IN ARBITRATION PROCEEDINGS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of Arbitration between:	
Federal Bureau of Prisons, *Employer*	ARBITRATOR'S OPINION AND AWARD
and	F.M.C.S. Case #15-50051-A (Suspension of Wei-Jen Tsai)
American Federation of Government Employees, AFL-CIO, *Union*	

INTRODUCTION

An arbitration hearing between the parties was held in Sacramento, California, October 1, 2015, during which the parties had an opportunity to examine witnesses and submit evidence. The parties agreed that the matter was properly submitted to the Arbitrator for a final and binding decision. The parties submitted written closing arguments, which were received by the arbitrator December 1, 2015, and the record was closed that same date.

APPEARANCES

For the Employer:

Steven R. Simon, Senior Labor Law Attorney
Federal Bureau of Prisons

For the Union:

Michael T. Pazder, Esq.
AFGE Legal Rights Attorney

Arbitrator:

Andria S. Knapp, Esq.

BACKGROUND

The essential facts that gave rise to this grievance are not seriously in dispute between the parties; rather, the issues presented for arbitration relate to what those facts mean, in the context of the parties' collective bargaining agreement.

The Federal Bureau of Prisons operates residential re-entry centers (RRCs), or half-way houses, for the purpose of assisting prison inmates with their return to society and the workplace. Inmates who are due to be released from prison soon are transferred to the RRCs, where they not only live under supervised conditions, but also receive support as they prepare for life in the outside world. Inmates can earn unsupervised leave privileges; there are adverse consequences, such as delayed release, if they fail to abide by the terms of the leave. The RRCs are managed through the Bureau's Residential Re-entry Management (RRM) office, which has its Central Office in Washington, DC; the Western Regional RRM office is in Grand Prairie, Texas. The Grievant, Wei-Jen Tsai, has been an employee of the Agency for twenty years and a Residential Re-entry Program Specialist based in the local Sacramento, California, RRM office since late 2010. Testimony at the arbitration hearing established that the RRM program had recently undergone a reorganization that had reassigned Program Specialists from regional employees to Central Office employees.

On Saturday, August 17, 2013, Inmate GP was scheduled to report back to the San Francisco RRC from an unsupervised leave at 9:00 p.m. but he failed to show up. When an inmate fails to return from an unsupervised leave, the staff at the RRC attempts to locate the inmate via cell phone or other contact information, searches the premises, and then checks with local police and hospitals before contacting the RRM. At 9:20 p.m., the manager of the SF RRC telephoned Mark Wilfing, Residential Re-Entry Manager of the Sacramento RRM and the Grievant's immediate supervisor, to report that GP was missing and a presumed escape: they had searched the premises and contacted San Francisco police and local hospitals without success in locating GP.

Wilfing immediately telephoned the United States Marshal's Office to report GP as an escape. When an inmate escapes, there is paperwork that RRM prepares and sends to the Marshal's Office, the FBI, and other law enforcement agencies as necessary. In the case of weekend escapes, however, neither the RRM office nor the Marshal's Office is open on weekends. The standard procedure is for the escape paperwork to be completed the next business day, in this case, Monday, August 19, 2013.

Later on the evening of August 17, 2013, the head security officer at the SF RRC contacted Wilfing to report that an unidentified woman had telephoned the RRC and told them that GP had been injured and was in the hospital. On Sunday, August 18, 2013, the manager of the SF RRC contacted Wilfing and confirmed that GP was indeed a patient at San Francisco General Hospital. As it turned out, GP had suffered a serious gunshot wound to his chest in a shootout at about 8:30 p.m. on August 17, and had been admitted to San Francisco General Hospital under the alias "Lulu" for security purposes. Wilfing notified his supervisor, Julie Salmi, of the incident. At some point over the weekend, someone—it is not clear who—logged GP into the electronic inmate monitoring system, SENTRY, as on "medical furlough."

Wilfing had been detailed to work in Salt Lake City the week of August 19-23, 2013, and the Grievant had been designated Acting Manager in Wilfing's absence, which made him responsible for preparing the paperwork related to GP's failure to return from his leave. The standard "escape packet" includes a Community Corrections Escape Report, a Notice of Escaped Prisoner Form, and an "escape flyer," or detainer letter to the Marshal's Office authorizing it to apprehend and hold the named individual. Form 583, Incident Report, is not part of the standard escape packet. It is an internal BOP document, not sent to any outside agency, used to report unusual incidents. Management wanted a Form 583 completed in this instance because of the shoot-out and injuries suffered by GP. The Western Regional Office and Central Office do not usually become directly involved in monitoring escapes, but the unusual circumstances in this case brought it to their attention.

The Grievant testified that when he arrived at work on Monday morning, August 19, 2013, he got a telephone call from Mark Wilfing informing him that GP had escaped Saturday night but that the RRC had located him at San Francisco General Hospital on Sunday. The Sacramento office relies on the information that it receives from the local RRC—here, the San Francisco RRC—in determining how to process inmate absences. According to Mr. Tsai, Wilfing told him to leave GP as a medical furlough since the office knew where he was. Tsai testified that per BOP policy, "you don't do an escape … if you know where the inmate's at. And we knew where he was at."[1] The Grievant stated that he consulted with another Program Specialist (since retired), who confirmed that GP should be left in medical furlough status. Inmates on medical furloughs are not treated as escapes—which means that the office does not prepare an escape packet for the inmate.

At 2:31 p.m. on August 19, 2013, the Grievant received an e-mail from David Dwyer, Western Sector Administrator in Grand Prairie, Texas, that read:

> I know you have a lot of stuff going on there. Can you please ensure a detainer has been lodged in this case. I received info there has not been one completed yet.
>
> Also, when it is resent can you add the following info:
>
> SFPD are sitting on inmate at the hospital and are waiting to book him on two counts of aggravated assault with a gun.
>
> Also add in the info of when the USM were notified of the escape.

