

issue: "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?" If, as the grieving party, Grievant wished to have the arbitrator consider and decide other issues he had the option of filing a conventional grievance. Grievant chose the first option, specified in Article 31.h.1. The Union invoked arbitration on this basis; there was no informal or formal grievance protesting the indefinite suspension. Rather, the Union moved directly to arbitration and stated the issue as, "Was the adverse action taken for just and sufficient cause, or if not, what will be the remedy?" (Joint Exhibit 2.) The Agency did not challenge this approach when the Union invoked arbitration, and it may not do so now.

Whatever steps are available to the Agency under 5 U.S.C. § 7513, or the other statutes applicable here, as well as the various implementing regulations, the Agency may not ignore the rights granted to Grievant under the Master Agreement, nor may it ignore the procedures made available to Grievant and the Union by that contract. Grievant elected to proceed under Article 31.h.1. The Union confirmed this election on the record at the hearing. The Master Agreement clearly sets forth the issue to be decided in this situation. For these reasons, it is determined that the issue in this case must be stated as set forth above. The Agency's arguments to the contrary, therefore, must be rejected. In considering the issue, of course, the arbitrator must apply the same substantive standards that the Board would apply.

Background

The facts of this case are largely undisputed. The parties entered into several stipulations establishing the events relating to the disputed suspension. They are as follows:

1. As a correctional worker, [Grievant] is a law enforcement officer and as of February 24, 2010, was a Plumbing Worker Supervisor, WS-4206-08. His position as Plumbing Worker Supervisor is a bargaining unit position.
2. As a Plumbing Worker Supervisor, [Grievant's] duties include monitoring and supervising inmates.
3. On January 5, 2010, [Grievant] was placed on home duty by letter dated January 5, 2010, issued by Warden Timothy Outlaw.
4. On January 12, 2010, [Grievant] was served with Notice of Proposed Indefinite Suspension.

5. The letter of proposed indefinite suspension informed [Grievant] that he had 30 days to respond to the proposed indefinite suspension and what the events were that led to the OIG investigation.
6. On February 9, 2010, [Grievant] responded to the proposed indefinite suspension via an affidavit submitted on his behalf by Gerald A. Coleman, Esquire.
7. On February 24, 2010, [Grievant] was indefinitely suspended.
8. The decision letter placing [Grievant] on indefinite suspension informed [Grievant] of the following:
 - a. the indefinite suspension was proposed in accordance with 5 CFR 752.404;
 - b. the reason for indefinite suspension is the pending investigation into allegations of misconduct that involve allegations of introduction of contraband in the form of large quantities of tobacco, into the institution;
 - c. the suspension will 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.

Not reflected in the stipulations, but also undisputed, is that on July 23, 2008, Grievant was injured on duty when he fell through a ceiling while checking a leak in an overhead pipe. He fell about 20 feet, and had to be transported by air ambulance to a hospital. He remained off work for more than three months, returning to light duty in October 2008. Grievant continued to work from then until he was suspended in the action giving rise to these proceedings.

On July 30, 2008, another employee in the Facilities Department was among a group of employees and/or inmates who were installing a sink in a break room. This employee was looking for a drain line. As part of his search he opened a plumbing chase in a wall of a staff bathroom. The "plumbing chase" is a space between certain walls where water supply lines and drain and vent lines are. The employee removed an access panel allowing him to enter the area. Inside the plumbing chase he found four quart-size "Ziploc" plastic bags. Each bag was approximately half full of a substance later determined to be tobacco. The employee immediately contacted his general foreman. The foreman came to the scene and photographed the bags of tobacco. The foreman then removed the bags and took them to another supervisory official. The employee who found the tobacco testified he prepared a

memorandum explaining how and where he had found it. He gave this memorandum to someone in SIS.⁴

It is not disputed that the plumbing chase where the tobacco was found is between a staff bathroom and an inmate bathroom. There is an access panel to the plumbing chase in the inmate bathroom as well, but this panel is in the ceiling. Record testimony establishes that this access panel had been bent in such a way as to allow someone to open it without unlocking the latch mechanism. The employee who found the tobacco testified he later returned and pop-riveted the ceiling panel shut to prevent unauthorized access. Before securing the panel he looked into the area above the false ceiling, where he could see the plumbing chase and other walls not accessible except through the access panels. He described the area as very dusty. He said he could see boot tracks in the space between the inmate bathroom and the plumbing chase where he had found the tobacco.

