IN THE MATTER OF THE ARBITRATION BETWEEN

FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL COMPLEX, FORREST CITY, ARKANSAS, AGENCY

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, FEDERAL CORRECTIONAL COMPLEX, FORREST CITY, ARKANSAS, UNION

OPINION AND AWARD

FMCS CASE NO. 13-02384-3

Arbitrator:	William E. Hartsfield
Date of Award:	March 31, 2014
Date Hearing Closed:	February 28, 2014
Hearing Site:	Forrest City, Arkansas
Hearing Date:	December 12, 2013
Record Closed:	February 28, 2014
Collective Bargaining Agreement (CBA)	Master Agreement
Representing the Agency:	Jennifer Spangler, Assist. General Counsel Labor Law Branch U.S. Department of Justice Federal Bureau of Prisons Getaway Complex Tower II 4th & State Avenue Kansas City, KS 66101
Also present for the Agency:	Rickey Galloway Human Resource Manager
Representing the Union and Grievant:	Patrick M. Flynn, Attorney 1225 North Loop West Suite 1000 Houston, TX 77008-1775

Also present for the Union and Grievant:	Jeffrey Roberts, President AFGE Local 0922 P.O. Box 1075 Forrest City, AR 72336 Jerry Carey, Grievant
Witnesses called by the Agency	Agent Christopher Howard Rickey Galloway, Human Resources Mgr. Warden Anthony Haynes
Witnesses called by the Union and Grievants	Jeffrey Roberts, President, Local 0922 Jerry Carey, Grievant
Exhibits Admitted	Joint Exhibits 1 through 5 (JX), Agency Exhibits 1 through 6 (AX), and Union Exhibits 1 through 4 (UX)
Decision	The Grievance is sustained.

OPINION AND AWARD

ISSUES

The parties jointly stipulated to the issues as follows:

Was the Agency's termination of the Grievant taken for just and sufficient cause?

If not, what will be the remedy?

PROCEDURE

The parties selected the Arbitrator through the procedures of the Federal Mediation and Conciliation Service. Pursuant to the parties' agreement, a hearing convened on December 12, 2013 in Forrest City, Arkansas. Both parties made opening statements. The parties submitted and the Arbitrator admitted Joint Exhibits 1 through 5, Agency Exhibits 1 through 6, and Union Exhibits 1 through 4. All witnesses were sworn. Except for the Grievant and the Agency's representative, the witnesses were excluded from the hearing. A Licensed Court Reporter attended the hearing and provided a transcript (Tr.). Both parties submitted post-hearing written statements.

The hearing afforded both parties a full opportunity to examine and cross examine witnesses under oath, to offer exhibits, to raise objections on procedural rulings and to make known their respective positions and arguments on the issues. The parties agreed no issues of arbitrability existed.

The parties agreed the award is due 30 days after the close of the hearing and that the hearing is closed upon the receipt of the post-hearing submissions.[1] The parties also agreed the Arbitrator may retain jurisdiction for 90 days.

All counsel are to be commended for their zealous, thoughtful and courteous advocacy at the hearing, as well as the quality of the arguments and materials submitted.

JURISDICTION

The parties agreed that all conditions of the Collective Bargaining Agreement (CBA)(JX1) have been met, that the Arbitrator had jurisdiction to determine the issues and the authority to fashion an appropriate remedy for the disputes in this proceeding and that the Arbitrator had the jurisdiction to issue a final and binding award.

RELIEF SOUGHT BY THE UNION AND GRIEVANT

Grievant seeks reinstatement and that he be "made whole in all respects" including lost wages, seniority, accrued annual leave, and accrued sick leave, and the Union seeks reimbursement of its attorney's fees, legal fees and related expenses. (JX1).

KEY PROVISIONS OF CBA

ARTICLE 5 - RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

...

2. in accordance with applicable laws:

    a. to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

[1] While the Union's Counsel received it, unfortunately, the Agency's submission to the Arbitrator via email went astray. The Arbitrator received it on March 7. Accordingly, the Award is due by April 7, 2014, the first business day following the expiration of 30 days from March 7.

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.

Section f. Employee representational rights are addressed in Article 6.

Section g. The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending

investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.

Section h. When an employee exercises his/her right to orally respond to a proposed disciplinary or adverse action, the reply official will allow ample time for the employee to respond at this meeting. Although the reply official may ask follow-up questions, nothing requires the employee to answer such questions during this meeting.

Section i. Supervisors are not required to annotate oral counseling sessions in an employee's performance log.

Section j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing. When adverse action is proposed, he/she will have fifteen (15) working days to respond orally or in writing. Approval or denial of extension requests must be provided within two (2) working days. These time frames do not apply to probationary employees or actions taken under the crime provision.

Section k. Employees making false complaints and\or statements against other staff may be subject to disciplinary action.

ARTICLE 32 - ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

1. a list of arbitrators will be requested utilizing the FMCS Form R43;

2. the parties shall list on the request any special requirements/qualifications, such as specialized experience or geographical restrictions;

3. the parties shall, within five (5) workdays after the receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel;

4. if they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from this list until one (1) name remains; and

5. the arbitrator selected shall be instructed to offer five (5) dates for a hearing.

...

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

...

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

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

Section i. A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost shall be shared equally including the cost of the arbitrator's copy.

KEY PROVISIONS OF STANDARDS OF EMPLOYEE CONDUCT

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6. DEFINITIONS. For the purposes of this Program Statement, the following definitions apply:

...

f. Inmate. ...This includes individuals participating in...halfway house placement...

g. Former Inmate. Any inmate for whom less than one year has elapsed since their release from Bureau custody or supervision of a federal court.

...