The Grievant testified that he was puzzled by Dwyer's instructions because the information it contained contradicted the information his office had received from the SF RRC:

> … [The] gist of the e-mail was hey, we have this guy, we have … information that made it seem like he was in a rolling gun battle with somebody at the halfway house, but when I — you know, normally our protocol is to get information from the halfway house, and the information I was getting from the halfway house was conflicting with what he was telling me.
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> The halfway house director basically said no, you know, he wasn't … in a shooting. He was a victim. He was a gunshot victim heading back to the halfway house. He was at San Francisco General Hospital under an alias for his own protection, and the SFPD was waiting for him to wake up so they could interview him, and once they interviewed him they left. *(Tr. 164)*

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[1] *See also*, the testimony of Daniel Painter, Tr. 201-208).

The Grievant telephoned his supervisor, Mark Wilfing, to ask what he should do. Wilfing told him "just do what they [central and regional management] say." Mr. Tsai further testified that he discussed the matter again with the other Program Specialist and decided that the situation was still confusing.

Accordingly, in his response to Dwyer, at 5:33 p.m. that same day, the Grievant asked Dwyer for clarification about what to do:

> Attached is the 583 for your review before I send it out again.
>
> He's not an escape because it was discovered that he was shot. As far as we know he was the victim so I don't under why a detainer would be lodged. The RRC has not provided us any information that the "**SFPD are sitting on inmate at the hospital and are waiting to book him on two counts of aggravated assault with a gun**." (Emphasis in original.)
>
> Thanks.

The Form 583 that was attached did not indicate Escape under "Type of Incident." Instead, the Miscellaneous box was checked. Under Inmate Injuries, Mr. Tsai had filled in: "Inmate [GP] suffered a gunshot wound and was transported to San Francisco General Hospital. He is in critical but stable condition." None of the escape information in Section 2 was filled out. The Section 6 Description of Incident made no mention of GP's having escaped or possible arrest by SFPD.

Dwyer did not respond to Tsai's e-mail until August 22, 2013, at 8:44 a.m.:

> The RRMD Administrator (Brent Kiser) called up the SFPD and found out the bolded info below. The RRC should have called and obtained this info, but did not. Although he was shot, it appears that he was also involved in misconduct (agg assault with a gun) and is being charged. Due to this, the escape report needs to be completed and a detainer requested with the USMS. We do not want SFPD to release him to anyone other than the USMS detainer. Due to this, he also needs to be put in escape status in SENTRY until he is back into primary federal custody. This in, as attached below needs to be added to the 583 prior to it being routed.

Dwyer had handwritten the information he wanted added, pertaining to GP's escape status and possible arrest by SFPD, on the draft Form 583 that Tsai had sent and appended it to his message. Dwyer's message indicated that the SF RRC "should have called and obtained this

info" (from SFPD).[2] However, the SFPD Incident Report was not completed until approximately 4:40 p.m., August 19, 2013; per the date stamp on the document, it was not received at the "RMS Unit" at 5:22 p.m. that same date. The narrative in the report was based on information from a "confidential informant" (CI). The narrative identified GP as one of two shooters and suggested that he may have been accidentally shot by the other shooter as they ran from the scene. The narrative concluded that based on the CI's statement, GP should be taken into immediate custody "on suspicion of two counts of aggravated assault with a firearm per 245(a)(2)PC and shooting firearm in grossly negligent manner per 246.3(a)PC."

After receiving Dwyer's message, Tsai completed an escape packet for GP and faxed it to the Marshal's Office at 10:42 a.m. that same day, August 22, 2013. However, the Grievant did not change GP's status in SENTRY to escape; he testified that it was a simple oversight on his part and not intentional—he had been assigned to perform the duties of two jobs for several months and with additional duties as Acting Manager, it was difficult to get everything done.

It appears that the Grievant neglected to inform Dwyer that he had completed the escape packet and revised the Form 583, because the next day, August 23, 2013, Jon Gustin, then Assistant Administrator of the Residential Re-entry Management branch in Washington, DC, directed David Dwyer to get the Grievant and his supervisor, Mark Wilfing, on the telephone for a conference call, so that Gustin could direct Tsai to place GP on escape status. Gustin had not received any paperwork, and GP was not on escape status in SENTRY. Mr. Tsai testified that he asked several times during the conversation for union representation but it was denied to him. Neither Dwyer nor Wilfing had any recollection that the Grievant had asked for Union representation; Gustin testified that he had not asked.

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[2] This statement elicited an e-mail from Julie Salmi, Mark Wilfing's supervisor on that same date, August 22, 2013: "Dave how was rrc supposed to know about these charges? Is it our intent to have them call the pd in every case from now on? I can see getting a police report of the incident but that info is not a part of it. Why would they ask?" Dwyer responded that "the RRM was forwarded the email from Brent Kiser two days ago. The RRC should have been provided the info and have the RRC look into the info."

When he returned to the office from his detail, Wilfing reviewed the e-mails and other documentation. Tsai testified that Wilfing told him that he could not see that the Grievant had done anything wrong; Wilfing testified that Tsai had failed to follow an order, in that he had told Tsai to do whatever higher management told him to do and he did not comply with their orders immediately. Wilfing and Tsai thought nothing more about the incident after that and assumed that it was over.

However, Mr. Gustin ordered that an internal affairs investigation into the Grievant's conduct be done. John Lynn, a Correctional Services Specialist in the Special Investigative Supervisor's Office in the Western Regional Office, conducted the investigation. He interviewed David Dwyer on August 30, 2013; Mark Wilfing on November 6, 2013; and the Grievant on November 26, 2013. Lynn prepared affidavits based on those interviews for them to sign. The Grievant had union representation during his interview, Baudelio Diaz from the Fremont office. Based on the information that he obtained, Lynn concluded that the Grievant had failed to follow his supervisor's instructions, which was a violation of Program Statement 3420.09, Code of Conduct, Section 10.c.: "Employees are to obey the orders of their superiors at all times." Lynn recommended a three-day suspension.