This same employee also testified that he and several other people handled the plastic bags containing the tobacco with their bare hands. The tobacco was later consolidated into one larger bag, but the record does not establish who did this or exactly when it happened. Although he prepared a memorandum explaining the matter, as noted above, the employee did not complete any kind of a chain-of-custody document relating to the tobacco he found. Finally, he testified that he had not been contacted by any OIG investigator or other representative of the OIG, and he had not been interviewed in connection with the incident. His testimony was not disputed or rebutted.

There is no question that bringing contraband, including tobacco, into a Federal prison is a criminal offense for which a term of imprisonment may be imposed.

Grievant returned to full duty in the Facilities Department after about three months on light duty. From that time until January 5, 2010, he performed his normal duties as a Plumbing Worker Supervisor. There is nothing in the record to indicate that Grievant's performance was any different than it had been before his injury.

On or about December 16, 2009, some 14 months after he first returned to work after his injury, Grievant was contacted by investigators or agents from the Office of Inspector General, U.S. Department of Justice. These investigators interviewed Grievant and asked him about the tobacco that had been discovered in the plumbing chase on July 30, 2008. This was the first notice Grievant received that he was being investigated in connection with the incident. It came almost 17 months after the tobacco had been discovered. Thereafter,

⁴ This acronym was not explained in the record. It is clear, however, that SIS is an administrative department or office at the Forrest City facility, and that it is responsible to the warden.

as described in the stipulations above, Grievant was assigned to home duty on January 5, 2010, and eventually placed on indefinite suspension.

Grievant testified that when he was interviewed by OIG investigators they showed him photographs of tobacco and a person he identified as the employee who had found the bags of tobacco on July 30, 2008. Grievant further testified that when he was called to the Warden's office and given the letter notifying him he was being assigned to home duty he saw these same photographs, along with other documents, in an orange folder on the Warden's desk. Other evidence in the record establishes that this meeting took place on January 5, 2010.

The decision to suspend Grievant indefinitely

Warden Outlaw testified that he suspended Grievant because the Agency, the Warden actually said "we," received information from an outside agency that "they," the outside agency, found there was contraband in one of the Agency's institutions. He went on to say, "They indicated that they had enough information through talking to [the] U.S. Attorney's office that they were going to consider prosecuting [Grievant]." (Transcript, page 85.) The Warden further testified that in making the decision to suspend Grievant he relied only on the information he received from the OIG representative. This information is contained in Agency Exhibit 1. He said he was making no judgment as to whether Grievant had actually done whatever he had been charged with, that his decision was based on the fact that "...the agency that was involved in the investigation and the U.S. Attorney's Office believe that they had enough to seek prosecution on an employee." (Transcript, page 88.) It is not disputed that the "outside agency" to which the Warden referred is the Office of Inspector General, Department of Justice. The Warden explained that because of the nature of the allegations against Grievant it was important that Grievant be removed from any contact with inmates.

On cross-examination the Warden acknowledged there was a file maintained by his SIS staff containing information concerning the incident involving the tobacco found on July 30, 2008. He testified that he had reviewed this file. As to the basis for his decision to suspend Grievant, Warden Outlaw testified, "We based it on the conversation from OIG regarding the information that's in the letter here." (Transcript, page 116.) He was referring to the January 6, 2010, memorandum from the OIG, Agency Exhibit 1. The Warden was unable to recall some aspects of his conversation with the OIG agent. He said, "They didn't get into the contents specifically about what he [Grievant] indicated. They just said that

based on the conversation with him and the other evidence, they believed that they would move forward.” (Transcript, page 119.)

The arguments based on the “seven tests” of just cause

As noted above, when the Union invoked arbitration here it stated that the suspension did not meet the seven tests of just cause. This was the only time the Union referred to the “seven tests.” The Union did not specifically argue this theory at the hearing or in its brief. The Agency, however, addressed the points in its brief. Accordingly, there must be some discussion of the concept or theory here.