8. GENERAL POLICY. Employees of the Bureau are governed by the regulations published in 5 CFR Part 2635. While this Program Statement expounds on those regulations to clarify

their application in the Bureau, it does not and cannot specify every incident which would violate the Standards of Conduct. In general, the Bureau expects its employees to conduct themselves in such a manner that their activities both on and off duty will not discredit themselves or the agency.

Employees shall:

a. Conduct themselves in a manner that creates and maintains respect for the Bureau of Prisons, the Department of Justice, and the U.S. Government.

...

i. Immediately report to their CEOs, or other appropriate authorities, such as the Office of Internal Affairs or the Inspector General's Office, any violation or apparent violation of these standards.

Failure by employees to follow these regulations or this policy could result in appropriate disciplinary action, up to and including removal (see Attachment A).

9. PERSONAL CONDUCT. It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. The following are some types of behavior that cannot be tolerated in the Bureau.

...

b. Sexual Relationships/Contact With Inmates. Employees may not allow themselves to show partiality toward, or become emotionally, physically, sexually, or financially involved with inmates, former inmates, or the families of inmates or former inmates. Chaplains, psychologists, and psychiatrists may continue a previously established therapeutic relationship with a former inmate in accordance with their respective codes of professional conduct and responsibility.

(1) An employee may not engage in, or allow another person to engage in, sexual behavior with an inmate. Regardless of whether force is used, or threatened, there is never any such thing as "consensual" sex between staff and inmates.

(2) Title 18, U.S. Code Chapter 109A provides penalties of up to life imprisonment for sexual abuse of inmates where force is used or threatened. "Sexual contact" is defined as the intentional touching of "the genitalia, anus, groin, breast, inner thigh, or buttocks." Penetration is not required to support a conviction for sexual contact. All allegations of sexual abuse shall be thoroughly investigated and, when appropriate, referred to authorities for prosecution.

(3) Employees are subject to administrative action, up to and including removal, for any inappropriate contact or relationship with inmates, regardless of whether such contact constitutes a prosecutable crime. Physical contact is not required to subject an employee to sanctions for sexual misconduct.

c. Additional Conduct Issues. An employee may not offer or give to an inmate or a former inmate or any member of his or her family, or to any person known to be associated with an inmate or former inmate, any article, favor, or service, which is not authorized in the performance of the employee's duties. Neither shall an employee accept any gift, personal service, or favor from an inmate or former inmate, or from anyone known to be associated with or related to an inmate or former inmate. This prohibition includes becoming involved with families or associates of inmates. If such contact occurs, it must be reported using the procedure in subsection c(5)

(1) An employee may not show favoritism or give preferential treatment to one inmate, or a group of inmates, over another.

...

(5) An employee who becomes involved in circumstances as described above (or any situation that might give the appearance of improper involvement with inmates or former inmates or the families of inmates or former inmates, including employees whose relatives are inmates or former inmates) must report the contact, in writing, to the CEO as soon as practicable. This includes, but is not limited to, telephone calls or written communications with such persons outside the normal scope of employment. The employee will then be instructed as to the appropriate course of action.

(6) Employees shall avoid situations which give rise to a conflict of interest or the appearance of a conflict of interest (see Section 6, Definitions).

(7) Employees shall not participate in conduct which would lead a reasonable person to question the employee's impartiality (see Section 20, Conflicts of Interest).

...

18. OUTSIDE EMPLOYMENT

...

b. Any employee who wishes to engage in employment outside the Bureau must obtain prior written approval for each activity using BP-S543.033 or BP-S166.033....

...

BURDEN OF PROOF

The parties agreed the Agency had the burden of proof.

BACKGROUND

The Agency employed Grievant as a Sports Specialist at FCC Forrest City, Arkansas. (JX3).

In 2009, the Agency began investigating Grievant based on an inmate's allegations. The investigation did not substantiate those allegations but did reveal other misconduct. When

first interviewed in 2010, Grievant readily admitted the misconduct. (AX2).

After that interview in November 2010, the Agency removed Grievant from his normal duties. It returned him to his normal duties in March 2012 without any notice that discipline might occur.

Approximately nine months later, the Agency first notified Grievant it proposed to discharge him for:
• inappropriate relationship with an inmate, which consisted of phone calls with a former inmate;
• failure to report the contact with the former inmate; and
• failure to obtain prior approval before working armed outside employment.
(JX3).

Grievant responded to the proposed discharge in January 2013, (JX4), and the Agency discharged him in May 2013, over a year after returning him to his normal duties. (JX5).

SUMMARY OF AGENCY'S POSITION

The Agency's mission is the care, custody and correction of individuals convicted or awaiting trial. It holds its law enforcement officers to a high standard of honesty and integrity.

The Grievant's 90 phone contacts with a former inmate, his contact with a former inmate at a bar in Little Rock and his failure to report these contacts are serious offenses. The offense may undermine the safety and security of the institution.

The Standards of Employee Conduct (Standards) states "Employees may not allow themselves to show partiality toward, or become emotionally, physically, sexually or financially involved with inmates, former inmates..." (AX4, p. 8).

The Standards also mandate:

> An employee who becomes involved in circumstances as described above (or any situation that might give the appearance of improper involvement with inmates or former inmates ...) must report the contact, in writing, to the CEO as soon as practicable. This includes, but is not limited to, telephone calls or written communications with such persons outside the normal scope of employment.

(AX4 p. 9).

Outside contact with a former inmate circumvents the Agency's procedures for secured, monitored communications. (Tr. 92). When employees circumvent secured, monitored communications, they enable inmates to run criminal enterprises, e.g., drug transactions within the prison. (Tr. 92-93). In fact, Mr. Galloway testified he had a specific security

concern because the Grievant told former inmate Perkins during one of their calls that another inmate was locked up in the special housing unit (SHU). (Tr. 105). Warden Haynes noted that if staff fail to draw boundaries with inmates, breaches of security and staff injury can occur. (Tr. 122).