The Grievant was issued a proposal letter dated February 3, 2014, indicating the Bureau's intent to suspend him for three days. The specific charges were that on August 19, 2013, he did not follow Dwyer's instructions to him to complete a Form 583 indicating that GP was on escape status (Specification A) and that on August 22, 2013, he failed to follow Dwyer's instruction to enter GP into SENTRY as being on escape status (Specification B). The proposal letter indicated that the Grievant had ten days to submit a reply to the Senior Deputy Assistant Director, Reentry Services Division, who would be making the final decision on the proposal. Mr. Tsai asked for Union representation when he was issued the proposal letter, which is not usually done. Due to the reorganization, the Union and the Agency had a dispute about who would represent Mr. Tsai: the Agency insisted that as a Central Office employee, he should be represented by the president

of that local. The local union in Fremont, to whom Tsai paid dues, insisted that it should represent the Grievant. The record includes a number of e-mails between the Grievant, Edward Canales, president of the Fremont local, and Brent Kiser. On February 10, 2014, Kiser agreed to reissue the letter to Tsai and have a three-way call with his local union representative. On February 18, 2014, the Grievant informed Kiser that it would not be necessary for him to have union representation and to re-issue the letter, which Kiser did. The Grievant signed his receipt of the letter February 20, 2014. This was more than ten days after the original date of the letter. However, the proposal letter also indicated that the Grievant could ask for an extension of the ten-day period and that he had the right to a representative of his choice in preparing and presenting his reply. Mr. Tsai did not submit any response to the proposal letter.

By letter dated July 24, 2014, Kathryn Tracy, the Senior Deputy Assistant Director, informed the Grievant of her decision regarding the proposed suspension. She found "the charge of Failure to Follow Supervisor's Instructions fully supported by the evidence in the disciplinary file," citing his own affidavit, in which he acknowledged that he did not lodge a detainer on GP when first requested and did not place GP on escape status in the SENTRY system. However, she reduced the proposed three-day suspension to a one-day suspension based on his longevity of service with an acceptable service record and no prior discipline. In testimony at the arbitration hearing, Ms. Tracy stated that her decision was based solely on the affidavits and the file she had received from the RRM office; in the absence of any input from the Grievant, there were no additional mitigating factors presented for her to consider.

The Union filed this grievance on August 22, 2014, citing a number of violations of the Master Agreement. Specifically, (1) the investigation and final decision were not timely; (2) the Grievant was denied Union representation on February 5, 2014, when he was given the proposal letter; (3) the Grievant was denied Union representation during the August 23, 2016, conference call with Dwyer, Gustin and Wilfing; (4) on August 19, 2013, the Grievant did not intentionally violate a supervisor's orders; he asked questions and sought further instruction based on new

information given to him; and (5) the level of discipline imposed was not in line with other similar occurrences. By letter dated September 18, 2014, Ms. Tracy denied the grievance: (1) the evidence in the record supported the conclusion that the Grievant failed to follow his supervisors' instructions; (2) the investigation was completed in December 2013, within the required 120-day period; (3) at no time was the Grievant denied Union representation in February 2014; (4) on August 23, 2013, the Grievant was not entitled to Union representation, because he was not subject to an examination and the teleconference was considered a counseling meeting; (5) the penalty assessed was consistent with the Table of Penalties contained in Appendix A of the Standards of Employee Conduct, Program Statement 3420.11.. The parties having been unable to resolve the dispute through the grievance process, the Union moved the grievance to arbitration on September 29, 2014.

ISSUES PRESENTED

The parties stipulated at the hearing to one issue:

—Did the Agency have just cause to suspend Wei-Jen Tsai for one day based on the charge of "Failure to Follow Supervisor's Instructions"? If not, what shall be the remedy?

The Union raised two additional issues, which the Agency claims were untimely filed:

—Did the Agency violate Wei-Jen Tsai's rights under the Master Agreement and/or federal law to Union representation on or about August 23, 2013, or February 5, 2013? If so, what shall be the remedy?

—Were the Agency's investigation and disciplinary action of Wei-Jen Tsai timely in accordance with the Master Agreement? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

The applicable Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, American Federation of Government Employees, effective July 21, 2014, through July 20, 2017, provides, in relevant part:

* * * * *

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 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…

. . . . .

ARTICLE 31 - GRIEVANCE PROCEDURE

. . . . .

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence…. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence....

. . . . .

* * * * *

ARGUMENTS OF THE PARTIES

The Agency.

There was just cause to discipline the Grievant. Under the "obey now, grieve later" doctrine, he was obliged to follow his supervisor's instructions even though he disagreed with them. This is not a case that falls under any of the limited exceptions to that doctrine. The Grievant had a grievance remedy under the collective bargaining agreement; accordingly, he should have complied with his supervisors' instructions and filed a grievance later.

The Grievant admitted that he violated his supervisors' instructions. He chose not to respond to the proposal letter. As a law enforcement officer, he is held to a higher standard of conduct. Accordingly, the deciding official properly weighed all known factors and, in fact, reduced the proposed three-day suspension to one day.

The collective bargaining agreement requires that grievances be filed within 40 days of the grievable occurrence. The Grievant's allegations regarding the August 2013 teleconference, the investigation, and the February 2014 proposal letter were not timely filed in conjunction with the August 22, 2014, grievance, and those issues in the grievance should be denied. The Agency took action in this case for good and sufficient cause in light of the evidence and information available at the time the decision to discipline was made, and the grievance should be denied.

The Union.

When an agency takes disciplinary action against an employee for misconduct, it bears the burden of proof. To sustain the one-day suspension under the just cause standard applicable in this case, the Agency must prove by a preponderance of the evidence that the Grievant actually committed the specific offense of "Failure to Follow Supervisor's Instructions" as set forth in the proposal letter, not just that the Agency reasonably concluded that misconduct occurred. The Agency must also prove that the one-day suspension was warranted, that it was imposed in accordance with all laws and regulations, and that it was consistent with the collective bargaining agreement and federal law. The Agency has failed to prove that it had just cause to suspend the Grievant. Furthermore, the evidence demonstrates that the Grievant's rights under the Master Agreement in regards to the timeliness of the investigation and disciplinary action were violated, as were his rights to Union representation.