The Master Agreement does not define “just cause” or “sufficient cause.” The term “cause” or “just cause” has been analyzed extensively for decades. Virtually every arbitrator has had the occasion to consider the term at one time or another, but no one has been able to devise a universally accepted definition of the concept. *See Just Cause: The Seven Tests* (Adolph M. Koven and Susan L. Smith, Second Edition, revised by Donald F. Farwell; Bureau of National Affairs, 2001), page 2. This work presents a thorough review of the often-cited “seven tests” of just cause first developed by Arbitrator Carroll Daugherty and thereafter set forth in his award in *Whirlpool Corp.*, 58 LA 421 (1972). The “seven tests” have been the subject of books and articles too numerous to recount; they have been discussed and debated in labor-management conferences; and they have been addressed in countless arbitration awards where cause – or just cause – was an issue. One such discussion appears in *Housing and Community Services of Lane County*, 121 LA 1121, at 1127 – 1128 (Arbitrator Reeves, 2005). The result of most of these writings and discussions has been that some arbitrators have adopted the tests and applied them rigidly, while others – including the undersigned – have recognized their usefulness in creating guidelines for evaluating disputed actions but have concluded that it is rarely appropriate to apply the tests mechanically to a set of events in order to determine the merits of a case. As the Supreme Court has told us on more than one occasion, arbitrators must look first to the contract under which they have been asked to serve for their authority to decide a dispute under that contract.

Whether one applies the “seven tests” rigidly, as, for example, Arbitrator Gaba in *Providence St. Peter Hospital*, 123 LA 473 (2006), and others, or whether one looks to a different standard for determining just cause, such as the two-pronged process described by Arbitrator Eisenmenger in *ConAgra Poultry Co.*, 116 LA 1029 (2001), there is no doubt that an employer may enforce its rules through appropriate disciplinary action. In general, the

employer must demonstrate that the employee violated a rule; that the employee was aware of the rule; that the rule was reasonably related to the employer's operation; and that the rule was applied evenhandedly. Some authorities teach that the employer must also show the penalty was reasonable.

To the extent that the "seven tests" have been raised here, record evidence makes it clear that the Agency's rules prohibiting the introduction of contraband into the facility are reasonable and well known to the employees. It cannot be disputed that the rule is specifically related to the Agency's operations. In order to show that the Agency did not apply its rules evenhandedly the Union presented evidence that some individuals employed at FCC Forrest City had been charged with various types of misconduct but had not been suspended. It is clear, however, that in each instance cited by the Union the individual was a supervisor or other member of management. The evidence, therefore, is insufficient to establish that the Agency treated Grievant different from any other similarly situated employee. Although one of these instances involved an individual who had been investigated for introducing contraband into the facility, there was no evidence that either the OIG or the U.S. Attorney's office made a determination to prosecute the individual. The Union's allegations based on disparate or discriminatory treatment of Grievant, therefore, cannot be sustained. As to one critical factor in considering the "seven tests," however, the Agency has not shown that Grievant actually introduced the contraband tobacco into the facility. That aspect of the case will be addressed below.

Applicable law and regulations

As the Agency points out, the Board generally recognizes three situations in which it has approved the use of indefinite suspensions. These are: (1) When the agency has invoked the crime provision; (2) 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 (3) when an 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. *Hodge v. Department of Homeland Security*, 2010 MSPB 190 (2010), citing *Gonzalez, supra*. In *Lamour v. Department of Justice*, 106 M.S.P.R. 366 (2007), the Board ruled that if an agency provides an employee with 30 days' advance notice of an adverse action it may "...indefinitely suspend the employee pending an investigation of the employee's possible criminal conduct without establishing reasonable

cause to believe that the employee committed a crime for which a sentence of imprisonment may be imposed.” *Id.*, page 5, citing *Perez v. Department of Justice*, 480 F.3d 1309 (Fed. Cir. 2007).