Warden Haynes expressed his justified concern that Grievant could not be trusted to separate his personal life from his duties as demonstrated by 90 phone calls to a former inmate, a "chance encounter" at a Little Rock bar and his failure to report any of these contacts. (Tr. 122, 124 and 129-131). The Warden's conclusion was correct as Grievant disclosed to inmate Perkins that another inmate was locked up in SHU. (Tr. 105).

Grievant committed another serious offense when he failed to obtain approval for armed outside employment. The Standards state: "Any employee who wishes to engage in employment outside the Bureau must obtain prior written approval for each activity using BP-S543.033 or BP-S166.033." (AX4, p. 14).

Through the Standards and annual training the Agency warned Grievant that he could be removed for an Inappropriate Relationship with an Inmate, Failure to Report Contact with an Inmate and Failure to Seek Approval Before Working Armed Outside Employment. (AX4, Appendix A, p. 11 and 16; Tr. 87 and 124; AX5 and AX6). Finally, Grievant admitted that he attended annual training. (Tr. 217-218).

The Agency conducted a fair investigation into whether the Grievant had an inappropriate relationship with a former inmate, failed to report contact with a former inmate and failed to seek approval before working armed outside employment. The OIG Investigator obtained telephone records showing Grievant exchanged approximately 90 phone calls with former inmate Antoine Perkins between June 24, 2008 and September 4, 2009. (AX1; Tr. 18-19). In an interview, the Grievant admitted all of this misconduct. (AX2; Tr. 216-217).

The Grievant did not produce a single comparator that was treated more favorably.

In making penalty determinations, arbitrators are required to apply the same rules the Merit Systems Protection Board ("Board") applies. Where the charge is sustained, the Board will review the agency-imposed penalty only to determine if the agency considered all of the relevant factors and exercised management discretion within tolerable limits of reasonableness. In doing so, the Board, or in this case the arbitrator, must give due weight to the Agency's primary discretion in maintaining employee discipline and efficiency, recognizing the Board's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised.

In deciding to remove the Grievant, Warden Haynes properly considered the relevant factors established in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) (JX5). The deciding official need not show that he considered all mitigating factors, but only that

consideration was given to the specific, relevant factors in the case.

Warden Haynes considered the following:
• the grievant was a non-probationary and non-supervisory Sports Specialist and a federal law enforcement official, in a position of public trust who is held to a higher standard than non-law enforcement employees;
• the Grievant did not have prior discipline;
• the Grievant's eight year work record of acceptable level of performance;
• the Grievant violated Bureau policy;
• the serious nature of the offenses;
• the violation eroded his confidence in the Grievant's ability to follow policy in the future;
• there was no notoriety about the misconduct;
• the Grievant was on notice that his conduct violated the Standards;
• the Grievant admitted his actions and accepted responsibility for his actions;
• the penalty was consistent with the Table of Penalties and penalties proposed on other employees and
• alternative sanctions would not have the desired corrective effect given the serious nature of the charges.

The evidence demonstrates the Agency had "just and sufficient" cause to remove Grievant, a law enforcement employee, for an inappropriate relationship with a former inmate, failure to report contact with a former inmate and failure to seek approval before working armed outside employment.

The Agency's mission is the care and custody of federal offenders. Grievant's actions demonstrated he could not draw appropriate boundaries with former inmates and circumvented the Agency's ability to monitor inmate communication and activity. Grievant's action could have caused a breach of security and/or the introduction of contraband.

The Agency established by a preponderance of the evidence that the deciding official, Warden Haynes, appropriately considered all relevant *Douglas* factors and reasonably concluded that the serious nature of the Grievant's conduct outweighed any mitigating factors. Under the circumstances, the penalty of removal was not "so harsh and unconscionably disproportionate to the offense that it amount[ed] to an abuse of discretion." Accordingly, the Warden's decision is entitled to deference under applicable Board case law. The Agency respectfully requests that the grievance be denied and the removal be upheld.

SUMMARY OF UNION'S POSITION

Article 30 of the CBA governs "disciplinary and adverse actions" and states: ". . . disciplinary and adverse actions …will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply." (JX2 p. 24).

Where the employer bears the burden of showing just cause for discipline, arbitrators generally require the employer to". . .come forward and show that it had good and sufficient *reason* for meting out a penalty to Grievant and that the penalty so meted out was *appropriate*, i.e., commensurate with the nature of the offense." *Vista Chemical Co,* 104 LA 584, 587 (Nicholas 1995) (emphasis in original).

To ensure just cause exists, and that a grievant's rights are protected, the Agency's discipline is circumscribed by the *Douglas* factors. *Douglas v. Veterans Admin*. 5 M.S.P.R. 380, 305-06 (1981). Moreover, Agency decisions must not be arbitrary, capricious, or taken in bad faith. *Williams Pipe Line Co*., 70 LA 664, 666 (Barnhart, 1978). "A penalty that flows from incomplete analysis of both the misconduct and the individual employee is arbitrary." *Clow Water Sys. Co*., 102 LA 377, 380 (Dworkin, 1994). Finally, "it has always been 'axiomatic' that the degree of penalty should be in keeping with the seriousness of the offense." *Capital Airlines*, 25 LA 13, 16 (Stowe, 1955). In disciplinary matters, "a penalty that is markedly too harsh for the offense is unreasonable and an abuse of managerial discretion." *Clow Water*, 102 LA at 380.

