BEFORE
STEVEN E. KANE
ARBITRATOR

IIN THE MATTER OF THE ARBITRATION BETWEEN	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL NO. 1242 Union	)	FMCS No. **13-56083-A**
and	)	June 6, 2014
U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, UNITED STATES PENITENTURY ATWATER, CA …… Agency	)	

RE: JUAN MENDOZA
Grievant

OPINION AND AWARD

Appearances

For the Union: Donald E. Martin, Jr., President, AFGE Local 1242

For the Agency: Darrel C. Waugh, Assistant General Counsel, Federal BOP

Arbitrator

Steven E. Kane, selected by the parties

Proceedings

The matter was heard in Merced, CA on January 9, 2014. . A transcript of the hearing was made by a court reporting firm. Briefs were submitted and exchanged on February 28, 2014.

Issue

At the hearing, the parties were able to agree upon the following issue presented to the Arbitrator.

> Whether the grievant was terminated for just cause, and if not, what is the appropriate remedy?

Pertinent Contract Provisions

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.

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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 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; and

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Key Facts

Many of the facts in this case were stipulated through 13 joint exhibits.

The Agency in this case is the U.S. Department of Justice, Federal Bureau of Prisons, United States Penitentiary (USP), Atwater, California. The Collective Bargaining Agreement effective currently is bargained nationally between the Council of Prison Locals, AFGE and the Federal Bureau of Prisons, as a Master Agreement, with locations negotiating local supplemental agreements. The last national agreement printed was effective from March 9, 1998 through March 8, 2001. It has been extended for one year increments by mutual agreement as provided under Article 42 of the Collective Bargaining Agreement.

The Agency operates a "maximum security prison" prison in rural California, confining some of the most dangerous convicts in the Bureau of Prisons. Security is an overriding issue for both egress and ingress.

The Grievant, Juan Mendoza, has been employed by the Atwater facility for 12 years. Four years ago he became a senior officer specialist. As such, he is responsible for providing supervision, protection, control and accountability of inmates. He ensures that judicial sanctions are carried out with respect to inmates that are in custody. He provides orientation and guidance to lower graded officers.

The Grievant is subject to arduous, adverse and stressful working conditions and environments. These can include possible gang fights and hostage situations. He is authorized to carry firearms and use deadly force in order to maintain control of inmates. It's important to maintain constant vigilance when at work, even on occasions when he works long or an irregular hours as an officer. The Grievant understands Bureau of Prisons' standards of employee conduct provide that employees' inattention to duty constitutes a violation of the Agency's Standards of Conduct

One of the Grievant's assignments is to function as a Mobile Patrol Officer. The duties include preventing inmate escapes and unpermitted things or people from entering the prison. He drives a truck on a perimeter road around the prison checking the fence lines at approximately 15 miles per hour. One lap around the institution may be a mile and a half.

On September 7, 2011, Grievant was assigned to work as a Mobile Patrol Officer on the midnight to 8AM shift. He did not feel well, and took some non-prescription medicine approximately half an hour before his shift began. The medication made him drowsy, and he took another dose of it at approximately 3 AM.

At 6:15 AM, 16 employees, including the prison Warden, were out for a run. Warden Rios and Lieutenant Morgan observed a stationary perimeter patrol truck and separated from the other joggers. As they approached the truck, they observed the Grievant at the wheel. He had his uniform shirt off. After conversing with the Grievant, Warden Rios and Lieutenant Morgan allowed the Grievant to finish his shift.

The next day the Grievant met with the Warden at the latter's request. They discussed the incident and the Grievant apologized... In his sworn affidavit regarding the incident,

he admitted he "…might have dozed off", "might have fell asleep". At the conclusion of their meeting, the Warden directed the Grievant to report it to Internal Affairs.

On May 29, 2012, the Grievant was given notice by his Captain that the latter proposed a three day suspension for inattention to duty on September 7, 2011.The Grievant sought to challenge the tentative disciplinary action, but due to administrative confusion, he did not file the proper document.

On February 12, 2013 newly appointed Warden Copenhaver reduced the suspension to two days.

There was disagreement as to certain facts, which are identified in the summary of witness testimony below. Each of the witnesses was credible, although their testimony regarding key events varied.

Witness Testimony

The Grievant testified that while the security truck was stationary, his eyes were closed when he blinked as a result of rubbing his eyes and sneezing, due to the effect of the medication. He further testified that he had been stationary in the vehicle with his foot on the break, never in the park mode, for about two minutes. Regarding his meeting with the Warden the next day, he admitted that he used the term "dosed off", which to him in Spanish meant "kind of dizzy", as he used the word "mareado" which translates from Spanish as "dizzy". He explained that having Spanish as his primary language, sometimes he struggled with English.