In the case presented here, the Agency provided Grievant with more than 30 days notice of the indefinite suspension. This effectively removed from consideration the Agency's burden to show reasonable cause to believe Grievant had committed the actions with which he was charged. Under the Court's decision in *Perez* the “reasonable cause” provision, § 7513 (b) (1), is inapplicable in such circumstances. As was the case in *Lamour*, however, as well as in *Gonzalez* and *Hodge*, among others, the Agency was still “...required to meet the remaining requirements of 5 U.S.C. § 7513, which, in pertinent part, provide that an agency may suspend an employee for a period in excess of 14 days only for such cause as will promote the efficiency of the service and that the agency must provide written notice stating the specific reasons for the appellants' indefinite suspensions.” *Lamour*, at pages 5 and 6, citing *Perez*.

Under many collective bargaining agreements, and by law in the case of public employees, an employer taking disciplinary action against an employee must ensure that the action is consistent with the employee's right to due process of law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), another decision cited by the Board in *Lamour*. As the Board also said in *Lamour*, “...fundamental due process requires that the tenured public employee have ‘oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.’” (Quoting *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656 (1994), which in turn quoted *Loudermill*.)

It is not disputed that the Agency here provided Grievant with only one document to explain its decision to suspend him. This was the memorandum to Warden Outlaw from the OIG Special Agent in Charge. The Agency specifically argues that the Warden predicated his decision to indefinitely suspend Grievant on his conversation with the OIG agent. This same information was subsequently submitted in writing, in the memorandum of January 6, 2010. The Agency defends its decision not to provide the OIG file to Grievant on the grounds that the file does not belong to the Bureau of Prisons. Further, the Agency argues that the criminal investigation being conducted by the OIG would be tainted by releasing the file to Grievant. Because the Warden testified he had not seen the OIG file, the Agency contends he was under no obligation to provide it to Grievant under the terms of the Master Agreement. (Agency brief, page 13.)

Analysis and Conclusions

The stated reason for the disputed action here was that Grievant was suspended "...pending investigation or inquiry and pending any subsequent agency action as a result of that investigation or inquiry, pertaining allegations of misconduct." (Joint Exhibit 6.) Grievant was not charged with any specific act of misconduct. The only basis for the decision, as the Warden testified and the Agency argued consistently throughout the proceeding, was the information conveyed to the Warden by the OIG Special Agent. This was also the basis for the Agency's decision not to provide the OIG file to Grievant. The Board has recently held that the mere fact that an agency has an open investigation into allegations regarding an employee's conduct is not "cause" for suspending an employee indefinitely. *Gonzalez*, at ¶¶ 24 – 27; see also *Hodge*, at ¶ 8. Under those holdings, it follows that the suspension here must be rescinded.

The Agency distinguishes *Gonzalez* from the instant situation in that the investigation in *Gonzalez* was administrative in nature while the OIG investigation here was criminal in nature. In its supplemental brief, submitted to discuss *Gonzalez*, the Agency argues that the deciding official – the Warden – based his decision on the crime provision of the Reform Act, 5 U.S.C. § 7513 (b). As noted above, however, the decision letter contained no suggestion that Grievant had engaged in criminal misconduct. The proposal of January 12, 2010, also stated that it was based on a pending inquiry. The proposal letter contained the further statement that the "...matter is being investigated by the Office of Inspector General and has been referred for possible criminal prosecution." (Joint Exhibit 4.) The Warden testified, above, that the OIG told him they "...were going to consider prosecuting" Grievant.

The circumstances here are remarkably similar to those considered by the Board in *Lamour*. The Agency in this case provided Grievant with only a brief memorandum to the Warden from the OIG, quoted above at page 9. This memorandum is not sufficient to inform Grievant of the nature of the evidence linking him to the introduction of the contraband. The memorandum notes that Grievant had keys to the restroom and that the seized packages contained his fingerprints. It goes on to state that the OIG "...developed other evidence" that Grievant smuggled the tobacco into the prison. It does not identify the nature or the source of this information. Finally, the memorandum does not indicate what the OIG representatives told the Assistant U.S. Attorney when they "briefed" him.

The Agency made it clear that it would not provide Grievant with the OIG file. At the hearing Counsel for the Agency instructed the Warden not to respond to any questions

about the file, stating that she had been told by the OIG that the investigation was still in progress and she could not discuss it because to do so would taint the investigation.