The Agency's analysis of Grievant's situation did not comport with *Douglas*. The Agency abused its managerial discretion, was not tempered by application of the facts to reasonable judgment, and the termination must be set aside.

According to Special Agent Howard of the Office of Inspector General (OIG), this investigation was sparked by the accusations of inmate Gaines who allegedly identified Carey as the supplier of marijuana (Tr. 15-16).

But the OIG was not ever able to interview Gaines–a fundamental violation of Grievant's right to due process. The exact nature and particulars of Gaines's charges remain unknown, Gaines may not be cross-examined, nor the veracity of his account evaluated. This omission, standing alone, provides sufficient reason to set aside the termination.

Agent Howard's investigation "did not sustain" convict Gaines's accusations that Grievant smuggled marijuana or had received payments for doing so. (Tr. 27).

Agent Howard had a list of telephone contacts between Perkins and Carey that took place in 2008 and 2009–compiled in November of 2009. (AX1). In fact, Agent Howard had this list by August 31, 2009–the date he interviewed Perkins. (AX3).

By the 2013 termination, almost four years later, the phone calls from 2009 were the only evidence–other than the Grievant's own admission that he had worked as bank security in 2009–that the Agency marshaled against the Grievant.

As of August 2009-December at the latest–OIG knew that Perkins and Grievant had telephone contact, which, according to Agent Haynes, made Grievant completely

untrustworthy and unemployable. (Tr. 37, 129-31). Moreover, the Government knew that the Grievant had engaged in outside employment by November 29, 2010, when Carey admitted this fact as well as the phone calls. (AX3).

The Agency clearly knew about Carey's admissions. As soon as the Grievant returned to work after his interview, the Agency removed him from his regular job and assigned him other tasks. (Tr. 186). The Agency's failure to act in 2009 or in 2010 on these facts means these facts cannot be used in May 2013 to terminate him.

Tardiness in imposing punishment has resulted in terminations being set aside. In *Federal Bureau of Prisons and AFGE Local 1218*, Honolulu Hawaii, FMCS 11-54214 (Chang, 2012), Arbitrator Chang found discipline imposed some "twenty-two plus" months after the date of the incident is not "timely" and violates the CBA. *Id.* at 8.

In *Federal Bureau of Prisons and AFGE Local 3690*, Miami, (Hoffman, 2009), discipline issued more than a year after the most recent incident was held untimely, and the arbitrator sustained the grievance. *See AFGE Local 1218*, at 7.

In Federal Bureau of Prisons and AFGE, Fairton, New Jersey, (Harlan, 2010), the Agency decided not to impose discipline for 17 months due to "unexplained" delays. That delay warranted reversal of the discipline. *See AFGE Local 1218*, at 7.

Despite the alleged importance of the offenses, the Agency took too much time to impose discipline. The CBA mandates "timely disposition of investigations and disciplinary/adverse actions." (JX2 p. 24). Indeed, Warden Outlaw had long restored Grievant to his Recreation work in March 2012. (Tr. 194).

Further the Agency's rules do not provide adequate notice that the phone calls violate its rules. Under Section 9.b of the Standards of Employee Conduct, the rules on "Sexual Relationship/Contact with Inmates," are broader than the title implies, but not as wide as the Agency suggests. (AX4, p. 9).

This rule prohibits employees from showing partiality toward a former inmate (one that has been released from BOP custody for less than a year) and from becoming emotionally, physically, sexually, or financially involved with a former inmate. (AX4, p. 9). Grievant credibly testified, without contradiction, that he did not show any partiality or become emotionally, physically, sexually, or financially involved with Perkins. (Tr. 204-05). In fact Perkins stated inmates did not like Grievant because he "would not do them favors." (AX3).

Carey did not view his innocuous conversations with Perkins as "improper involvement" and that is why he did not report them. (Tr. 205). He now knows how the Agency interprets the rules and accepts it. (Tr. 205). Grievant's conduct does not warrant termination under a

reasonable interpretation of the rules when one considers the content of the contacts, regardless if there were many or few.

Moreover, when Carey went back to his normal assignment in March 2012 that should have been the end of matters.

CBA Article 30.d.2 states:

> . . . 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. . .

(JX2 p. 24).

Warden Outlaw told both Carey and Union President Roberts that the investigation into Carey was "closed" in March of 2012 and that Carey was being returned to Recreation. (Tr. 159, 161-64, 194). Under Article 30.d.2, that ends matters.

Seven months and four acting wardens later, matters changed radically with the arrival of Anthony Haynes. (Tr. 115-16, 153, 171). Warden Haynes, the decision maker in the matter, said that his attitude towards Warden Outlaw's handling of Carey could fairly be characterized as "critical." (Tr. 118, 146).

In this context, punishment involving the same events and work history amounts to double jeopardy. *City of Kenosha*, 76 LA 758, 760 (McCrary, 1981). This is yet another reason why Carey's termination should be set aside.

The parties and Warden Haynes agree that the *Douglas* factors apply to the assessment of discipline against Grievant. (Tr. 119-24).

