

**UNITED STATES OF AMERICA
FEDERAL MEDIATION AND CONCILIATION SERVICE
IN THE MATTER OF ARBITRATION
BETWEEN**

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL NO. 1637

Union

and

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTION INSTITUTION,
SEAGOVILLE, TEXAS

Agency

FMCS No. 15-53210-3

Before: Neutral Arbitrator Stephen Crable, Esquire

For the Federal Bureau of Prisons:

Stuart Bauch
Assistant General Counsel
FCI Seagoville, Texas

For AFGE Local 1637:

Tony Cornelius
Second Vice President
1713 Rancho Drive
Mesquite, Texas

I.
STATEMENT OF THE CASE

On June 23, 2014, the Bureau of Prisons (“Bureau” or “Agency”) issued a notice of proposed discipline recommending a five (5) day suspension for Raymond Cook, II, an employee of the Agency (“Grievant”). The alleged misconduct triggering the suspension involved Grievant’s misuse of his government issued travel charge card during 2012. The Grievant did not dispute the allegations. On January 27, 2015, the Agency reduced the suspension to one (1) day, and the Grievant served the suspension during January 2015. The American Federation of Government Employees, Local 1637 (“Union” or “Local 1637”) grieved the suspension pursuant to the relevant Collective Bargaining Agreement (“Master Agreement” or “Agreement”), and the parties subsequently utilized the offices of the Federal Mediation and Conciliation Service to select the undersigned Arbitrator to resolve the dispute.

On April 15, 2015, the Union filed a Motion for Decision without a Hearing, seeking exoneration of the Grievant from disciplinary action. In the main, the Union argued that the discipline was untimely and collaterally estopped given the delay between the misconduct and the final Agency action. The Agency filed a reply on April 24, 2015 arguing that Master Agreement between the parties does not require the Agency to comply with any specific timetable for taking disciplinary action and urged the Arbitrator to deny the Union’s motion. The Arbitrator denied the Union’s motion without prejudice.

The parties appeared through their representatives and offered arguments and evidence at an arbitration hearing held at the FCI in Seagoville, Texas on May 14, 2015. A court reporter prepared a written transcript of the proceedings, and the parties filed written briefs on July 17, 2015.

II.
STATEMENT OF THE ISSUE

Whether the disciplinary/adverse action was for just and sufficient cause for Grievant's one day suspension without pay, and, if not, what shall be the appropriate remedy?

III.
POSITION OF THE PARTIES

A. AGENCY

The Agency argues that there is no dispute about Grievant's misconduct. He admitted using his government issued credit card for personal business on several occasions. The Agency investigated the misconduct and proposed a five day suspension after reviewing the discipline issued to an Agency supervisor for similar misconduct. After the Grievant met with Eddy Mejia, the Warden at Seagoville, the Warden decided the discipline should be reduced to a one day suspension. In reaching his decision, the Warden considered the Douglas factors, and he gave weight to the length of time that had passed between the misconduct and the Agency decision. The Agency argues that there is no time limit for investigating misconduct in the Agreement. While acknowledging delay, the Agency argues that a back log of

cases, and the personal illness of key participants explained the delay.

B. UNION

The Union argues that the Agency did not meet the burden of showing just cause for the disciplinary suspension of the Grievant. The Agency did not adequately consider the Douglas factors in determining discipline. The Agency representatives identified different and conflicting rules that Grievant violated. According to the Union, the Agency official who proposed discipline and the Agency official who assessed the discipline did not investigate the Grievant's work record and had no meaningful input into the proposed or final disciplinary action. The Union asserts that the Agreement requires timely, corrective discipline and that the Agency's handling of the discipline met neither burden. Nearly three years passed from the time of the offense until Grievant was disciplined. This delay amounts to double jeopardy. Finally, the Union argues there is no showing that a lesser penalty would not have been adequate to correct the Grievant's conduct, particularly in light of his good record, the mitigating circumstances surrounding the misconduct and his forthright acknowledgment that his use of the government credit card was not permitted.

**IV.
RELEVANT PROVISIONS OF THE AGREEMENT, RULES and
REPORTS**

Article 30 -- DISCIPLINARY AND ADVERSE ACTIONS

* * *

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize there are offense 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.

* * *

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.

STANDARDS OF EMPLOYEE CONDUCT, ATTACHMENT A

* * *

Nature of Offense

16. Unauthorized possession or use of, loss of, or damage to government property or property of others.

First Offense

Official reprimand to removal

* * *

53. Misconduct off the job

First Offense

Official reprimand to removal

DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEW OF THE FEDERAL BUREAU OF PRISONS' DISCIPLINARY SYSTEM

Executive Digest

* * *

BOP guidance instructs CEOs to impose similar penalties for similar misconduct only at their current institution, which does not ensure that discipline is imposed consistently BOP-wide.