It appears that the Agency has attempted to avoid its responsibility for determining the basis for the indefinite suspension by somehow delegating this role to the OIG. Like the proposing and deciding officials in *Barresi v. U.S. Postal Service*, 65 M.S.P.R. 656 (1994), however, the Agency officials here did not have access to the complete record of evidence when they decided on the indefinite suspension. It is they, not the OIG representatives, who represent the Agency in effecting adverse personnel actions. It follows that their decisions must be based on accurate and complete information bearing on the issue. If the OIG memorandum was a recommendation it should have included a summary of the relevant evidence. It did not contain any recommendation, however, nor did it contain any specific conclusion that the OIG had determined Grievant had any culpability in introducing the tobacco into the facility. The statement that the Assistant U.S. Attorney had been "briefed" and "agreed to pursue prosecution" of Grievant is not sufficient to constitute such a determination. Unless the General Foreman and the Warden were provided with the evidence adduced by the OIG investigation they could not have been in a position to evaluate the memorandum. With only the limited information contained in the OIG memorandum the Agency officials were unable to make an informed evaluation of the evidence against Grievant sufficient to allow them to decide to suspend him indefinitely. See *Barresi*, *Gonzalez* and *Lamour*, discussed above.

A public employee's rights to due process are not diminished simply because the Agency has the right, in certain circumstances, to indefinitely suspend the employee. In this case, Grievant was entitled to review the evidence against him. That evidence is contained in the OIG file. If the Agency, in accordance with the wishes or instructions of the OIG, declined to provide the OIG investigative file to Grievant, it was free to do so. Unless it was prepared to give the file to Grievant, however, the Agency could not initiate an adverse action as it did here.

Grievant's right to review the evidence against him arises both from his rights to due process established in *Loudermill* and from Article 30.e.1 of the Master Agreement. Because the Agency denied Grievant access to this evidence it denied him a meaningful opportunity to be heard. For these reasons as well, therefore, his indefinite suspension must be rescinded.

There are two additional points to be resolved. They are whether the indefinite suspension imposed on Grievant has an ascertainable end and whether the Agency has

shown there is a nexus between the alleged misconduct and the efficiency of the service. As to whether the suspension has an ascertainable end, the Board has held that an indefinite suspension may extend through the completion of both a pending investigation and any subsequent administrative action. In such circumstances, however, an agency must initiate administrative action within a reasonable period of time after completion of the pending investigation. To permit the agency to take an unlimited amount of time to determine what action to take while keeping the appellant on an indefinite suspension would run contrary to the requirement that an indefinite suspension have an ascertainable end. *Joseph V. Arrieta v. Department of Homeland Security*, 108 M.S.P.R. 372 (2008) (Citations omitted.)

At the time of the hearing in this case Grievant's suspension had been in effect for four months. It had been almost two years since the tobacco was first discovered and about six months after the OIG had notified Grievant he was under investigation in connection with the July 30, 2008, discovery. These time frames demonstrate that the Agency did not view the initial discovery of the tobacco as a matter warranting immediate action. It cannot be said that the Agency even placed any kind of priority on investigating or otherwise acting on the incident. The record does not establish when the matter was referred to the OIG, nor does it reflect when the OIG began its investigation.

Notwithstanding the inordinately long time between the discovery of the tobacco and the interviews of Grievant, it cannot be said that the term of the suspension, in and of itself, is sufficient to establish it does not have an ascertainable end. Because the Agency has not provided the OIG file, of course, there is nothing in the record to indicate how the investigation has progressed or how much longer it might last. In view of the ultimate disposition of this grievance, however, it is not necessary to determine whether four, six or even eight months is an acceptable term for an indefinite suspension. Suffice to say that the Agency does not have an unlimited period of time in which to act.