A complete *Douglas* analysis as applied to Carey is best considered in the form of a table:

Douglas Factors	***Douglas*** Factors as applied to Grievant
(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;	Grievant did not have improper involvement with a former inmate. The Standards do not state that <u>any</u> contact is prohibited or reportable only <u>improper involvement.</u> The "armed post" allegation happened one time. Grievant's good behavior and the Agency's failure to act from November 2010 to May 2013, show no discipline is warranted. The offense was not repeated.
(2) the employee's job level and type of	No contact with the public and Grievant is not a

employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;	supervisor or prominent employee.
(3) the employee's past disciplinary record;	No discipline, good performance reviews and characterized by Warden Haynes as "having done an excellent job."
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;	Warden Haynes said Grievant "has done an excellent" job. Grievant was trusted to work with inmates even after the "investigation" and, even after Proposal Letter to transport them into town while armed. Grievant received awards for his work and his "Employee Performance Appraisals" were good and indeed for the period 1 April 2012 to 31 March 3013 Grievant was rated excellent or above in all areas, and as an overall excellent employee. In 2009, 2010, 2011 and 2013, Grievant's overall performance was rated as "exceeding expectations."
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;	Please see note at Factors Nos. 3-4.
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;	Termination cases processed similarly have been overturned. The CBA, at Article 6.b.2, provides for fair and equitable treatment "in all aspects of personnel management".
(7) consistency of the penalty with any applicable agency table of penalties	Warden Haynes could have given a letter of reprimand and gone up to termination. (AX4 Exh. 4, Attach. A). CBA Article 30.c mandates discipline be progressive in nature. (JX2, p. 24).
(8) the notoriety of the offense or its impact upon the reputation of the agency;	No publicity in the media.
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;	Rule was unclear and no evidence of warnings.
(10) the potential for the employee's rehabilitation;	Warden Haynes stated Grievant had been an excellent employee and "no doubt he can perform the duties as required by the standards." This was Grievant's first offense, and the CBA prescribes progressive discipline.

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and	Evidence that Inmates Gaines and Neely blamed Carey for having him put into Special Housing for marijuana possession. (Tr. 209; AX2). Perkins said inmates didn't like Carey, because he would not do them favors. (AX3).
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.	Reprimand was available. CBA enshrines progressive discipline. See Note 7 above.

This review of the *Douglas* factors shows they were not properly applied. For this reason alone, Carey's termination should be set aside.

Grievant seeks reinstatement, that he be "made whole in all respects" including lost wages, seniority, and reimbursement of attorney's fees, legal fees and related expenses. (JX1). Grievant is entitled to such an award. 5 U.S.C. § 5596; *See American Fed'n. of Gov't. Employees, Local 3882 v. Federal Labor Relations Authority*, 994 F.2d 20, 21 (D.C. Cir. 1993)

Requests for an award of attorney's fees are considered in relation to several factors: (1) the employee must be the prevailing party; (2) the fees must be "related to the personnel action; and, (3) the payment of fees must be warranted in the interest of justice." *Local 3882*, 994 F.2d at 21. Grievant should be restored to his position, and thus will be a prevailing party. The demand for reasonable attorney's fees is related to the personnel action: the Agency lacked just and sufficient cause to terminate him and its adverse action was not for the purpose of the efficiency of the service.

The grievance should be granted, and the termination deemed to be unjust and without cause. Grievant should be made whole, with back pay, interest, accrued annual leave and accrued sick leave that he would have received from the time of his termination until he returns to work; and, the Union should be awarded reasonable attorney's fees. The Arbitrator should retain jurisdiction of the case for 90 days in the event the parties cannot agree as to the appropriate remedy. The Union should have 30 days from the date of the award to reach agreement with the BOP concerning the amount of attorney's fees or this question should be submitted to the Arbitrator for determination.

ANALYSIS

The CBA does not define the phrase "just and sufficient cause and to promote the efficiency of the service, and nexus will apply." (JX1, Article 30. Section a) (just and sufficient cause). Moreover, "just and sufficient cause" may not be defined absolutely because of the diversity of potential misconduct and circumstances. Adolph M. Koven and Susan L. Smith, *Just Cause The Seven Tests*, (2nd ed., revised by Donald F. Farwell, 1992, p. 2).

Full and careful consideration was given to the entire factual record, including the credibility of the witnesses, the CBA, the exhibits, and all arguments.

Not every theory, standard, policy, definition, allegation or fact is listed, but all were considered. Further, while every one was considered, not every fact or reason in support of a statement is recited. Every admitted exhibit was considered. References to exhibits, testimony, arguments, or other material are not exhaustive. Rather, references are intended to be representative samples. Not every time that a witness corrected or altered his testimony, and not every time a witness refreshed his recollection has been described but all were considered. Not all contradictions in the evidence are recited, but all were considered. Implicit in every factual determination is an evaluation of the witnesses' credibility. Any evidence admitted for a limited purpose was considered only for that purpose. Any evidence to which an objection was sustained was disregarded as was any evidence which was presented but subsequently determined to be inadmissable.

Misconduct and Removal

The Agency's notice to Grievant of his proposed removal recited the following basis:

> inappropriate relationship with an inmate, which consisted of phone calls with a former inmate;
> failure to report the contact via telephone and via a chance encounter with the former inmate; and
> failure to obtain prior approval before working armed outside employment.

(JX3).

The Agency's decision to remove Grievant states:

> having contact with an inmate, failing to report it, and carrying a weapon on a job while off duty without permission are very serious infractions what have seriously undermined your credibility with the Agency. Your removal is warranted and in the interest of the efficiency of the service.

(JX5).

Untimely Action

The Agency began its investigation of Grievant in approximately June 2009 based on an inmate's allegation that Grievant smuggled contraband, i.e., marijuana. (Tr. 15-16; UX2). At that time, the inmate also described contact between Grievant and a former inmate. (UX2). As a member of the Agency's Special Investigative Support (SIS) attended this interview, the Agency received notice of this alleged contact in June 2009. (Tr. 46; UX2).

By August 31, 2009, Agent Howard had charts reflecting calls between Grievant and a former inmate. (Tr. 37). His report recites: "Between June 24, 2008, and September 4, 2009, [Grievant] and Perkins called one another approximately 90 times." (AX1).