Under both federal law and the Master Agreement, federal employees have the right to Union representation at any examination of the employee in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action and if he/she requests representation. (Article 6.f.) The four-way conference call on August 23, 2013, with Gustin, Dwyer, Wilfing and the Grievant was an "examination" that the Grievant reasonably believed could lead to disciplinary action: Gustin berated Tsai for his actions and told Wilfing that Tsai would not be his Acting Manager again. The Grievant requested Union representation on two separate occasions (once immediately before the call and again during the call) but his

requests were ignored, in violation of the Agreement. Moreover, Article 6.f. requires the Agency to notify employees of their right to a Union representative "if an official examination authorized and/or initiated by the Warden or higher authority of the Bureau of Prisons could potentially lead to disciplinary action of said employee…" The conference call was initiated by Mr. Gustin, who qualifies as a "higher authority of the Bureau of Prisons." The content of the call could reasonably be considered an issue that could lead to disciplinary action, since the Grievant was later disciplined for the conduct that was discussed during the call. The conference call was not, as the Agency claims, a counseling. This disciplinary action should be overturned, as the Grievant was denied his right to Union representation during a key moment in the investigatory process when he was called into a meeting with three members of management where he was asked questions and accused of wrongdoing without being given the right to a Union representative. If the conference call is determined to have been a counseling instead of an examination, the Grievant was suspended for the exact same misconduct that he was previously counseled and sanctioned for. He should not be subject to punishment twice for the same conduct. Finally, the claim in the grievance for denial of Union representation was timely filed because the grievance was filed within forty days of the disciplinary action being issued. There was no grievance to file until the disciplinary action was finally issued. The conference call may in fact have been a counseling meeting in which no representation was required—until the disciplinary action was issued. Once discipline was issued, the Union concluded that the conference call was not a counseling, but had to be considered an examination regarding an issue that led to disciplinary action.

The Grievant was also denied his right to Union representation in February 2014 when he was e-mailed by Brent Kiser and asked to call Kiser "to discuss a personal letter" with him, without being given the right to have Union representation present. The Grievant asked to have Union representation present for the call and any discussions about the proposal letter. Kiser then sent the letter to the Grievant, asking him to sign and return it. Article 6.f. grants the right to Union representation during an examination and also "prior to submission of any written report

by the employee." Because the Grievant was not familiar with a proposal letter, he requested that he be granted Union representation. When the Agency agreed that the Grievant could have Union representation, it insisted that his representative be someone from Central Office. Only after protracted discussion did the Agency agree to let someone from AFGE Local 3584 represent Mr. Tsai. The dispute lasted far beyond the 10-day time period to issue a response to the proposal letter and the Grievant was effectively denied his right to respond.

The Agency's investigation and disciplinary action were untimely under the Master Agreement. Article 30, Section d., of the Master Agreement states that "the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions." In this case, the allegations in question occurred between August 19 and August 22, 2013. The Grievant was not disciplined until 11 months later, on July 24, 2014. There is no rational or legitimate reason why the process required 11 months, and the delay subjected the Grievant to great stress and embarrassment while the matter hung over his head. The delay violated the requirement in the Master Agreement for "timely disposition of investigations and disciplinary/adverse actions."

The Agency did not have just cause to suspend the Grievant for one day based on the charge of "Failure to Follow Supervisor's Instructions." Such charges should be sustained only if the agency establishes a nexus between the misconduct and the efficiency of the service. Here, there was no such nexus and there was no management interest in suspending the Grievant based on what occurred, especially after he had already been counseled and penalized based on the same allegations eleven months prior.

Specification A charges the Grievant with failing to follow instructions given to him by David Dwyer on August 19, 2013, via e-mail. The Grievant's response to Dwyer that same day included a Form 583 and asked for Dwyer to review it and get back to the Grievant, who was confused by the conflicting information he had gotten. Asking such questions was appropriate. Dwyer did not respond until August 22, 2013. Tsai complied immediately upon receipt of Dwyer's response. At no point was the Grievant "reluctant" to follow his supervisors'

instructions—he was confused and sought clarification from his supervisor about how to proceed. The Agency has failed to prove that Tsai did not follow Dwyer's specifications from Dwyer as soon as he reasonably could.

Specification B charges the Grievant with failing to enter GP into the SENTRY system as being on escape status. The Grievant did fail to do that, but not intentionally; he was performing the duties of three positions and it slipped his mind. He did prepare the escape packet and the Form 583 as instructed. The failure to change GP's status had absolutely no negative impact at the Agency or anywhere else. The Agency's decision to suspend the Grievant for one day without pay based on an unintentional clerical oversight is completely unreasonable and baseless.

Even if the Grievant is found guilty of the charges against him, the penalty assessed by the Agency was unwarranted and unreasonable, under the *Douglas* factors. The deciding official failed to consider those factors; indeed she was not aware of all the facts surrounding the incident and may not have had all the relevant evidence before her when she made her decision. The Agency has greatly exaggerated the seriousness of the situation and any alleged wrongdoing committed by the Grievant. In addition, in other similar cases, the Agency has made findings that employees failed to follow their supervisors' instructions but assessed no penalty. The Agency had that option here. In failing to give similar penalties to employees in similar cases, the Agency subjected the Grievant to disparate treatment and the unreasonable penalty cannot be upheld.

The Agency has failed to prove by a preponderance of the evidence that the Grievant's one-day suspension was for just cause. His rights to be provided Union representation when requested were violated, as was his right to a timely investigation and disciplinary action. The suspension should be overturned and the Grievant made whole pursuant to the Back Pay Act, 5 U.S.C. § 5596, with the Arbitrator retaining jurisdiction over the implementation of any remedy.

DISCUSSION

(1) Did the Agency violate Wei-Jen Tsai's rights under the Master Agreement and/or federal law to Union representation on or about August 23, 2013, or February 5, 2013?

The threshold question here is whether these issues were timely raised by the Union. The parties have agreed that under Article 31, Section e., the Arbitrator has jurisdiction to decide matters of timeliness with respect to the filing of grievances

Article 31, Section d., requires that "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence.... If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence..." The Union contends that the Grievant was denied his right to Union representation the first time on August 23, 2013, when his requests for Union representation during the four-way conference call with managers Jon Gustin, David Dwyer and Mark Wilfing were ignored. The second incident occurred on or about February 4, 2014, when Mr. Tsai asked for Union representation when Brent Kiser initially contacted him about giving him the proposal letter setting forth the Agency's intention to discipline him for his conduct the preceding August. Final disposition of the proposed discipline was not issued until July 24, 2014. The grievance was filed August 22, 2014, well within the forty-day period for challenging the Grievant's suspension, but more than forty days after the August and February incidents during which the Grievant was allegedly denied his right to Union representation.

