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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. 11-54214

(RE: Grievance of Shawn Manini)

ARBITRATOR'S DECISION AND AWARD

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This 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 Shawn Manini ("Grievant") under which Louis L. C. Chang was selected to serve as Arbitrator.

An arbitration hearing was held in this matter on February 3, 2012. The Agency's brief was submitted and received by the Arbitrator on March 3, 2012 and the Union's brief, although transmitted on March 3, 2012, was not received by the Arbitrator until March 27, 2012, 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 parties stipulated that 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. The parties requested that the Arbitrator issue an abbreviated Decision with brief explanation of the Arbitrator's conclusions in the matter.

APPEARANCES

On behalf of the Agency:

Michael A. Markiewicz, Agency Representative, Federal Bureau of Prisons, Labor Management Relations West, 230 North First Avenue, Ste. 201, Phoenix, Arizona, 85003.

On behalf of the Union:

Winfred Murphy, Union Representative, Local 1218, Federal Detention Center.

P. O. Box 30547, Honolulu, Hawaii, 96820.

STATEMENT OF ISSUES

The parties submitted different formulations of their respective statements of the issue in this case. Upon consideration of the submitted proposed statements of issues, the Arbitrator determines that the statement of issue in this case is as follows: Did the Agency violate the Collective Bargaining Agreement or applicable regulations by failing to timely conclude the investigation and imposition of discipline of the Grievant? If so, 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 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

* * * * *

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 Federal Detention Center as a Case Manager. The Grievant was suspended for one (1) day for unprofessional conduct relating to the use of profanity in a verbal exchange with a co-worker. The incident occurred on January 28, 2009. Following internal investigations and reviews, a disciplinary Decision Letter, dated December 2, 2010, was issued to the Grievant suspending him for one (1) day.

The Union does not challenge the discipline that was issued in this case but the Union asserts that the unreasonably long delay in the imposition of discipline is such that the discipline was improper and punitive so as to constitute a denial of due process.

Following the disciplinary incident which occurred on January 28, 2009, the information regarding the incident was referred to the Office of Internal Affairs ("OIA"). Applicable agency procedures require that allegations of employee wrongdoing be referred to the OIA in Washington, D.C. and potentially also to the Office of the Inspector General to determine if there may be criminal misconduct. If it is determined that the reported incident or allegation warrants investigation, the matter is referred back to the Agency and

assigned to a Special Investigative Agent ("SIA") to conduct an investigation. In this case, the matter was promptly assigned to an SIA who completed his investigation in the matter by July, 2009.

Consistent with a memorandum to the Chief Executive Officers ("CEOs") dated October 31, 2006, the Agency policy and practice sought to remove CEOs (in this case the warden) from reviewing and approving investigative reports of employee misconduct in cases where the CEO will be acting as the deciding official. Thus, cases involving local staff misconduct are forwarded by the local investigative staff to the OIA for approval before the information is forwarded to the CEO for action.

Following completion of the investigation in this case in July, 2009, the completed investigation report is submitted to OIA for further review. If the case is sustained by the OIA, the case is then forwarded back to the Agency for follow-up action. Under applicable Agency policy and practices, a Proposal Letter is prepared setting forth a proposed discipline to the employee and the Proposal Letter is communicated to the employee. The employee then has ten (10) working days under the Collective Bargaining Agreement to submit or make any reply to the proposed discipline. Following that, a Decision Letter is prepared and issued by the CEO. In this case, the Agency's Human Resource Office prepares a draft of the Proposal Letter as well as the ultimate Decision Letter. Both the Proposal Letter and the Decision Letter are required to be sent to the Regional Office and to Labor Relations Office for review before being issued.

In this case, a Proposal Letter issued to the Grievant proposed a three (3) day suspension. The Proposal Letter was received by the Grievant on August 31, 2010, some thirteen (13) months following the completion of the Investigation Report. The Grievant did not choose to submit any reply to the proposed letter within the contractually provided timeframe. Subsequently, by the Decision Letter dated December 2, 2010, the CEO issued his determination that the appropriate discipline to be imposed upon the Grievant was a one (1) day suspension. This whole process from date of incident to date of the issuance of the ultimate Decision Letter took something more than twenty-two (22) months.

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 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 for 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. Further, the recommendation included the statement that the OIA is to complete its review of the local investigation packet within ten (10) business days unless additional information is needed. Once approved, the investigation packet is to be forwarded to the local agency CEO for appropriate action. The Union submits that the

Agency's actions in this case taking some twenty-two plus (22+) months before the imposition of discipline is so substantially non-compliant with the OIG recommendation such that it is punitive, arbitrary and in violation of the Master Agreement.