Agent Howard interviewed Grievant on November 29, 2010 (Tr. 19-20; AX2). Following that interview and Grievant's admissions of contact with a former inmate and working off duty at an armed security post for a third party (AX2), the Agency reassigned Grievant to different duties. (Tr. 186-87). In March 2012, the Agency returned Grievant to his normal duties. (Tr. 160-61 and 194). Agent Howard closed his investigation and submitted his report in June 2012. (Tr. 30). The Agency proposed Grievant's termination on December 18, 2012–over two years after he admitted the misconduct. Ultimately, the Agency terminated Grievant in May 2013–over two and half years after he admitted the misconduct.

If Grievant's admitted misconduct justified his termination, the CBA obligated the Agency to take timely action. Specifically, the CBA "endorse[s] the timely disposition of investigations and disciplinary/adverse actions." (JX2, Article 30. Section d).

Indeed, the Standards provide that the "reckoning period" for the misconduct is two years and defines the "reckoning period" "as that period of time following the date management becomes aware of the offense during which that offense can be used to determine the sanction for a subsequent offense." (AX4, Attachment A, pp. 1, 11, and 16).

Based on the preponderance of the evidence, including the credibility of the witnesses, the excessive delay of over two years from November 29, 2010 until December 18, 2012 violates the CBA and means the Agency's termination of the Grievant was not taken for just and sufficient cause as defined in Article 30 of the CBA. *See Federal Bureau of Prisons and AFGE Local 1010, Beaumont, Texas*,[2] FMCS No. 12-54698, (Arb. Thomas A. Cipolla, 2013) (12 months excessive); *Federal Bureau of Prisons and AFGE Local 1010, Beaumont, Texas*,[3] FMCS No. 12-56222 (Arb. Barbara J. Wood, 2013) (24 months excessive); *Federal Bureau of Prisons and AFGE Local 1218, Honolulu Hawaii*,[4] FMCS 11-54214 (Arb. Lou Chang, 2012) (22 months excessive); *Federal Bureau of Prisons and AFGE Local 2441, Morgantown WV*,[5] FMCS No. 11-55696-A (Arb. M. Bernard Keisler, 2012) (13 months excessive); *Federal*

[2] Citations in blue are hyperlinked. Award also available at http://www.cpl33.info/files/BUREAU_OF_PRISONS_BEAUMONT_TX_AND_AFGE_1010_ABITRATION_OF_REMOVAL_OF_AAARON_WICKLIFF_FMCS_CASE_NO_12-54698_001.pdf)

[3] Available at http://www.cpl33.info/files/AWARD_BOP_Beaumont_TX_AFGE_1010_Massey_FMCS_12-56222_2-1.pdf).

[4] Available at http://www.cpl33.info/files/Untimely_Discipline_Honolulu_Manini.pdf.

[5] Available at http://www.cpl33.info/files/drenningdecision.pdf.

Bureau of Prisons and AFGE, Fairton, New Jersey,[6] (Arb. Norman R. Harlan, 2010) (17 months excessive); *Federal Bureau of Prisons and AFGE Local 3652, Chicago, IL.*,[7] FMCS No. 06-58934 (George Edward Larney, 2007) (21 months excessive); Theodore J. St. Antoine, ed., *The Common Law of the Workplace, The Views of Arbitrators*, § 6.15 pp. 210-211 (2nd ed. 2005).[8]

Double Jeopardy

Grievant and the Union President testified Warden Outlaw stated the investigation of Grievant was closed and Grievant was being returned to his normal job. (Tr. 163-64 and 194). The Agency objected to the testimony as hearsay, (Tr. 161-62) and the Union urged the statement was admissible. (Tr. 161-63). Neither the CBA nor applicable law require the application of the rules of evidence. *Antilles Consol. Educ. Corp.*, 64 FLRA 675, 677 (2010) (liberal admission by arbitrators of testimony and evidence is a permissible practice); *Nat'l Border Patrol Council & Nat'l Immigration & Naturalization Serv. Council*, 3 FLRA 401, 404-05 (1980) (liberal admission of testimony and evidence is the "usual practice" in arbitration). Moreover, the Federal Rules of Evidence recognize that the testimony is not hearsay as a statement by an official against the Agency's interest. FRE 801(d)(2).

Even absent this testimony, Warden Haynes testified the case was completed and the misconduct known when Warden Outlaw returned Grievant to his normal duties. (Tr. 128).

Based on the CBA, Article 30, Section d.1., Warden Outlaw's statement is notice that the Agency is taking no further action.

Even without Warden Outlaw's statement, returning Grievant to his normal assignment under the facts here, e.g., the misconduct is known and no notice that discipline or adverse action may be taken, serves as notice under Article 30 that no disciplinary or adverse action will be proposed.

Based on a preponderance of the evidence, including the credibility of the witnesses, taking action in December 2012 based on the misconduct admitted by Grievant in November 2010 violated the CBA. Elkouri & Elkouri, *How Arbitration Works*, at pp. 980-83 (Alan Miles Ruben, Editor-in-Chief, 6th ed., 2003). Accordingly, based on the preponderance of the

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[6] Excerpt available at http://www.cpl33.info/files/fci-fairton-donnellwhite.pdf.

[7] Appendix to Union's Brief, Attachment 3.

[8] Prior awards may be useful guides and even authoritative but are not necessarily binding. *See* Elkouri & Elkouri, *How Arbitration Works*, at pp. 575-76 (Alan Miles Ruben, Editor-in-Chief, 6th ed., 2003).

evidence, including the credibility of the witnesses, the Agency's termination of the Grievant was not taken for just and sufficient cause as defined in Article 30 of the CBA.

Douglas Factors

The Agency must establish by a preponderance of the evidence the facts which support the its decision to terminate Grievant. *Douglas v. Veterans Admin.*, 5 MSPB 313, 324, 5 M.S.P.R. 280 (MSPB 1981).