The Master Agreement sets a time limit for grievances to be filed "within forty days of the date of the alleged grievable occurrence" OR when the filing party could "reasonably be expected to have become aware of the occurrence." One cannot determine the timeliness of any grievance without determining the "date of the alleged grievable occurrence" or the later date when the party filing the grievance could reasonably have been expected to have learned about the occurrence.

The conference call between the Grievant and the three managers occurred on August 23, 2013. At the end of the call, both the Grievant and his immediate supervisor, Mark Wilfing, thought that the matter was closed—that is, that the call was at most a counseling, to inform the Grievant of management's expectations and how he had not met them. Pursuant to Article 6, Section f., of the Agreement, unit employees "have a right to a Union representative during any examination by … a representative of the Employer in connection with an investigation if: (1) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (2) the employee requests representation." Section f. further states:

> Employees will be notified of their right to a Union representative by the Employer if an official examination authorized and/or initiated by the Warden or higher authority of the Bureau of Prisons could potentially lead to disciplinary action of said employee. This notification will be given prior to examination … This is not intended to interfere with the routine questions supervisors ask employees in the normal course of a workday …

Upon request, bargaining unit members are entitled to Union representation during "examinations" where the employee has a reasonable belief that the examination might result in disciplinary action; the Agency has an affirmative duty to advise employees of their right to a Union representative where an examination initiated by a "higher authority" of the Agency "could potentially lead to disciplinary action." Article 30, Section b., defines disciplinary actions as "written reprimands or suspensions of fourteen (14) days or less." Accordingly, unit members are not entitled under Article 6, Section f., to Union representation during oral counselings, because they are not "discipline" as defined in the Agreement. Therefore, if the August 23, 2013, conference call was a counseling session, Mr. Tsai had no contractual right to representation, even if he asked for it. The Union suggests that the conference call was disciplinary in nature, in that the Grievant suffered adverse consequences: Mr. Gustin told the Grievant that, moving forward, he would no longer be assigned as Acting Director in Wilfing's absence. That directive was never put in writing; moreover, given the fact that the Grievant was already working the duties of two positions and had not asked to be assigned as Acting Director in the first place, it is entirely possible that he welcomed being relieved of having to add the duties of a third position

in the future. In the absence of any evidence that being assigned as Acting Director was seen as something desirable by the Grievant, it is hard to conclude that Gustin's comment that he would not work as an Acting Director in the future was in fact an adverse consequence. Even if it were, it is not clear that such an unwritten directive would qualify as "discipline" under the Agreement.

It is only in retrospect that the conference call assumed a different character. When the Agency moved forward to investigate Grievant's actions as possible misconduct subject to discipline, the conference call could be seen as a first examination of the Grievant for potential misconduct. Even then, however, the conference call retained its character as a counseling until the Agency actually decided to take disciplinary action—not all investigations result in discipline being proposed and implemented. If the investigation into the Grievant's actions concluded that he was not guilty of any misconduct, or proposed no discipline, that would have been the end of the matter. John Lynn's investigation concluded otherwise, and on February 4, 2013, the Agency initially attempted to serve a proposal letter on the Grievant for his conduct August 19-22, 2013, setting forth a proposed three-day suspension.[3] This is the point at which the nature of the conference call took on a different complexion, becoming, after the fact, the first step in the process leading up to Grievant's discipline.

Neither the Grievant nor the Union knew or could have known on August 23, 2013, that the conference call was anything other than the counseling that the management representatives told the Grievant it was. However, with the Agency's letter proposing to suspend the Grievant for three days, the Grievant and the Union were put on notice that the conference call was not merely a counseling but was, in fact, an examination that could potentially—and ultimately did—lead to disciplinary action. The Union did not need to wait until final disposition of the proposal letter in July 2014 to file a grievance about the Grievant being denied his right to Union representation. The language of Article 6, Section f., is conditional: the employee reasonably believes that the

[3] The proposal letter is dated February 3, 2014, but Brent Kiser did not contact the Grievant about serving the letter until February 4, 2014 (per the e-mail string in the record). Following the discussions about Union representation, the letter was ultimately re-served on February 20, 2014.

examination *may* result in discipline, an examination initiated by a higher authority *could potentially* lead to disciplinary action. The right to Union representation is not limited to cases where employees are in fact disciplined. It is broader than that, extending to cover instances where discipline *may* issue. The Grievant and the Union knew as of February 4, 2014, that the Agency proposed to suspend the Grievant. The issue of Union representation was a live one then too—the record includes a series of e-mails between the Grievant, Brent Kiser, and Edward Canales, President of Local 3584 on exactly that topic, and Kiser's effort to serve the proposal letter on the Grievant is the second incident alleged by the Union to have violated his rights to Union representation.

The issue of Union representation for the Grievant during the August 23, 2013, conference call ripened in February 2014 when the Agency proposed to suspend Mr. Tsai for the conduct that was the subject of that call. Under Article 31, Section d., the time limit for filing a grievance on the issue of Union representation was forty days after that. The issue was not raised, however, until August 22, 2014, when the Union filed the primary grievance addressing the one-day suspension and included the Union representation claims. That is more than forty days after the date "the party filing the grievance can reasonably be expected to have become aware of the occurrence," the "occurrence" there being the alleged denial of Union representation. Accordingly, the claim that the Grievant was denied his right to Union representation during the conference call on August 23, 2013, was not timely filed and must be denied.

The same analysis applies to the claim that the Grievant was denied his right to Union representation when Brent Kiser sent him the proposal letter on February 4, 2014. The issue of Union representation was discussed extensively by the parties at that time.[4] The proposal letter was signed by the Grievant, indicating its receipt, on February 20, 2014. The issue of Union representation relating to the proposal letter was ripe at that time, and any grievance should have

[4] Eventually, Mr. Kiser offered to re-submit the proposal letter to the Grievant in the presence of the representative of his choice. The Grievant ultimately rejected the offer and Kiser re-submitted the letter to Mr. Tsai on February 20, 2014.

been filed within forty calendar days after that date. It was not, and that claim must also be dismissed as having been untimely filed.

