's contention that it was proper to suspend Grievant because of the pending investigation of allegations of misconduct, the Union contends that the Agency has not suspended managerial employees who were charged with various types of misconduct. Included in the Union's examples was one lieutenant who had been charged with a felony involving violence against another employee. These examples, according to the Union, constitute evidence that Grievant was subject to disparate treatment in that he was suspended while others alleged to have engaged in misconduct were not suspended. The Union argues that this is further evidence that the Agency did not have just and sufficient cause to suspend Grievant.

Finally, it is the Union's position that the applicable standard of review here is the "just and sufficient cause" standard established by the Master Agreement, not MSPB law as asserted by the Agency. Even if the Agency is correct, according to the Union, the Agency has not complied with and properly fulfilled the elements required for an indefinite suspension under the MSPB. To support this argument the Union states that the Agency did not have reasonable cause to believe Grievant was involved in criminal activity; that the suspension has no ascertainable end; and the Agency has not demonstrated a nexus between Grievant's suspension and the efficiency of the service.

Agency's Position

The Agency made several arguments to support its position that the disputed suspension was appropriate in the circumstances presented here.

With respect to the specific issue to be decided in this case, the Agency states that under 5 U.S.C. § 7701 an employee against whom an adverse action is taken is entitled to appeal the action to the MSPB. Alternatively, the employee may elect to appeal an adverse action through a negotiated grievance procedure and, thereafter, appeal an unfavorable arbitration decision to the Board. Citing *Cornelius v. Nutt*, 472 U.S. 648 (1985), and *Elkouri and Elkouri, How Arbitration Works*, 6th Edition (2003), the Agency states that an arbitrator hearing an adverse action grievance or appeal must apply the same substantive rule or

standards as those applied by the Board. Because an indefinite suspension constitutes an adverse action, the Agency asserts that the arbitrator here is constrained to follow case law of the MSPB to decide the case.

The Agency also argues procedurally that disparate treatment is not covered by the "just and sufficient cause" provisions of Article 31 of the Master Agreement. Rather, the Agency states that disparate treatment is an issue properly raised under Article 6, Rights of the Employee. In any event, the Agency contends that Grievant was not treated any differently than any other similarly situated employee. Thus, according to the Agency, the Union's disparate treatment theory is without merit.

Next the Agency argues that when an employee is under criminal investigation the provisions of 5 U.S.C. § 7513 (b) and 5 CFR 752.404 apply to the dispute, not the "just and sufficient cause" provision of the Master Agreement. Grievant's guilt or innocence, according to the Agency, is not a factor in the legal procedure under which he was placed on indefinite suspension. The Agency specifically contends that, under Article 3, Section a, of the Master Agreement, the crime provision of 5 U.S.C. § 7513, as implemented by 5 CFR 752.404, supersedes the Master Agreement. Therefore, the "just and sufficient cause" standard of the Master Agreement does not apply in this case.

The Agency then addressed the Union's statement in its memorandum invoking arbitration that the suspension did not "meet the seven tests of just cause." After reciting the seven part "just cause" test articulated by Arbitrator Carroll R. Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966), the Agency stated:

The evidence of record demonstrates that (1) Grievant had notice of the disciplinary consequences of the alleged misconduct; (2) the rule is reasonably related to the orderly running of the institution; (3) guilt or innocence is not relevant as discussed herein below; (4) the investigation continues; (5) the disciplinary and adverse action rules are applied without disparate or discriminatory animus. Nonetheless, the Union has raised disparate treatment as an issue in this proceeding.
(Agency Brief, page 6.)

Responding to the Union's claim that Grievant was subjected to disparate treatment the Agency asserted that none of the individuals named by Grievant or the Union were similarly situated to Grievant. In one case the individual was not arrested or indicted, and in the others there was no pending criminal investigation. Unlike all the identified comparators, Grievant was under investigation for introduction of contraband into the facility. On these bases the Agency distinguishes those situations from that presented here.

As to the specific elements of the suspension, the Agency states that it is valid and enforceable because it meets all of the requirements established by the MSPB. Citing 5 CFR § 752.404 (b)(3) and § 752.402 (e), the Agency lists three limited circumstances in which an agency may suspend an employee indefinitely: first, when the agency has reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment could be imposed, pending the outcome of the criminal proceeding or any subsequent agency action following the conclusion of the criminal process; second, when the agency has legitimate concerns that an employee's medical condition makes his continued presence in the workplace dangerous or inappropriate, pending a determination that the employee is fit for duty; and third, when the employee's access to classified information has been suspended and the employee must have such access to perform his job, pending a final determination on the employee's access to classified information. The Agency states that this case falls under the first circumstance because Grievant is under criminal investigation for a felony – introduction of contraband (tobacco) into the Forrest City facility.