Further, an adverse action may be adequately supported by evidence but still be arbitrary and capricious, if no rational connection exists between the misconduct and the interest assertedly served by termination. *Douglas* at 5 MSPB at 325.

The review of an agency penalty is to assure that the agency conscientiously considered the relevant factors and struck a responsible balance within tolerable limits of reasonableness. Only if the agency failed to weigh the relevant factors, or the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Douglas* 5 MSPB at 332-33.

The agency bears the ultimate burden to persuade that the termination is appropriate. *Douglas* 5 MSPB at 333. Selecting an appropriate penalty is a distinct element of the agency's decision, and properly within its burden of persuasion. *Douglas* 5 MSPB at 334.

Mitigation is appropriate only where the agency failed to weigh the relevant factors or where the agency's judgment clearly exceeded the limits of reasonableness. *Balouris v. U.S. Postal Service*, 2008 MSPB 1, 3 ¶6, 107 M.S.P.R. 574 (2008). The deciding official need not show that he considered all mitigating factors, but only that consideration was given to the specific, relevant factors in the case. *Id.* Still, the relevant factors may be weighed if the agency failed to demonstrate that the deciding official considered specific relevant mitigating factors before deciding to terminate. *Id.*

Based on the preponderance of the evidence, including the credibility of the witnesses, the deciding official failed to consider known, specific, and relevant mitigating factors before deciding to terminate, and the termination exceeded the limits of reasonableness.

For example, the Agency either failed to carry its burden with respect to a considered factor or failed to consider the following known, specific, and relevant mitigating factors contained in the records at the time of the decision to terminate.

Agent Howard's statement that Grievant had "a close personal friendship with this inmate" (Tr. 27) overstated the facts. To illustrate, the charts created from the telephone records reveal that approximately two-thirds of the "calls" lasted less than 1 minute and approximately one-third of the "calls" lasted less than 30 seconds. (AX1). As explained by Grievant, many of the dialed calls did not lead to actual communications but instead the call was not answered. (JX4, p.2; Tr. 202). Accordingly, the report's description of 90 calls over approximately 15 months creates a view of the contact for the deciding official markedly different from the contact that occurred. (Tr. 130).

Under the heading "Sexual Relationships/Contact With Inmates" the Standards prohibit partiality toward and emotional, physical, sexual and financial involvement with former inmates. (AX4, p.8, 9.b.). It states: "Employees are subject to administrative action, up to and including removal for any *inappropriate contact* or relationship with [former] inmates..." *Id.* (emphasis added). The heading and the introductory paragraphs do not convey that all contact is prohibited only inappropriate contact.

The Agency also relied on the following passage on the next page to terminate Grievant:

> An employee who becomes involved *in circumstances as described above* (or any situation that might give the *appearance of improper involvement* with inmates or former inmates or the families of inmates or former inmates, including employees whose relatives are inmates or former inmates) must report the contact, in writing, to the CEO as soon as practicable. This includes, but is not limited to, *telephone calls or written communications with such persons outside the normal scope of employment*.

(AX4, p.8, 9.b.). (emphasis added).

In the context of the Standards, this passage does not ban all contact. It only conveys that inappropriate contact or situations that might give the appearance of improper involvement are prohibited.

The former inmate had earned a professional personal trainer certificate. (JX4, p.2; Tr . 199). When contacted by the former inmate, Grievant provided him with job leads at local gyms and opportunities for volunteer community organizations. (JX4, p.2; Tr. 201). Such communications may not reasonably be considered as outside the normal scope of the position of a Sports Specialist, such as Grievant. (JX4, p.2; Tr. 202 and 204). Nor can such communications be reasonably considered as giving the appearance of improper involvement with the former inmate. *Id.*

The interview of the former inmate contains the following:

> PERKINS said he asked CAREY for cigarettes while at FCC-PC and CAREY refused. PERKINS said inmates at FCC-FC didn't like CAREY, because he would not do them favors. PERKINS said CAREY came to FCC-FC to work, not be friends with inmates.

(AX3, p.3) (capitalization in original).

That passage establishes Grievant did not show any partiality toward the former inmate or other inmates.

Grievant did not provide his contact information to the former inmate. (JX4; Tr. 201).

Grievant did not invite the former inmate to meet him at the Little Rock bar and grill. (JX4. p. 2; Tr. 202-03). Rather, it was a chance encounter. *Id.*

In determining the discipline for an improper relationship, the Standards recite: "Degree of involvement is a primary consideration in determining severity of penalty." (AX4, Attachment A, p. 11). The record here reflects a low degree of involvement.

Since 2010, when Grievant admitted the conduct which the Agency viewed as violations, he had not violated any Agency rules through the day of his termination in 2013. (UX4).

Grievant's supervisor rated his overall performance as excellent for the periods 04/01/2008 to 3/31/2009; for 04/01/2009 to 3/31/2010; from 04/01/2010 to 3/31/2011; and 4/01/2012 to 3/31/2013. (UX4). During this time, Grievant's supervisor rated him as outstanding in one job element for the period 04/01/2008 to 03/31/2009; outstanding in two job elements for the period 04/01/2009 to 03/31/2010; and outstanding in two job elements for the period 04/01/2012 to 03/31/2013.

Warden Haynes testified Grievant did an excellent job (TR. 129)and that he had "no doubt [Grievant] can perform the duties as required by the [S]tandards." (Tr. 123).

The former inmate Perkins returned as an inmate, and the Agency assigned him to Grievant's supervision. Now knowing that the Agency viewed his contact with the former inmate as improper, Grievant reported this fact to his superior and to the internal special

investigative agent. (Tr. 156 and 197). Such action demonstrates Grievant will comply with policies which are clearly explained and that he can be rehabilitated.