(2) Were the Agency's investigation and disciplinary action of Wei-Jen Tsai timely in accordance with the Master Agreement?

The Agency has also raised a timeliness objection against this claim. However, the disciplinary process was not complete until final disposition, and any complaint about the length of the process did not ripen until its end. This claim was included in the original grievance, which was timely filed, so it was timely filed as well.

The actions for which the Grievant was disciplined occurred between August 19 and August 22, 2013. The Agency did not issue its final determination that he would be suspended for one day until July 24, 2014, eleven months later. The Union argues that the final disposition of the case occurred so long after the underlying events that the Agency violated Article 30, Section d., of the Master Agreement, in which the parties undertook to "endorse the concept of timely disposition of investigations and disciplinary/adverse actions." In support of its position, the Union submitted a previous arbitration award between the parties on the same, *Federal Bureau of Prisons and American Federation of Government Employees, Local 2052, Federal Arbitration 02-09481 (Foster, 2003)*, in which Arbitrator Howard Foster found that a 14-month delay in disposing of charges against an employee constituted a violation of Article 30, Section d., and sustained the grievance.

As Arbitrator Foster noted in *Local 2052*, although the parties "endorsed the concept" of timely disposition of investigations and disciplinary actions in Article 30, Section d., they did not include any specific time limits to indicate what "timely disposition" might be. In addition, Section d. includes language that acknowledges that some cases may take longer than others to process to final disposition: "Recognizing that the circumstances and complexities of individual cases will vary..." In light of these ambiguities in the contract language, Arbitrator Foster developed an analytical framework that is useful in this case. He noted initially:

> While it is true, as the Agency points out, that the Agreement does not provide a specific definition of timely disposition, *in the abstract no reasonable construction of that phrase can characterize a disposition after fourteen months as timely*. The Agreement, however, in the same clause, does suggest that the measure of timeliness may vary with the circumstances and complexity of individual cases, and the Agency argues that the circumstances of this case … explain the unusual delay. (Emphasis added.)

Arbitrator Foster went on to identify the factors that should be considered in evaluating whether a delay in disposition of charges was so unreasonable as to violate Section d.:

(1) What was the timeline?

(2) Were there "circumstances and complexities" that justified the delay?

(3) Was the employee prejudiced by the delay?

In *Local 2052*, the Agency was simultaneously conducting a major criminal investigation at the site. After evaluating the evidence, however, Arbitrator Foster concluded that the other investigation did not justify the delay in the relatively simple case before him:

> The decision by [the deciding official] came on January 17, more than 13 months after the incident and more than 10 months after the grievant admitted the offense in his statement. It is important to note that there was nothing cumbersome or complicated in these procedures. The investigation consisted of taking brief statements from four people, all at the same site. The facts were largely uncontested. Most of the proposal letter is boilerplate, and it simply says that the grievant failed to follow post orders (which he had admitted from the outset) and a one-day suspension was being recommended. *The actual time for the conduct of all these activities appears measurable not in days but hours.* However consuming the criminal investigation, it does not explain why the proposal and decision stages could not have been reached much earlier. (Emphasis added.)

The Agency in that case argued that the delay was irrelevant because the grievant was not harmed by the delay. The evidence established that the grievant had been told he was not being considered for promotions while charges were pending. Arbitrator Foster concluded that the delay had had adverse consequences for the grievant:

> If the grievant is being categorically bypassed for positions for which he is best qualified precisely because charges are pending, then clearly he is prejudiced by a delay in the disposition of those charges.

Applying the analytical framework set forth by Arbitrator Foster in *Local 2052* to this case, the actual timeline is the first thing to consider. The conduct for which the Grievant was

disciplined occurred between August 19 and August 22, 2013. The official investigation started not later than August 30, 2013, when Investigator John Lynn interviewed David Dwyer and prepared his affidavit. Lynn did not interview Mark Wilfing until November 6, or the Grievant until November 23. There is no explanation in the record for the delay of more than two months between Dwyer's interview and those of Wilfing and Tsai. Lynn submitted his investigative report on November 27, 2013, the day after Tsai's interview. The initial proposal letter was dated February 3, 2014. There is no explanation in the record for why it took another two months for a two-page proposal letter to issue. Final disposition of the charges was not made until July 24, 2014, more than five months later. Again, there is no explanation in the record for the delay. The decision letter is three pages in length, but the second and third pages are boilerplate, informing the Grievant of his right to appeal and options for doing so. All told, it was eleven months between the time of the conduct under investigation and final disposition of the charges against the Grievant. On its face, that seems an extensive length of time for what appears to be a relatively simple case, but the span of time alone does not establish that the delay was unreasonable. Whether eleven months constitutes an unreasonable delay depends on the other factors as well, the "complexities and circumstances" of the case and whether the employee suffered any adverse consequences.

In *Local 2052*, the Agency argued that the major criminal investigation happening on the site at the same time hampered its ability to dispose of the charges against the grievant more quickly. Although Arbitrator Foster found that explanation inadequate, at least the Agency offered some explanation. There is little in the record in this case that addresses why the various steps in processing the charges against Mr. Tsai took as long as they did. Ms. Tracy's September 18, 2014, response to the initial grievance notes that the investigation—meaning Mr. Lynn's investigation—was completed within 120 calendar days and was therefore timely. It appears that Ms. Tracy read the first paragraph of the explanatory Attachment to the grievance to apply only to the investigation conducted by John Lynn, but it is clear from reading the paragraph that the Union meant the timeline of the entire disciplinary process:

> On July 24, 2014 Wei-Jen, Tsai was charged with failure to follow a Supervisor's instruction and was given notice of a pending one day suspension of work and pay and was then placed on suspension for one day on July 28, 2014. This violates the Master Agreement Article 30 Section A as this investigation did not meet the definition of just and sufficient cause and Article 30 Section D as this investigation was not done timely.

