LOU CHANG

MEDIATION • ARBITRATION • NEUTRAL SERVICES

Attorney At Law

July 15, 2014

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Thomas F. Muther, Jr., Esq.
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5132 W. 26th Ave.
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RE: AFGE, Loc. 1218/Federal Bureau of Prisons
(Grievance re: Darren yamada)

Dear Mr. Waugh & Mr. Muther:

Please find enclosed the Arbitration Decision in the above referenced matter.

Periodically, I receive requests for copies of my labor arbitration decisions or recommendations that I submit decisions (with name of Grievant and individuals redacted) for possible publication or summarization in digests or reporters of labor decisions. I regard the arbitration process to be a private adjudication process selected by and belonging to the parties. Thus, I've always felt that it was the right and option of the parties or a party (and not the arbitrator) to decide whether they want copies of arbitration decisions in their matters to be published or distributed.

I am inquiring whether there are any reservations or objections to allowing me to submit the arbitration decision in the above referenced matter for publication or distribution. If there are any reservations or objections, please mail, fax or e-mail a brief note to me to that effect within 30 days. I will, of course, honor any request or desire that the arbitration decision not be published or distributed. If there are no objections or reservations, you do not need to reply to this inquiry.

Thank you for the opportunity and privilege to serve as an arbitrator in the matter and for your attention to this inquiry.

Very truly yours,

Lou Chang, Arbitrator

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
Council of Prison Locals (AFL-CIO)
Local 1218,

and

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL DETENTION CENTER
HONOLULU, HAWAII,

FMCS Case No. 14123-00045-1

(RE: Grievance of Darren Yamada)

ARBITRATOR'S DECISION

ARBITRATOR'S DECISION

The arbitration arises between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Council of Prison Locals (AFL-CIO), Local 1218 ("Union") and U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL DETENTION CENTER, HONOLULU, HAWAII ("Employer" or "Agency") regarding the grievance of Darren Yamada ("Grievant") under which Lou Chang was selected to serve as Arbitrator.

An arbitration hearing was held in this matter on May 1 & 2, 2014. Post hearing briefs were submitted by the parties on July 3, 2014, whereupon the matter was deemed submitted. The parties were afforded a full opportunity to present any and all evidence, witnesses, and testimony in support of their respective claims.

The Collective Bargaining Agreement applicable to this matter is that certain Master Agreement between the Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees for the period March 9, 1998 through March 8, 2001 ("CBA" or "Master Agreement").

APPEARANCES

On behalf of the Agency:
Darrel C. Waugh, Esq., Assistant General Counsel, Federal Bureau of Prisons, Employment Law

Branch, WRO, 7338 Shoreline Drive, Stockton, CA, 95219.
On behalf of the Union:
Thomas F. Muther, Jr., Esq., Minahan & Muther, P.C., 5132 W. 26th Ave., Denver, CO 80212.

STATEMENT OF ISSUES

The parties agreed to the following statement of the issue in this case: Whether the subject discipline was taken for just and sufficient cause, to include being conducted in a timely period. If not, what is the appropriate remedy?

PERTINENT CONTRACT AND OTHER PROVISIONS

CBA:

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 c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except 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 case 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.

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ARTICLE 32 – ARBITRATION

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Section h.

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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.

BACKGROUND INFORMATION

The Grievant in this case was employed at the Honolulu Federal Detention Center as a Correctional Officer. He began employment with the Agency in March, 2006. Employees accrue sickness benefit and other leave benefits. Near the end of 2010, Grievant had used his accrued leave benefits and had no more sickness and leave benefits. During the period of December 2010 to January 2012, Grievant had 36 dates of absences for which he had insufficient sickness benefit or leave benefits. In each instance, Grievant called in to report his inability to come in to work because he was sick. Grievant was thus treated as being absent without leave for these 36 occasions. Following internal investigations and reviews, a disciplinary Decision Letter was issued to the Grievant suspending him for three (3) days for excessive leaves of absence without authority.

The Union does not challenge the substantive facts that Grievant was absent on those 36 occasions for which he had no accrued sickness or other leave benefits. However, the Union asserts that the discipline was improper and untimely so as to constitute a violation of the CBA.