While Warden Haynes testified the termination of Grievant was consistent with the action taken in other cases of a similar nature, the Agency did not provide any examples. As the Agency has the burden to show it complied with the *Douglas* factors, *Douglas* 5 MSPB at 333-34, it did not carry its burden on this factor.

Douglas Factors	*Douglas* Factors as applied by Decision Maker	*Douglas* not applied by Decision Maker
(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;	Decision maker believed Grievant had made 90 phone contacts.	Did not consider that significant number of dialed calls were short indicating no contact occurred, (AX1); that Grievant believed the requirement for approval of off duty work had changed, (JX4); that Grievant did not show partiality toward the former inmate or other inmates (AX3, p.3); Grievant did not provide his contact information to the former inmate. (JX4; Tr. 201); the encounter in Little Rock was by chance (JX4 p.2; Tr. 202-03); "Degree of involvement is a primary consideration in determining severity of penalty." (AX4, Attachment A, p. 11); and that the offenses were technical or inadvertent.
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;	Non-probationary and non-supervisory Sports Specialist and a federal law enforcement official, in a position of public trust who is held to a higher standard than non-law enforcement employees. (JX5).	Few contacts with the public and not prominent position.
(3) the employee's past disciplinary record;	No prior discipline.	

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;	Grievant's past work record of having been employed with the Bureau of Prisons for eight years at an acceptable level of performance. (JX5).	Grievant's performance was excellent. (UX4; Tr. 129).
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;	Violation eroded decision maker's confidence in the Grievant's ability to follow policy in the future. (JX5).	Grievant performed at an excellent level after the misconduct. (UX4; Tr. 129).
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;	Warden Haynes testified he considered this factor.	Agency did not carry its burden for this factor because it did not provide examples of others terminated.
(7) consistency of the penalty with any applicable agency table of penalties	The penalty was consistent with the Table of Penalties and penalties proposed on other employees (JX5)	Did not consider Article 30.c of the CBA concerning progressive discipline. (JX2).
(8) the notoriety of the offense or its impact upon the reputation of the agency;	No notoriety about the misconduct. (JX5).	
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;	Decision maker believed Grievant on notice that his conduct was a violation of the Standards given that he had annual training on the Standards. (JX5).	The rule and training ban inappropriate contact or appearance of improper involvement and did not require reporting all contact. (AX4 pp. 8-9; AX6 pp. 1-9). No evidence of warnings. Grievant believed the rule regarding outside employment had changed so permission was not needed. (JX4).
(10) the potential for the employee's rehabilitation;	Warden Haynes testified seriousness of offenses meant no rehabilitation. (Tr. 123-24).	Grievant reported to superiors that former inmate returned and was assigned to Grievant's supervision. (Tr. 156 and 197). Warden Haynes stated Grievant

		had been an excellent employee (Tr. 129) and had "no doubt he can perform the duties as required by the standards." (Tr. 123). Excellent performance after misconduct. (UX4).
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and	Not considered.	Inmates Gaines and Neely blamed Carey for having him put into Special Housing for marijuana possession. (Tr. 209; AX2). Perkins said inmates didn't like Carey, because he would not do them favors. (AX3).
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.	Decision maker concluded that they would not have the desired corrective effect given the serious nature of the charges.	Grievant reported to superiors that former inmate returned and was assigned to Grievant's supervision (Tr. 156 and 197) and had excellent performance reviews following the misconduct (UX4) indicating rehabilitation occurred.

As the decision maker did not consider several known, specific, and relevant mitigating facts that support a penalty lesser than removal, the Agency failed to carry its burden to show compliance with *Douglas*.

Remedy

While the *Douglas* factors indicate some discipline less than removal is warranted, the violations of the CBA by the Agency require that Grievant be reinstated to his former position and be made whole in all respects less any earned income and any unemployment benefits.

Under the Back Pay Act (BPA), 5 U.S.C. § 5596, an arbitrator may award backpay when he finds: (1) an unjustified or unwarranted personnel action; and (2) that action directly resulted in the withdrawal of "pay, allowances, or differentials." *U.S. Dep't of Transp., FAA, Detroit, Mich.*, 64 FLRA 325, 329 (2009). A violation of a CBA provision is an unjustified or unwarranted personnel action. *AFGE, Local 1592*, 64 FLRA 861, 861- 62 (2010).

For a grievant to be eligible for an award of attorney fees, it must be the "prevailing party." When a grievant receives a mitigated penalty, it has received significant relief and is a prevailing party. *AFGE, Local 987*, 64 FLRA 884, 886-87 (2010).

In the interest of justice, an award of reasonable attorney's to the Union is warranted. *Naval Air Development Center, Navy and AFGE, Local 1928*, 21 FLRA 131 (1986).

AWARD

Based on the CBA, applicable law and the evidence, including the credibility of the witnesses, the Agency failed to establish by a preponderance of the evidence that the Agency had just and sufficient cause, as defined in the CBA, to terminate the Grievant.

The Grievance is upheld.

Grievant is to be reinstated to his former position, is to made whole in all respects including lost wages, seniority, accrued annual leave, and accrued sick leave, less any earnings from employment and any unemployment benefits. In the interest of justice, an award of reasonable attorney's fees to the Union is warranted.

The Arbitrator's fees and costs shall be borne as provided in the CBA.

The Arbitrator retains jurisdiction of this matter to correct any clerical errors, e.g., references to exhibits or the transcript and to address any unresolved interpretation of this award or its application, including any remedy, for 90 days following the date of the Award. A party must make a written request to the Arbitrator with notice to the other party via the same means of transmission.

March 31, 2014
Date

William E. Hartsfield, Arbitrator