The phrase "this investigation did not meet the definition of just and sufficient cause" does not make sense: the just cause standard applies to discipline, not to investigatory procedures. The phrase *does* make sense if one reads "this investigation" as "this discipline." A similar analysis applies to the second use of "this investigation": the actual investigation by Mr. Lynn was complete by the end of November, approximately three months after the conduct at issue. While the investigation could probably have been concluded in less time (for instance, if Wilfing and Tsai had been interviewed sooner), three months is not an egregiously long amount of time for conducting an investigation and, more importantly, it appears that the Agency has up to 120 days to complete any investigations. (The specific authorization for that is not in the record, but the Union did not object to the statement in Tracy's letter or when she testified to it at the arbitration hearing.) The real thrust of the Union's complaint is that it took another eight months to dispose of the case after the investigation was completed. As to that, there is no evidence in the record to explain that time gap.

Arbitrator Foster noted in *Local 2052* that "there was nothing cumbersome or complicated in these procedures," and the instant case was similarly straightforward to investigate and decide. Lynn interviewed only three individuals. As in Foster's case, "the facts were largely uncontested" here—the real issue for decision was whether Mr. Tsai's admitted conduct constituted a failure to follow a supervisor's orders. The proposal letter issued by Brent Kiser appears to be taken directly from Lynn's investigation report. Perhaps the proposal letter was delayed due to the end of the year holidays. The proposal letter was issued in February 2014, but it was July 24, 2014, before the final decision was made. In making that decision, Ms. Tracy considered the Grievant's length of service and prior disciplinary record as mitigating factors for the level of discipline to be assessed, but presumably they are factors that must be considered in

every case. She did not have to consider any arguments or facts other than those submitted to her by the Agency, because the Grievant submitted no rebuttal statement into the record before her. Why it took five months for the final decision to issue is a mystery. To quote from Arbitrator Foster, the time to complete the various activities associated with issuing the proposal letter and the final decision "appears measurable not in days but hours." All in all, the evidence in the record does not establish that there were any "circumstances and complexities" that would have delayed the "timely disposition" of the discipline in this case.

The final factor to be evaluated is whether the Grievant was in any way prejudiced by the delay. In *Local 2052*, the grievant actually lost the opportunity to be considered for promotions while the charges against him were pending. That did not happen to Mr. Tsai, nor does the record indicate that he suffered any concrete adverse consequences from the delay.

The fundamental problem in evaluating all of the factors together is that the parties never negotiated any time frames into Article 30, Section d., which means that one must be cautious about reading them into the contract for any but the grossest time delays. There are two significant facts that differentiate this case from *Local 2052*. First, the employee there suffered actual adverse consequences in his employment due to the delay in processing the charges against him. That did not happen here. Second, in *Local 2052*, over nine months elapsed between the end of the investigation and the supervisory review. During that period, management took absolutely no action whatsoever. All in all, fourteen months elapsed between the conduct and final disposition. In this case, matters were proceeding slowly, but (in comparison) they *were* moving. The investigation was completed in three months. It took two months for the proposal letter to issue, then another five months for the final decision. Five months seems inordinately long, but it is considerably less than nine months. While the facts are similar in the two cases, the comparative timeline in this case (albeit protracted) and the lack of any adverse consequences for the employee here operate to tip the balance in the Agency's favor—barely. It is difficult to understand why it took so long for the Agency to process the charges against the Grievant. In the

end, however, the ambiguous language of Article 30, Section d., leads to the conclusion that Section d. was not violated by the length of time it took to dispose of the charges against Mr. Tsai. Had the timeline extended for more than a year, the result would be different.

(3) Did the Agency have just cause to suspend Wei-Jen Tsai for one day based on the charge of "Failure to Follow Supervisor's Instructions"?

A review of the evidence in the record establishes that the Agency's conclusion that the Grievant had failed to follow his supervisors' instructions springs from two disconnects between the Sacramento RRM office on the one hand and the regional and central RRM offices on the other. One relates to how the Sacramento RRM categorized and processed inmates who failed to return from a pass, and the other relates to the informational gap between the facts about GP's failure to return that were known to the Sacramento RRM and those that were known by the regional and central offices.

It is clear from the record that the Sacramento RRM office had a practice of using a somewhat different protocol for "escapes" than what higher-level management in the regional and central offices expected. Specifically, the Sacramento office did not categorize employees who were prevented from returning to their RRC for medical reasons beyond their control as "escapes." When the Sacramento RRM learned late Saturday night or early Sunday that GP was in the hospital, he was placed on "medical furlough" in the SENTRY system. The Sacramento RRM did not treat inmates on medical furlough as escapes and did not prepare the standard "escape packet" to distribute to the Marshal's Service and FBI. In contrast, the record also establishes that standard protocol at the regional and central office levels is to treat *every* inmate who fails to return from a leave as an escape, regardless of the reason or if the inmate's whereabouts are known. Some situations are classified as "technical escapes," but whatever the circumstances, there is no third "medical furlough" category. The evidence further establishes that it is unusual for higher management to get involved in escaped inmate proceedings; their interest and involvement here were occasioned by the fact of the shootout that sent GP to the

hospital. It appears that David Dwyer in the Western Regional Office and Jon Gustin and Brent Kiser in the Central Office were unaware of the medical furlough status used by the Sacramento RRM either in general or as applied to GP.

The Grievant testified that when he arrived at work on Monday morning, August 19, 2013, to assume Mark Wilfing's duties as Acting Manager while Wilfing was on detail, Wilfing telephoned him to notify him about the situation with GP. The Grievant further credibly testified that Wilfing instructed him to leave GP on medical furlough. This would explain why Mr. Tsai did not prepare an escape packet right away. Moreover, the evidence establishes that Form 583 is not part of the standard escape packet. Instead, Form 583 is an internal document used to memorialize unusual incidents, such as the shootout that GP was involved in.