Whether the Agency has demonstrated that the suspension promotes the efficiency of the service is another question. Certainly the introduction of contraband into a penal institution is an offense that goes to the heart of the Agency's mission. If there were evidence that Grievant had engaged in misconduct of this nature, the Agency would certainly have a legitimate interest in removing him from a position where he had contact with inmates while the allegations were investigated. Apart from the brief OIG memorandum, however, the Agency offered nothing to establish that it had any basis for believing the allegations against Grievant were credible. Whether it was so critical to protect the integrity of the OIG investigation by withholding the evidence is a decision the Agency made. By so

choosing, however, the Agency abdicated its own responsibility for conducting a substantive inquiry into the allegations, or reviewing the results of such an inquiry, before initiating the adverse action. The OIG memorandum contains less information than, for example, the arrest warrants and arraignments considered by the Court in *Dunnington v. Department of Justice*, 956 F.2d 1151 (Fed. Cir. 1992). Finally, if the Agency found it necessary or advisable to maintain the integrity of the OIG investigation by withholding the file, it had the option of keeping Grievant on the job or in the home duty assignment or by suspending him with pay, as the Supreme Court suggested in *Loudermill, supra*, at 544 – 45.

In view of the foregoing, it must be concluded that the Agency has failed to demonstrate that the indefinite suspension of Grievant promoted the efficiency of the service. This, too, requires that the suspension be rescinded.

The Union's remaining arguments

In its memorandum invoking arbitration the Union stated generally that the Agency had violated the Whistle Blower Act. There was no argument or evidence on this point at the hearing. This argument, therefore, is rejected.

The Union also asserted that the Agency suspended Grievant in retaliation for his participation in an EEO investigation filed by another employee. On this point Grievant testified that he had submitted a memorandum supporting a sexual harassment complaint against a supervisor. According to Grievant the supervisor later approached him and said, "I can't believe it. I can't believe you'd do this. What comes around goes around." Grievant said he took this as a threat from the supervisor.

This limited evidence is not sufficient to establish a retaliatory motive on the part of the Agency in connection with Grievant's suspension. There is nothing to show when Grievant submitted the memorandum and nothing to demonstrate any causal connection between Grievant's limited participation in the EEO complaint and the suspension disputed here. It is concluded, therefore, that the allegation that the Agency suspended Grievant in reprisal for engaging in protected EEO activity is without merit.

Final conclusions

For the reasons set forth in greater detail above, it is concluded that the Agency denied Grievant his rights to due process by suspending him indefinitely without providing him with a meaningful opportunity to respond to the allegations against him. This violated Article 30.e.1 of the Master Agreement. It is further concluded that, in the circumstances

presented here, the disputed suspension was not for just and sufficient cause and did not promote the efficiency of the Service. This violated Article 30.a of the Master Agreement. Grievant's indefinite suspension effective at midnight on February 24, 2010, therefore, will be canceled. The Agency will make Grievant whole for any loss of wages and benefits he suffered as a result of the suspension.

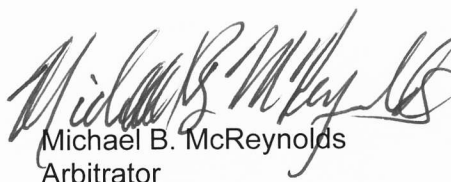
Nothing in this award is to be construed as finding or concluding that Grievant was not involved in the introduction of contraband (tobacco) into the Forrest City facility. The OIG investigation will eventually run its course. At that point the U.S. Attorney, or other authority, will decide whether to proceed against Grievant and, if so, on what basis to do so. The Agency will then be in a position to determine the next course of action it will take.

Because it cannot be determined on this record whether there is cause to believe Grievant engaged in the misconduct that is the subject of the OIG investigation, the Agency will not be directed to reinstate Grievant to his position. Rather, the Agency will have the option to return Grievant to his position; to assign him to home duty or to another position commensurate with his pay grade; or to suspend him with pay pending the results of the investigation and/or until there is sufficient evidence to return him to duty or to support subsequent administrative action. Accordingly, the undersigned issues the following:

Award

The grievance is sustained. The Agency will cancel Grievant's indefinite suspension, issued February 24, 2010, and make him whole as described above, including back pay, interest on the back pay, and other benefits under the Office of Personnel Management's regulations. The Agency will, at its option, either return Grievant to his position; assign him to home duty or to another position commensurate with his pay grade; or suspend him with pay pending the results of the investigation and/or until there is sufficient evidence to return him to duty or to support subsequent administrative action.

Issued at Fort Worth, Texas, September 17, 2010.


Michael B. McReynolds
Arbitrator