The Agency submits that each case of misconduct is unique and that various factors can impact the investigative and discipline process, including such factors as absences, staffing shortages, holiday periods and inmate crime cases that need to be investigated. Other factors can include and are not limited to, the complexity of the disciplinary incident involved, the numbers and availability of witnesses, the scheduling impact of required staff training and whether involvement of Federal or Local law enforcement is required. The Agency further submits that in this case, the CEO, Warden Meeks, applied the appropriate Douglas factors (Douglas v. Veterans' Administration, 5 MSPR 280, (1981)) and that the CEO took into consideration the length of time that had been involved in the investigation and consideration of discipline in this case when he decided to reduce the proposed discipline from three (3) days to one (1) day. In this case, the Agency submitted testimony that the Agency's HR Office had staffing shortages with one staff member on extended sick leave during the 2009 – 2010 time period. It was also submitted that the investigating officer had taken some leave during the course of the investigation. Further, there was suggestion that required staff training programs also impacted and caused delay in the processing of the discipline issued in this case. Upon consideration of the entire record submitted, the Arbitrator finds insufficient explanation to establish the Employer or Agency's contention that special or exigent circumstances existed in this case such that the investigation imposition of discipline should be considered "timely" as contemplated by Article 30, Section d, of the Master Agreement.

The issue of untimely discipline has arisen and been considered in numerous other arbitration matters involving the Bureau of Prisons. Arbitrators note the Parties' "endorsement" of the concept of timely disposition of investigations and disciplinary actions and the fact that the Master Agreement does not specify specific time frames or deadlines for the disposition of investigations and disciplinary action. Arbitrators also note the Parties' recognition that the circumstances and complexities of individual cases will vary and thus allowances or considerations are given to the Agency's offers and

explanations of applicable considerations and complexities in each given case.

The Arbitrator has closely examined all of the cases submitted by the parties on this issue, several of which are instructive for the instant case. In the case of Department of Justice, Bureau of Prisons, Federal Correctional Institution, Miami and AFGE Local 3690, (Arbitrator Hoffman, 2009), 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. Three different charges relating to multiple allegations of employee offenses were considered. 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 following the latest charge in October, 2008. Arbitrator Hoffman concluded that the issuance of a discipline Decision Letter more than one (1) year after the latest incident was not "timely" and sustained the grievance, rescinding a three day suspension. 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 concluded that the delayed discipline failed to meet the just and sufficient cause standard, was not for the efficiency of the service, was not consistent with the Master Agreement and sustained the grievance and ordered the suspensions to be expunged.

DECISION AND AWARD

Based upon the record in this case, the Arbitrator determines that the grievance should be sustained. The parties recognized in their Master Agreement in Article 30, Section d, that disciplinary actions should be "timely". Although the Arbitrator has concluded that the OIG guidelines are aspirational and are not directive and that the Master Agreement contemplates that the Agency can show that circumstances and complexities of individual cases can reasonably result in investigations and imposition of discipline taking a longer period of time. However, in this case, the underlying disciplinary incident did not involve a complicated event or inordinate numbers of witnesses nor complex issues. Absent reasonable explanation or showing of pertinent circumstances and complexities to warrant and support the delay, the imposition of discipline in this case some twenty-two plus (22+) months following the date of the incident is not "timely" and thus violates the Master Agreement. Accordingly, Grievant's one (1) 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 reimbursed for the loss of wages associated with the one (1) day suspension.

DATED: Honolulu, Hawaii, April 4, 2012.

LOUIS L. C. CHANG
Arbitrator

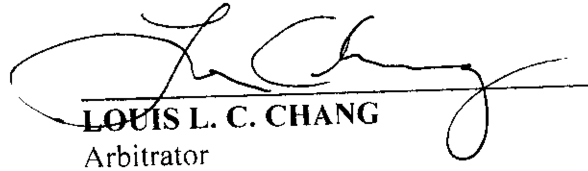
CERTIFICATE OF SERVICE

I hereby certify that an original copy of the "Arbitrator's Decision and Award" dated April 4, 2012 was duly served by mail on the 5th day of April, 2012 to the following:

Michael A. Markiewicz
Agency Representative
Federal Bureau of Prisons, Labor
Management Relations West
230 North First Avenue, Ste. 201
Phoenix, Arizona 85003.

Winfred Murphy
Union Representative, Local 1218
Federal Detention Center
P. O. Box 30547
Honolulu, Hawaii 96820

DATED: Honolulu, Hawaii, April 5, 2012.



LOUIS L. C. CHANG
Arbitrator