Lieutenant Zaragoza testified that a Special Investigative Supervisor lieutenant would assist the Special Investigative Agent official to prepare case files alleging misconduct. That file is sent to the Warden, who approves it being sent to the Office of Internal Affairs in Washington, DC. The Office of Internal Affairs determines if the case is approved for an investigation by the local Special Investigative Agent, or occasionally that Office would conduct the investigation Lieutenant Zaragoza explained that he and Special Investigative Agent Estrada conducted the investigation in this case. They got sworn affidavits from those involved, with the exception of Warden Rios. They obtained a memo, rather than an affidavit, from the Warden because they understood in cases where a Warden is a witness, one usually obtains a memo.

In this matter the Office of Internal Affairs approved the case for local investigation. Thereafter, the Lieutenant did not sustain the second violation of policy charge which resulted from the Grievant not wearing the proper uniform.

Lieutenant Zaragoza explained away the comment on the document from the Office of Internal Affairs clearing the case for investigation which stated "An affidavit should be obtained from Warden Rios. He witnessed staff misconduct and therefore should provide an affidavit." He pointed out that it was included in the "General Comments (for future reference)" section.

Lieutenant Zaragoza also testified from personal experience that someone working in the perimeter patrol post must remain vigilant at all times.

Lieutenant Morgan testified that he was out on the morning run with the Warden on September 7, 2011. He approached the mobile patrol vehicle and observed the Grievant with his head down initially. When he knocked on the door, the Grievant raised his head. Their conversation only dealt with whether the Grievant was OK. Lieutenant Morgan was confident that the Grievant would be awake until the end of the shift, and therefore didn't replace him. The lieutenant also testified he had never known the Grievant to lie.

Human Resources Manager Cham-Sanchez testified that in discussing the proposed suspension with the new Warden, she reviewed a prior case of inattention to duty in the last year where an employee had fallen asleep. In that case, the proposed suspension was three days and the Warden's decision was to reduce it to one day. In order to be consistent with the prior case, Warden Copenhaver decided to reduce the Grievant's suspension to one day. She drafted the decision letter and forwarded it to the western region headquarters in Stockton. They reviewed it and wanted to revise the decision to a two day suspension. Human Resources Manager Cham-Sanchez testified that in addition to the regional human resources review, there's something call an Employment Law and Ethics Branch review of each proposal letter. Employment Law and Ethics has to approve every proposal before it's issued at an institution. Since the initial and proposed disciplinary action changed in this matter, the review of the actual decision letter in terms of going up to the regional human resources level as well as legal review is the same on the decision letter as it is for the proposal letter, going up and down twice for each regional reviewing body

Human Resources Manager Cham-Sanchez also testified that a year and a half between an unapproved act and the decision letter was the standard amount of time at Atwater Penitentiary. Guidelines in the Bureau of Prison that specify that a proposal should be issued within 75 days of the incident. Since the regional office reviews all proposals and decisions within the western region, they have a backlog. She opined that a year and a half between the misconduct and decision letter is too long.

Warden Copenhaver testified that there are 375 staff to cover the 1500 inmates at Atwater. He had worked a perimeter patrol. Alertness on mobile patrol is critical since the officers carry weapons. He further testified that "dozing off" meant falling asleep to him. Lastly, wardens completing affidavits are unusual.

Position of the Parties

The Agency suggests that the criteria for determining just cause should be those first articulated almost fifty years ago by Arbitrator Carroll Daugherty to seven tests in the seminal case *Enterprise Wire Company*, 46 LA (BNA) 360, 363-365 (1966) They are:

(1) Did the Agency give the employee forewarning of the probable consequences of the employee's disciplinary conduct?
The Agency suggests that the criteria for determining just cause should be those articulated first

(2) Was the Agency's managerial order reasonably related to: (a) the orderly, efficient, and safe operation of the Agency's business; and (b) the performance that the Agency might properly expect of the employee?

(3) Did the Agency, before administering discipline, make an effort to discover whether the employee did in fact violate or disobey an order of management?

(4) Was the Agency's investigation conducted fairly and objectively?

(5) At the investigation did the company "judge" obtain substantial evidence or proof that the employee was guilty as charged?

(6) Has the Agency applied its rules, orders and penalties even-handedly and without discrimination to all employees?

(7) Was the degree of discipline administered by the Agency in a particular case reasonably related to: (a) the seriousness of the employee's proven offense; and (b) the record of the employee in his service with the Agency?

The Agency applies these tests to the facts of the case to demonstrate that it had just and sufficient cause for its action of suspending the Grievant.

A summary of the Union's position is that the Agency bears, but did not meet, its burden of proof to establish just and sufficient cause in its disciplinary action, in accordance with *AFGE Local 1298 and Federal Bureau of Prisons*, 100 FLRR 2-1124, *6 (1999) and related cases and federal regulations. Such a burden does not impede the Agency's management rights. It identifies its own test: An agency may establish a nexus between the misconduct and the efficiency of the service by showing that the employee's conduct:

(1) affected the employee's or his coworkers' job performance,

(2) affected management's trust and confidence in the employee's job performance, or

(3) interfered with or adversely affected the agency's mission as articulated in *Johnson v. Dept. of Health and Human Services,* 86 M.S.P.R. 501 (2000).