The Agency has an extensive, multi-step external review and internal investigation and review process relating to the investigation and processing of discipline for alleged misconduct. Where allegations of employee misconduct are made, the Warden is informed and a determination is made whether the matter should be referred for investigation. The investigative process involves referral of the matter to the Office of Internal Affairs (OIA or IA) for the Bureau of Prisons, located in Washington D.C. Then, the matter is referred to the Office of Inspector General (OIG), an outside agency, located in Washington D.C. The OIG reviews the matter for assessment of any possible criminal misconduct. If it is determined that the matter does not involve criminal misconduct, the matter is returned to IA for a determination as to whether further investigation is to be conducted by IA or whether the matter is to be returned to the Agency institution to conduct any needed investigation. Where the matter is referred back to the institution, the matter is assigned to the Special Investigative Agent (SIA) to conduct the local investigation. The SIA will conduct an investigation, interviewing the employee subject as well as other Agency or third party witnesses, if applicable. The SIA obtains written affidavits of witnesses and gathers pertinent documents and evidence. After this investigative process, the SIA prepares an investigative report, with supporting documentation, sustaining or not sustaining the alleged misconduct. The SIA investigative report is then sent back to the OIA for a determination whether there is sufficient evidence or if additional investigation is needed. If the investigation does not sustain the alleged misconduct, the matter is concluded. If the investigation sustains the alleged misconduct, the matter is referred to the Agency's Human Resources (HR) office. The HR office confers with the employee's supervisor with regard to a proposed discipline before preparing a Proposal Letter setting forth a proposed discipline for the alleged misconduct. The Proposal Letter and supporting documents are then forwarded to the HR Western Regional Office for review and to an employment law ethics branch for a secondary review. After such review, the Proposal Letter is returned to HR at which point, the Proposal Letter is issued to the employee. The employee then has ten (10) working days under the Collective Bargaining Agreement to submit or make an oral and/or a written reply

to the proposed discipline. If the employee wishes to submit an oral reply, a meeting is arranged with the Warden. If the employee wishes to submit a written reply, the employee may also do that and it becomes added to the discipline case file. Following that, the matter is submitted to the Warden and a Discipline Letter is prepared and issued by the Warden as the decision maker or deciding official setting forth the actual extent of discipline to be issued to the employee.

At this institution, with regard to the matter of employee attendance, the Agency has a practice whereby a Captain or an administrative Lieutenant will perform periodic operational audits to review employee attendance. In the span of time from January 7, 2011 to January 29, 2012, six different audits noted that Grievant had multiple days or periods of unauthorized absences for which Grievant did not have accrued sickness or other leave benefits and for which Grievant was considered absent without leave. The first audit dated January 7, 2011 noted that Grievant's had unauthorized absences for December 15, 16, 25, 28 & 29, 2010 and for January 1 and 4, 2011(seven days). The second audit dated July 22, 2011 noted that Grievant had unauthorized absences for June 15, 21 and 22, 2011 and July 3 and 4, 2011 (five days). The third audit dated September 9, 2011 noted that Grievant had unauthorized absences for August 7, 28 and 29, 2011 and September 4 -7, 10 and 11, 2011 (nine days). The fourth audit dated August 21, 2011 noted that Grievant had unauthorized absences for July 24 and 29, 2011 and August 2, 3, 6, 13 and 15, 2011 (seven days). The fifth audit dated December 18, 2011 noted that Grievant had unauthorized absences for December 14 and 15, 2011 (one and a half days). The sixth audit dated January 29, 2012 noted that Grievant had unauthorized absences for January 21-24, 27 and 28, 2012 (five and a half days). Each of these six audits resulted in separate assignments to the SIA for investigation. The six assignments to SIA were made on February 23, 2011, September 20, 2011, October 25, 2011 and February 10, 2012. The six assignments to SIA resulted in the issuance of six investigative reports from the SIA over a period of time from May 31, 2011 to June 27, 2012.

Since each of the six investigations entailed the SIA separately interviewing the Grievant and the individual witnesses who might have been involved in the specific dates of absences, the investigative process took time to complete. Many factors contribute to the complexity and length of time that it might take to contact, schedule, interview and prepare witness affidavits for each of the reported dates of absences. In addition, staff schedules, absences, trainings and operational priorities at times impact the length of time needed to conduct and complete each individual investigation. The record reflects that the SIA was able to complete its investigation and to issue the six SIA investigative reports over periods of time ranging from 97 days to 180 days.