The second point of disconnect relates to the facts surrounding GP's failure to return to the SF RRC. The Sacramento RRM acts on the information that it gets from the local RRCs. In this case, as of August 19, 2013, SF RRC had informed the Sacramento RRM that GP was the victim of a shooting and that he had been checked into San Francisco General Hospital under an alias for his protection, where he was being guarded by San Francisco police who were waiting to question him when he regained consciousness. These facts were unknown to higher management. At some point on or before August 19, Brent Kiser from the Central Office in Washington, DC, had directly contacted the San Francisco Police Department, which informed him that GP was a suspect in the shootout and that SFPD was on guard at the hospital waiting until he regained consciousness to arrest him on charges of aggravated assault with a firearm and shooting a firearm in a grossly negligent manner. On August 19, 2013, these facts were unknown to anyone at the Sacramento RRM or to the SF RRC. SFPD is supposed to send its Incident Reports to SF RRC, which then forwards them to Sacramento RRM. The Incident Report on the GP shootout was not completed until late the afternoon of August 19, 2013. The record does not establish when the SF RRC received the Incident Report, or if and when the Report was forwarded to the Sacramento RRM. One of David Dwyer's e-mails to the Grievant indicates that at some point

Brent Kiser sent an e-mail to SF RRC about what he had been told by SFPD, but Kiser's e-mail is not in the record. There is no evidence that Kiser's e-mail to SF RRC was sent, copied or forwarded to the Sacramento RRM.

Taking these facts into account, it appears that on August 19, 2013, when Dwyer and the Grievant were in communication about GP's escape status, they were each proceeding on the basis of different protocols and different understandings of the underlying facts. In that context, it is easy to see how their communications evolved the way they did.[5] At 2:31 p.m. on August 19, 2013, Dwyer instructed the Grievant to issue a detainer and referenced the facts known to him about SFPD waiting to book GP; his e-mail did not mention Form 583. The Grievant was understandably confused by Dwyer's e-mail: based on the information it had received from the SF RRC, the Sacramento RRM had already categorized GP as being on medical furlough, which would not lead to a detainer being issued, and the office had no knowledge of SFPD's intention to arrest GP. The information on which Dwyer was proceeding directly contradicted the information received by Sacramento RRM in critical ways. SF RRC was geographically close to the scene of events, and SFPD is supposed to contact the local RRC when it has information on one of the inmates.[6] As of late afternoon August 19, 2013, that had not happened. Dwyer, with whom the Grievant had not worked before, was based in Texas and had not indicated to the Grievant where his information came from. So it is not surprising that the Grievant had questions about what the true facts were, in particular the source of Dwyer's information, since he had nothing from SFPD. Because of the public safety element in the Agency's work, it is important that all levels of the Agency are on the same page, so to speak, and, moreover, that they are on the *right* page when the Agency takes action. In light of the radically different facts that the Sacramento RRM and the regional and central offices had, it was appropriate for the Grievant to

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[5] As useful as e-mail is in many instances, this is a situation that could probably have been easily resolved if the parties had simply picked up the telephone and spoken directly to one another at the beginning.

[6] In fact, Dwyer's statement in a later e-mail to the Grievant that the RRC "should have known" that SFPD was waiting to arrest GP motivated Mark Wilfing's supervisor (i.e., Grievant's second level supervisor) to intercede, with questions of her own about how that was supposed to have happened and whether the RRCs were now expected to initiate contact with local police departments, instead of vice-versa.

seek clarification from the instructing supervisor (Dwyer) before taking further action. While the Grievant's e-mail back to Dwyer at 5:33 p.m., August 19, 2013, may not have been as artfully worded as it could have been, it raised questions about the critical points of confusion. First, as far as Sacramento RRM knew, GP was on medical furlough, which would not require a detainer.[7] Second, Sacramento RRM had no information about GP from SFPD, either directly or via the SF RRC. Mr. Tsai's e-mail also included a draft Form 583 that he asked Dwyer to review before it was sent out. The Form 583 was completed on the basis of the information that the Sacramento RRM Office had (that is, it treated GP as being on medical furlough, not as an escape).

The Grievant's August 19, 2013, e-mail to Dwyer clearly anticipated an answer: "Attached is the 583 *for your review before I send it out again.*" (Emphasis added.) Dwyer did not respond until August 22, 2013. Dwyer's 11:44 a.m. e-mail of that date explained the basis for Dwyer's request that GP be treated as on escape status. In response, the Grievant prepared an escape packet and modified Form 583—despite the fact that he forgot to make some of the changes requested—and faxed them off that same morning to the Marshal's Service, FBI and "GEO." It is true that the Grievant failed to change GP's status in SENTRY to "escape." However, when one reviews the events of August 19 through August 22, 2013, objectively, the Grievant's course of action did not comprise a failure to follow his supervisors' instructions. Instead, his conduct was that of an experienced employee who had been asked to perform duties that were in conflict with both his office's standard protocol and with the facts as they were known to his office. He was not "reluctant," he was cautious. Before moving forward, he prudently asked for clarification of the situation. When he got that clarification, he immediately moved to comply with his supervisors' instructions to the best of his ability. He inadvertently failed to change GP's status in SENTRY but it was not a deliberate oversight and had minimal impact. No harm to the Agency or to the public occurred as a result of Mr. Tsai's actions. There was no emergency regarding GP's whereabouts or any real possibility of his being released from

[7] Unfortunately, the Grievant did not specify that his office had put GP on medical furlough, perhaps because he assumed Dwyer would see that in the SENTRY system.

the hospital and disappearing into the general population: GP was in critical condition and on a ventilator. In fact, information in the record indicates that SFPD left GP unguarded in the hospital because his medical condition removed any concerns about further "escape."[8]

Considering the totality of the record, the Agency has not proven that there was just cause to discipline Mr. Tsai for failing to follow his supervisor's instructions in relation to either of the Specifications set forth in the February 3, 2014, proposal letter. The grievance is sustained. The disciplinary action shall be rescinded, and the Agency is ordered to make the Grievant whole for any losses sustained as a result of the one-day suspension without pay.

AWARD

For the reasons set forth above, the grievance is sustained in part and denied in part:

—The claims for denial of the right to Union representation are denied as being untimely;

—The claim that the disposition of the charges against the Grievant was so grossly delayed as to violate Article 30, Section d., is denied; and

—The Agency did not have just cause to discipline the Grievant for failing to follow his supervisors' instructions at any time between August 19 and August 22, 2013.

The Arbitrator will retain jurisdiction pending implementation of the remedy.

Andria S. Knapp, Arbitrator

Date: 16 June 2016

[8] In fact, GP's jail sentence ended before he was released from San Francisco General, and it appears that he went home from there. There is no evidence in the record that he was arrested by the San Francisco police in relation to the shootout in which he was injured. Finally, the Agency rescinded the detainer letter on August 23, 2013, the day after it was sent.