In addition, the Union believes the Agency did not comply with its own investigatory procedures in that the Warden did not produce an affidavit.

The word of two witnesses against one cannot be sustained when there is no sworn affidavit of the second witness. It points to testimony by Special Investigative Supervisor Zaragoza: "That was actually part of the problem with the case." He felt he should have gotten an affidavit from Warden Rios.

Finally, the Union claims that the Agency violated the timeliness requirements of Article 30d of the Collective Bargaining Agreement.

Discussion

The setting for this case is almost unique at virtually the highest security prison in the US. Any departure from constant vigilance by the officers can result in their own death and many others. An armed Mobile Patrol Officer at Atwater Penitentiary is in a very real sense the first line of defense for a break-in and the last line of defense of a break-out of some the most dangerous criminals. As a result, the standard for attention to "routine" duty is almost unparalleled.

Unlike the two other witnesses to the matter, Warden Rios did not provide an affidavit regarding the events in the case. As Warden Rios did not swear to his recollection of the facts, either in an affidavit or in any testimony at the hearing, and as the union did not have any opportunity to cross-examine the written statements Warden Rios did make, his memo will not be given the same weight as sworn testimony and affidavits.

The testimony of Lieutenant Morgan and both the testimony and affidavit by the Grievant suggest that the latter was impaired from fully functioning in such a sensitive role while on the graveyard shift September 7, 2011. One has to question the egregiousness of his conduct when he was allowed to finish his shift. Whether or not the Grievant in this case was asleep, rubbing his eyes, impaired for medical reasons, not patrolling for just a few minutes, I find he was not fully attentive to duty as his position description details.

In this case, Human Resources Manager Cham-Sanchez opined that the time to process the disciplinary action was too long and attributed the cause as the significant workload of the human resources and legal departments at their respective regional offices. However, the Bureau of Prisons has structure and processes to ensure rapid response if there is a security problem with any inmate population. It knows how to deal with matters they consider critical.

Just as prisoners have to due process rights, so do agency employees. A timely resolution of disciplinary action is a right granted by Article 30 of the Collective Bargaining Agreement. The only reason identified in Article 30 to allow delay in processing disciplinary action are complicated matters. The Agency offered no evidence regarding complex matters in this case. In fact, Agency Counsel began his opening statement by stating, "Mr. Arbitrator, this is not a complicated case."

The sixth standard to ensure industrial due process identified by management in this matter speaks to fair discipline processing. This would include timely processing of the disciplinary action. As such, Article 30 in the collective bargaining agreement is the parties' contractual equivalent of a portion off the sixth requirement of the *Jones* test offered by the Agency as the proper standard to use in weighing the factors in this case.

It is not for the Arbitrator to identify opportunities to restructure the management process of decision making and its internal review. It is only to decide if the timeframe in a given matter complies with the Collective Bargain Agreement.

Several cases cited by the union are instructive as they interpret the requirements of article 30 of the Collective Bargaining Agreement between the BOP and AFGE.

In *AFGE Local 3690 and Bureau of Prisons, FCI Miami*, FMCS No. 08-00539, *11,14 (October 16, 2009) three investigations of the Grievant took 12-16 months to process.

Arbitrator Robert B. Hoffman found that disciplinary processing time of over a year violated Article 30 and reversed a three day suspension. Likewise in *AFGE Local 2052 and Bureau of Prisons, FCI Petersburg,* FMCS No. 02-09481, 107 LRP 5031, (December 15, 2003), Arbitrator Howard Foster found an Article 30 violation in a 13 month disciplinary action processing time. These cases are not precedential, but they eloquently discuss the interplay of article 30 and the just cause standard.

Here, the investigative and disciplinary action process was untimely. It was too long between the commission of the Grievant's questionable conduct and the issuance of a final decision letter in a case without complexities, thus contravening the Article 30d requirement of "timely disposition". Because of a 17 month timeframe to administer disciplinary action, the Agency did not meet its burden of establishing just cause for a two day suspension of the Grievant. However, I do not believe the Grievant sufficiently discharged his duty in a high risk role. The Warden's originally proposed one day suspension was appropriate.

Award

On this record taken as a whole, I find the two day suspension of Juan Mendoza was not taken by the Agency for just cause. The grievance is upheld in part and denied in part. The two day suspension will be converted to a one day suspension without pay and the Grievant's record will be adjusted accordingly. The work, benefits and seniority status as well as all terms and conditions of employment of Grievant will be treated in the same manner as other employees suspended for one day without pay, in accordance with the Collective Bargaining Agreement and past practice.

The Arbitrator will retain jurisdiction of this matter for 90 days from the date of this Award.

Steven E. Kane

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