Grievant was interviewed by SIA regarding each of the six investigations. Thus Grievant would have been interviewed about alleged unauthorized absences prior to the May 31, 2011 SIA investigative report for the first set of alleged unauthorized absences. Similarly, Grievant was interviewed regarding the alleged unauthorized absences for each of the other five sets of alleged unauthorized absences during the period of September, 2011 to June, 2012.

Proposal Letters were prepared for at least some of the earlier reported periods of unauthorized absences. However, at some point, the Agency decided to combine the six groups of reported dates of unauthorized absences and to treat the entire group as a single disciplinary chain of events. The Agency issued a proposal letter for a fifteen day suspension on February 7, 2013. The Union objected to the untimeliness of the proposed discipline and to the Agency's "stacking" of the several periods of absences that went back to absences occurring in December, 2010 (26 months prior to the date of the proposal letter) through absences occurring in January,

2012 (one year prior to the date of the proposal letter). After the Warden reviewed and considered the matter, the Warden decided to mitigate the proposed fifteen day suspension to a three day suspension.

The record in this case reflects that Grievant had been previously disciplined for being absent without leave for a prior period of absence in October, 2010. Grievant was issued a Decision Letter dated August 15, 2012 which had imposed a letter of reprimand for the October 2010 absences. By the time of the August 15, 2012 Decision Letter, Grievant appears to have gained appreciation of the potential consequences for further unauthorized absences and has been able to avoid further instances of unauthorized absences after late January, 2012. The Union and Warden agreed that the letter of reprimand would be removed from Grievant's file if the Grievant had no further AWOLs for 60 days. Grievant has not had any further AWOLs since such time and as a result, the letter of reprimand was removed from his files.

For the six periods of AWOLs, the Union points out that the time duration from the dates when the SIA completed and issued its six investigative reports (May 31, 2011 to June 27, 2012) to the time of the Warden's Decision Letter of June 18, 2013 ranged from 25+ months to 13+ months. The Union challenges the timeliness of the Agency's actions and seeks cancellation of the three day suspension, restoration of pay and benefits, attorney's fees and other relief.

DISCUSSION

The Master Agreement does not prescribe a specific timeframe or time limit within which investigations of employee misconduct and imposition of disciplinary action must be completed. Article 30, Section d, includes the statement that "the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions". However, the section also acknowledges that "circumstances and complexities of individual cases will vary". The section also provides that: "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."

The Master Agreement also contains the general provision that disciplinary action can only be taken for "just and sufficient cause". The just and sufficient cause standard, like the just cause standard has long been interpreted to incorporate and include principles of due process in labor management relations. A number of labor authorities recognize that due process in labor relations includes the requirement that employers take timely action in disciplining employees. Most arbitrators agree that an employer's action in disciplining or discharging an employee must be timely-taken without undue delay after the incident or incidents relied upon by the employer in justifying its action. . . . This is seen as a component of procedural due process since employees are not to be subjected to the difficulties of responding to stale claims-claims by the employer relating to events so distant that witnesses or participants may be gone, memories may have faded, documentary evidence may have scattered. Each case will, of course, depend on its specific facts. When the delay appears not to have prejudiced the employee, arbitrators may call it harmless error and uphold a discipline or discharge. (Internal citations omitted). The Common Law of the Workplace, St. Antoine Ed., 2005, Section 6.15, page 210. See also, Discipline and Discharge in Arbitration, ABA Labor and Employment Law Section (BNA, 1998), page 37.

In this case, the Union relies upon an Office of Inspector General report which made the recommendation that allegations of misconduct classified in Classes 1 and 2 should be completed and the investigative packet forwarded to the OIA within one hundred and twenty (120) calendar days of the date that the local investigation was authorized by the OIA.