* * *

The BOP did not consistently report, investigate, and adjudicate employee misconduct cases in a timely manner.

RECOMMENDATIONS

We make ten recommendations...

9. Establish written time guidelines for the investigative and adjudicative phases of the disciplinary system....

V. **BACKGROUND**

The Grievant has worked for the Agency as a Correctional Systems Officer and a Corrections Officer for 12 years. He has a good employment record and received Outstanding or Exceeds performance evaluations in his last 3 annual performance reviews. Grievant has received a discretionary pay increase, a QSI, and a time off award for the quality of his work for the Agency.

Between April 21, 2012 and May 10, 2012, Grievant used his government credit card to make cash withdrawals on several occasions, totaling less than \$1,000. Grievant was not on travel status when he made the withdrawals and acknowledges that he misused his government credit card for personal expenses. Grievant paid the credit card bill in full when it became due. During the arbitration hearing, the Grievant indicated that he was experiencing personal problems at the time, including a divorce, loss of a

child, and health issues. Grievant voluntarily sought help from an Employee Assistance Program as a result of these problems. Prior to the hearing, the Grievant had not shared these circumstances with the Agency.

In *June 2012*, the Agency's Finance Branch in Washington DC identified Grievant's improper use of his government credit card during normal auditing procedures and reported the improper use to the Office of Internal Affairs ("OIA"). On June 23, 2012, the OAI authorized Helton Gentry, the local Security Investigation Supervisor ("SIS") at the Seagoville facility, to investigate the Grievant's misuse of the government credit card and report his finding to the OIA within 120 days.

SIS Helton interviewed Grievant on *May 20, 2013*, nearly a year later, and Grievant signed an affidavit in which he admitted improperly using his government credit card and taking full responsibility for his actions.

In March 2013, Human Resource Manager LaTanya Cottrell joined the Agency staff in Seagoville. Ms. Cottrell inherited a backlog of cases. At some point, nearly a year after SIS Helton's investigation, Ms. Cottrell became aware of the investigation and prepared a letter proposing to suspend the Grievant for 5 days on account of his misuse of his travel charge card. Cottrell met with Grievant and gave him the letter proposing the suspension on *June 23, 2014*.

On July 8, 2014, Grievant met with Warden Eddy Mejia, who reviewed the proposed suspension with Grievant and offered the Grievant the opportunity to make whatever comments he wished. Six months later, in a letter dated *January 27, 2015*, Warden Mejia reduced the proposed 5 day suspension to a 1 day suspension. The

Grievant served his suspension, as directed by the Warden, on January 30, 2015. The Warden noted that he reduced the proposed suspension in consideration of the Grievant length of service and his performance “at an acceptable level”. During the arbitration hearing, the Warden testified telephonically, over the objection of the Union, that he considered the Douglas factors and the extended delay in investigating the Grievant’s misuse of the travel card as reasons for reducing the proposed suspension from 5 days to 1 day.

VI.
DISCUSSION AND OPINION

The facts in this case are not in dispute. During early 2012, the Grievant improperly used his government credit card to obtain cash for personal use. He was not in travel status, and he readily acknowledged, when questioned by the Agency, that he should not have done so. The Grievant paid the credit card bill in a timely fashion, and the Agency incurred no penalties because of the Grievant’s actions. At the time of the credit card misuse, Grievant was experiencing severe personal problems that he only belatedly shared with the Agency at the arbitration hearing.

While Grievant’s misuse of the government credit card violated Agency rules and warranted some type of disciplinary action, a 1 day suspension, with consequent loss of pay, is not supported by considerations of just cause and the Douglas factors. The Agency offered several different versions of which Agency rule (ranging from off duty conduct to unauthorized use of government property) the Grievant violated. Neither of these referenced rules was specifically cited in the notice of proposed discipline, and the

verbiage of both rules differed from the verbiage describing the offense in the proposed discipline letter.

While this lapse might not undermine just cause if it were the only shortcoming in the case, the Agency only considered one instance of discipline for comparable conduct at the Seagoville facility in determining the Grievant's discipline. It did not review, on an Agency wide basis, discipline assessed other Agency employees for the same offense. This omission is particularly significant in light of the critique of this very practice in the Office of Inspector General's extensive Review of the Federal Bureau of Prisons' Disciplinary System.