The Agency further notes that it gave Grievant more than 30 days' advance notice of the proposed suspension. Citing *Lamour v. Department of Justice*, 106 M.S.P.R. 366 (2007), the Agency states that it may indefinitely suspend an employee without establishing reasonable cause to believe the employee committed a crime for which a sentence of imprisonment could be imposed so long as it provides the employee with the required 30 days' notice. The Agency argues that it has also met the two additional criteria established by the Board in *Lamour*. Those are that the indefinite suspension must have an ascertainable end and that there must be a nexus between the alleged misconduct and the efficiency of the service. On these points the Agency contends that there is an ascertainable end to Grievant's indefinite suspension. As stated in Warden Outlaw's decision letter, the suspension will continue "while the investigation is pending and/or until there is sufficient evidence to return [Grievant] to duty or to support subsequent administrative action." With respect to demonstrating nexus between the alleged misconduct and Grievant's job, the Agency states the allegation that Grievant violated federal law by smuggling contraband into the institution is a sufficient basis upon which the deciding official determined that Grievant should not be interacting with inmates, either at FCC Forrest City or any other penal institution.

As to whether Grievant is entitled to review the OIG criminal investigative file, the Agency contends that Warden Outlaw did not see or rely on the OIG file when he decided to

place Grievant on indefinite suspension. The Agency notes the Union, relying on Article 30, Section e.1 of the Master Agreement, has alleged that the Agency violated the Master Agreement by not providing the OIG file to Grievant. The Agency states that this allegation exceeds the invocation to arbitration, which was filed under Article 31, Section h.1. On this basis the Agency contends that consideration of this issue would exceed the arbitrator's authority. In order for the Union to legitimately raise this issue, the Agency argues that the grievance should have been filed through the normal grievance procedure.

The Agency further argues as follows:

...because of the nature of the alleged misconduct underlying this proceeding, the Master Agreement does not apply. Only the criminal statute and regulations governing indefinite suspensions apply to this case – not “just cause”, not even reasonable cause apply as argued and supported in the previous section. This is a criminal not an administrative matter governed by rules and laws of higher government-wide authority than the Agency involved in this proceeding. In the event that the Arbitrator disregards federal law governing indefinite suspensions, and the Master Agreement itself, i.e. Article 3, the Agency contends that under Article 30, section e.1, the Grievant received all of the information on which the Warden as the deciding official relied to place Grievant on indefinite suspension.
(Agency brief, page 12.)

The Agency went on to say that the OIG file does not belong to the Federal Bureau of Prisons. Moreover, the criminal investigation being conducted by the OIG would be tainted by releasing the file to Grievant. In addition, the Agency points out that Warden Outlaw testified he had not seen the OIG file. The Warden had a conversation with the OIG agent, who told him Grievant's case was being referred to the U.S. Attorney's office for criminal prosecution. The subsequent memorandum the Warden received from the agent contained the same information that had already been communicated to him. As a result, he was under no obligation to provide the OIG file to Grievant under the terms of the Master Agreement. Finally, the Agency states that Grievant received exactly what the Warden relied upon to make his decision.

Subsequent Arguments

After the parties had submitted their post-hearing briefs the undersigned received an unsolicited e-mail message from the President, Council of Prison Locals – 33, in Forrest City, Arkansas. The Council of Prison Locals is a party to the Master Agreement. The message, which was also sent to several other arbitrators, commented on the recent decision of the MSPB in *Manuel J. Gonzalez v. Department of Homeland Security*, 114

M.S.P.R. 318 (2010), a case involving the indefinite suspension of an employee, and included the text of the decision. Because the instant case involves an issue similar to that presented in *Gonzalez*, I determined that the Agency should be made aware of the communication and given the opportunity to respond. The Agency submitted a supplemental closing argument on September 7, 2010.

Although the Union President's e-mail was ill advised, given the circumstances, it does not appear that there was any improper intent on his part. In any event, to the extent that the Agency may have been prejudiced by the submission any such prejudice was cured by the Agency's subsequent opportunity to review the communication and submit a rebuttal.

To the extent *Gonzalez* may be said to apply in this case, it will be discussed below.

Discussion

Determination of the issue

At the outset, it is necessary to define the issue presented here.

As the Agency correctly points out, an employee subjected to an adverse action over which the Board has jurisdiction has several avenues available to challenge the action. Where, as here, the employee has invoked binding arbitration, it is clear the arbitrator is to apply the same substantive standards that the Board would apply if the matter had been appealed to the Board. *Cornelius v. Nutt*, *supra*, cited by the Agency. On this basis the Agency argues that the crime provision of 5 U.S.C. § 7513 supersedes the Master Agreement in this case. Because the statute takes precedence over the Master Agreement, the Agency further contends that the specific terms of the contract do not apply here. For these reasons the Agency believes the issue should be limited to whether the action was consistent with applicable MSPB law. This approach, however, ignores the fundamental basis for the arbitrator's authority, which is the collective bargaining agreement.

The Supreme Court has also said an arbitrator's award "...settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract." *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). In this case, there can be no doubt that it is the Master Agreement that initially governs these proceedings. This was first established in the Warden's decision letter of February 24, 2010. After listing the procedures available to Grievant the Warden informed Grievant of the time in which a grievance must be filed. He went on to say, "You should file under Article 31 of the Master Agreement." (Joint Exhibit 6.) Article 31, set forth above, gives Grievant two additional options. He could move directly to arbitration if he agreed that the arbitrator was to decide the following sole