The Union cites many Bureau of Prisons cases where arbitrators have ruled that untimely discipline has warranted overturning discipline finding the discipline to be in violation of Section 30 d. of the Master Agreement including a decision rendered by this Arbitrator in AFGE Local 128 and FDC Honolulu (FMCS No. 11-54214). From among the cases cited by the Union, the Arbitrator notes that in Federal Bureau of Prisons and AFGE Local 2052, 107 LRP 50311 (2003), arbitrator Howard found a 14 month period of elapsed time from the disciplinary event to the issuance of the warden's decision to impose a one day suspension a violation of the timely disposition concept endorsed in the Master Agreement. Of significance, the arbitrator found the disciplinary event a simple one, involved few witnesses, was not denied by the employee and found that the employee incurred job related prejudice from the delay.

In another case cited by the Union, Federal Bureau of Prisons and AFGE Local 922, 110 LRP 14786 (2010), arbitrator McReynolds reviewed a two day suspension discipline imposed for two unrelated charges (off duty misconduct and misuse of Agency computer resources) that were investigated at the same time. While the time lapse between the commencement of the investigation to the issuance of a discipline decision letter was about a year, the arbitrator concluded that the employer did not have sufficient grounds to support the charge related to off duty misconduct. Although the employer had grounds for the second charge relating to the misuse of agency computer resources, the arbitrator found the discipline untimely and in violation of the progressive discipline concept contained in the Master Agreement and sustained the grievance.

In the case of Department of Justice, Bureau of Prisons, Federal Correctional Institution, Miami and AFGE Local 3690, (2009) arbitrator Hoffman concluded that the issuance of a discipline Decision Letter more than one (1) year after the incident was not "timely" and that the delay was prejudicial in that the employee lost overtime and other compensation opportunities. In that case, the employee was charged with unprofessional conduct in the use of profanity in dealings with an inmate and failing to report off duty misconduct as required by applicable policies. The case concerned multiple allegations of employee offenses, three (3) different charges. The three charges were the subject of three (3) investigations commenced in June, August and October of 2007. The Agency's Decision Letter was issued approximately one (1) year later in October, 2008.

In the case of Federal Bureau of Prisons and AFGE St. Petersburg, 107 LRP 50311 (2003) (Howard, Judge, Administrative Officer), an employee was suspended for one (1) day for a discipline incident which occurred in December, 2000. The arbitrator found that the issuance of the discipline letter took almost fourteen (14) months in an uncomplicated matter and sustained the grievance as a violation of the Master Agreement, Article 30, Section d.

In Federal Bureau of Prisons, Federal Correctional Institution, Fairton, New Jersey and AFGE, (2010) (arbitrator Harlan), the employee was disciplined for two (2) separate incidents. The investigation of the incidents was conducted in two separate investigations and the Agency's determination to impose discipline some seventeen (17) months and twenty (20) months following the events. The arbitrator concluded that the imposition of discipline for one of the charges for an unexplained delay of seventeen (17) months sufficient to warrant dismissal

of the discipline.

In the case of Federal Bureau of Prisons and AFGE Local 612, FMCS Case No. 09-03023 (2010) (arbitrator Block), two (2) grievants were disciplined in this case. One (1) for an incident occurring on May 26, 2005 and the other for an incident occurring on September 8, 2005. Both incidents dealt with the improper use of a government computer for non-work purposes. The Agency imposed suspension disciplines in one (1) case, forty-four (44) months following the date of the disciplinary incident and in the other case forty-six (46) months following the date of the disciplinary incident. The arbitrator sustained the grievance and ordered the suspensions to be expunged.

From these cases cited by the parties, arbitrators review and take into consideration the circumstances and complexities of each individual case. They recognize that the Master Agreement does not set forth an agreed or specific time limit. They consider also whether any delay in the disciplinary process has been detrimental or prejudicial to the employee and consistency of the discipline with the principle of progressive discipline.