Grievant readily acknowledged and accepted responsibility for his actions, and there is no indication that a monetary penalty is needed to deter him from future instances of misuse. Insofar as reflected by the record, the Grievant has an excellent 12 year work history. He received performance ratings of "exceeds" or "outstanding" in the last 3 rating periods. He has been promoted during his job tenure, and he received both a Quality Step Increase and a Time Off award for his excellent performance. It is noteworthy that Grievant maintained this work record during a period of time when he faced either an uncertain fate or a 5 day suspension for misuse of the government credit card. Moreover, the Warden apparently believed that the Grievant had an "acceptable" employment record, when, in fact, Grievant had an exemplary performance history.

Finally, and most telling, is the passage of time between the Grievant's misuse of the government credit card and the Agency's assessment of discipline. The Agreement speaks generally to the importance of timely investigations. "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.”

Agreement, Section 30(d). The Arbitrator recognizes, as have other Arbitrators cited by the Agency, that the Agreement does not contain a specific time limit for completing an investigation.

However, it does not follow that the language of Section 30(d) is meaningless, or that the Agency is free to take whatever time it likes in completing investigations. The Office of Internal Affairs (“OIA”) and General Counsel for the Bureau of Prisons have recommended that local investigations be completed in 120 days. The Inspector General for the Department of Justice has recommended that the Bureau of Prisons adopt formal written guidelines for the investigation and adjudication of disciplinary matter. Apparently, none of these recommendations have been heeded.

The Arbitrator neither needs to decide whether the recommendations of the General Counsel, OIA or Justice Department IG are binding on the Agency; nor needs to determine a bright line test for timeliness. It is sufficient to say, that in this case, a delay of nearly three years mitigates the appropriateness of Grievant’s discipline. Once the OIA reported the Grievant’s misuse of the credit card to the Special Investigations Supervisor at the Seagoville facility, it took a year for the investigation to be “completed”. The investigation essentially consisted of an interview with the Grievant in which he admitted using the credit card improperly. Another year passed before the Agency proposed a 5 day suspension, and 9 more months went by before the Agency suspended the Grievant for 1 day. For an offense that occurred in the spring of 2012 and

was discovered shortly thereafter, nearly 3 years passed before the Agency disciplined the Grievant. This extended delay becomes a penalty in and of itself, and the delay undermines the effectiveness of corrective employee discipline.

For all of the above reasons, the Arbitrator concludes that there was not just cause to suspend Grievant for one day without pay. The appropriate remedy is to reduce the Grievant's one day suspension without pay to a one day "paper" suspension. That is, to a one day paper suspension, with pay. Misuse of a government credit card is a serious offense that, under other circumstances, might warrant a disciplinary suspension or even termination in a particularly egregious case. The absence of any system wide guidance leaves to the Arbitrator the task of determining the appropriate discipline in this case without the benefit of Agency wide practice. However, this decision should not be cited as establishing the appropriateness of such a light penalty in other cases with different facts.

The Arbitrator rejects the Union's argument that the Grievant should be completely exonerated and his record expunged. While the record does not support the loss of pay penalty imposed by the Agency, neither does it support a finding that Grievant is blameless. He misused the government credit card and his record should reflect that fact so long as permitted by the relevant provisions of the Agreement. The Arbitrator also rejects the Union's requests for other extraordinary relief.

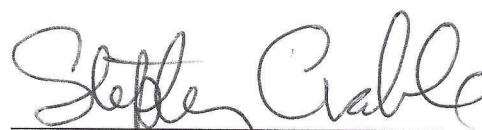
The Arbitrator hastens to add that he finds no ill intent by the Agency in the handling of Grievant's investigation and adjudication. Staffing considerations and the press of more significant criminal matters requiring staff attention explain but do not

excuse the delays in this case.

VII.
AWARD

While there was just cause for discipline of the Grievant for misusing his government credit card, mitigating circumstances and the Douglas factors require that the appropriate remedy is to reduce the one day suspension, without pay, to a one day suspension, with pay. The Agency shall make Grievant whole for any lost pay or benefits within 45 days of the date of this Award. The Grievant's record shall continue to reflect this incident so long as permitted by the Agreement. The Arbitrator retains jurisdiction of this dispute for 30 days from the date of this decision solely for the purpose of resolving any remedy disputes.

Dated: July 28, 2015



Stephen Crable
Arbitrator & Mediator
2116 Paseo Ponderosa
Santa Fe, NM 87501
(202) 365-0948
Scrabble8454@gmail.com.