Applying such considerations to the present case, the Arbitrator finds the disciplinary events complicated by the multiplicity of occurrences of absences without leave occurring in six different attendance audit periods. However, the events are not denied by the Grievant which would seemingly make the investigation of the many different dates of absences less burdensome for the SIA. The discipline decision in this case is also complicated by the Agency's decision to include all six groups of days of absences together ultimately in one final Discipline Letter. The Arbitrator has examined the dates when each of the six periods of absences were assigned to the SIA and the dates when the six SIA investigative reports were issued and the resulting length of time (97 days to 180 days) between the dates of assignment and the date of the SIA investigative report. The record does not provide a clear explanation why some of the six investigated groups of days of absences took longer (164, 174 and 180 days) and others were completed in shorter periods (97, 130 and 139 days). This alone would not lead the Arbitrator to find a violation of the timelines consideration endorsed in the Master Agreement. However, the record reflects that it took over seven months from the dates of the last two of six investigative reports (June 18 and 27, 2012) until the issuance of the Proposal Letter dated February 7, 201. At this stage of the Agency's discipline and review process, the review of the SIA investigative reports and preparation of a Proposal Letter involves the Agency's HR office and review by the HR Western Regional Office and employment law ethics branch. It also took another four months and ten days until the issuance of the Discipline Letter dated June 18, 2013 by the Warden. Collectively, the slowness of the disciplinary process raises concerns as to the efficacy of the discipline to correct and improve employee behavior as contemplated by the progressive discipline concept endorsed in Section 30 c. of the CBA.

Being AWOL for thirty five days over thirty six different days is certainly serious and disruptive conduct that warrants the imposition of discipline. But by the time the Agency issued the February 7, 2013 Proposal Letter and the June 18, 2013 Discipline Letter, the scope of the discipline event days of AWOL went back to cover a span of time of nearly two and a half years to about one and a half years. The decision of the Warden to mitigate the proposed fifteen day suspension to three days took into consideration that there were thirty six separate AWOL absences spanning the period of December 2010 to January 2012. The investigation and discipline process in this case and the prior August 15, 2012 Decision Letter imposing a letter of reprimand for a prior period of AWOL dates (which was later rescinded based upon an agreement that if Grievant stayed free of further AWOL incidents the letter of reprimand would

be rescinded) appear to have resulted in improving and correcting Grievant's behavior with regard to AWOL absences.

Grievant's history of AWOL absences appears to have been corrected by the August, 2012 discipline and corrective action, before the issuance of the February 7, 2013 Proposal Letter and the June 18, 2013 Discipline Letter issued in this case. Grievant has not had any further instances of AWOL days since late January 2012. To discipline an employee for absences that occurred more than two years before the issuance of discipline raises significant questions as to the corrective efficacy of the discipline and would appear to be inconsistent with the CBA's endorsed concept of timely disposition of discipline. The Arbitrator finds that to impose a three day suspension under the circumstances of this case and after the AWOL conduct has ceased and been corrected is inconsistent with the progressive discipline and timeliness concepts endorsed in Sections 30 c. and d. of the Master Agreement and thus the Agency lacked just and sufficient cause for imposition of the suspension discipline.

DECISION AND AWARD

Based upon the record in this case, the Arbitrator determines that the grievance should be sustained in part. Grievant's three (3) day suspension is rescinded and all record of such suspension is to be expunged from Grievant's personnel files and any other system of records in use by the Agency. Grievant shall be deemed to have received a letter of reprimand with regard to AWOL attendance. Grievant shall be made whole for the loss of wages together with any applicable interest and any other benefits associated with the three (3) day suspension. The parties are directed to meet and discuss the appropriate calculation of such remedy awarded. The parties are to have a reasonable opportunity to reach a mutual agreement as to an agreed calculation for such awarded remedy. In the event the parties are unable to reach such mutual agreement by no later than September 15, 2014, the parties may resubmit the matter to the Arbitrator for a resolution of that dispute.

The Arbitrator expressly retains jurisdiction to resolve the remaining issue regarding attorney's fees and any dispute that may arise between the parties concerning the proper interpretation or application of the remedy portion of this Decision and Award.

DATED: Honolulu, Hawaii, July 15, 2014.

LOU CHANG
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that an original copy of the "Arbitrator's Decision" dated July 15, 2014 was duly served by mail on the 15th day of July, 2014 to the following:

Darrel C. Waugh, Esq.
Assistant General Counsel, Federal Bureau of Prisons, Employment Law Branch, WRO,
7338 Shoreline Drive
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Thomas F. Muther, Jr., Esq.
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DATED: Honolulu, Hawaii, July 15, 2014.

LOU CHANG
Arbitrator