In the Matter of Arbitration Between

American Federation of Government Employees, Local 0222
(Michael Davidson)

–and-

Bureau of Prisons. Federal Medical Center, Devens

FMCS Case No. 221211-02204

Issued: February 6, 2022

Arbitrator: Timothy J. Buckalew

Appearances: Robert Klein, Legal Rights Attorney, for A.F.G.E., Local 0222 (Union); Michael O'Connell, Esq., Counsel; Marie C. Clarke, Esq., Asst. General Counsel, Bureau of Prisons for Bureau of Prisons, Federal Medical Center, Devens; and Adam Eisenstein, Esq., Asst. General Counsel for Federal Medical Center Devens/ Bureau of Prisons (Employer)

PRELIMINARY STATEMENT

On March 23, 24, May 24, and July 20, 2022, the parties appeared at a hearing conducted under the rules and auspices of the Federal Mediation and Conciliation Service. The first three days of hearing were conducted in Devens, Massachusetts; the final day of hearing was conducted remotely under COVID-19 protocols. The following Decision and Award is based on evidence adduced at the hearing, the parties' collective bargaining agreement and arguments raised at the hearing and in post hearing memoranda.

ISSUE

The Employer asks the Arbitrator if the grievance is procedurally barred because of the alleged failure of the Union to follow Article 31.b of the Master Agreement (CBA, JX16)? The Union did not join this issue.

The parties had different formulations of the substantive issues raised by the grievance. After discussion, the following issues were adopted for the hearing.

> Did the Agency have just cause to discipline the Grievant with a 30-day suspension for the two charges of failure to conduct Special Housing Unit ("SHU") rounds and providing inaccurate information on a government document in the decision notice dated October 14, 2020 to promote the efficiency of the service? If not, what is the remedy?

Relevant Facts

The evidence advanced at the hearing may be summarized for purposes of this award and in the interest of economy. The grievant, the local Union president Jason Basil, Executive V.P. Michael Guerriero, and acting Captain Michael Bernier testified for the Union. OIG Senior Special Agent, Daniel Benedict, Kay Reed, Human Relations Manager, Warden/CEO Amy Boncher, and SIS Lt. Justin Patronik testified for the Employer. In addition to the testimony of these witnesses, the video recordings relevant to the time and place of the incident at the heart of the grievance were reviewed at the hearing, with the opportunity for management and union witnesses to comment on the actions recorded. The Arbitrator reviewed the same recordings, transcripts of testimony and relevant documents in producing this summary.

Michael Davidson, now a Senior Officer Specialist, GS-08, was hired as Correction Officer on June 3, 2003. At the time of the incidents giving rise to this grievance, he had been employed at the BOP Devens, Massachusetts Federal Medical Center for his entire correctional career. The evidence shows he had no discipline of note alive on June 16, 2017, and had received uniformly strong, positive successive evaluations of his performance in the prior years, and in years after the incident giving rise to this dispute.

On June 16, 2017, Davidson was the senior correction officer, officer in charge, or SHU#1 on duty in the Special Housing Unit for the Morning Watch, 1200 am –800 am.

Specific Post Orders for the SHU require staff to observe all inmates confined on a 24-hour lockdown on the SHU at least once in the first thirty minutes of the hour followed by a second round in the second thirty minute period of the hour to ensure that each inmate is observed at least twice per hour. The observation of inmates in their cells are called rounds and all observations must be documented and maintained on file as soon as possible after completion of a

round. JX 7, General Post Orders, and Specific Post Orders. Rounds were recorded on a prepared form, known as rounds check list reiterating the obligation to record when rounds were performed.

> "Staff will use this sheet to track the times when 30 minute rounds are conducted in SHU/N-1. Irregular rounds must be conducted with the first 30 minutes of the hour and the last 30 minutes of the hour and will not exceed 40 minutes apart. To ensure this documented properly in TruScope [BOP electronic data keeping system] the times will be logged on this sheet and passed from shift to shift to ensure they are continuous during shift changes." Jx. 2D

Any correctional staff member may conduct rounds, according to the testimony of the Warden Boncher and all staff are trained in the essential functionality of conducting rounds.

SHU #1 controls the access of corrections staff to the SHU via the sally port door which is opened by the Central Control Officer at the radio direction of SHU#1; SHU #1 allows staff and onto the ranges or groups of cells in the SHU. SHU#1 conducts rounds when staffing the SHU between 12:00am and 6:00 a.m. when the SHU#2 officer comes on the unit. There are four ranges in the SHU under the responsibility of SHU #1. SHU 1 does not have keys to access individual cells and is not permitted onto a range when staff with such keys are on the range. "During the hours of 10:00PM to 6:00 AM there will normally be only one officer assigned to the unit. Whenever there is only one officer present in the unit, he/she will never have access to the keys to the cell doors. " Davidson was trained in SHU operations and had worked SHU#1 for some time before June 17, 2017.

The rounds check sheet completed by Davidson for his June 16, 2017 morning watch state that rounds were conducted per the post orders for all prescribed half-hour intervals, with these corresponding these hand-entries for the last rounds of his shift.

0500-0530 "5:00" [the institution wide count]
0530-0600 "5:37"
0600-0630 "6:20"
0630-0700 "6:52"
0700-0730 "7:18"
0730-0800 "7:48"

At around 6:33 am on June 16, inmate EM was discovered on the floor of his unit, not

responsive with a noose around his neck. He was transported from the SHU to a local hospital and pronounced dead on arrival.

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The evidence shows that on June 16, two staff members were allowed entry on to Range 2 at around 5:04. when an institutional count of the entire facility is conducted. There were no staff on the range again until about 5:29 when two Compound Officers went on the range to collect an inmate or inmates who were to be transported on the bus. The video of the activities of the Compound Officers shows the staff did not check the individual cells of the inmates other than the inmate being transported. Davidson did not directly observe the conduct of the two staff members, but testified that before this incident any time a correction officer goes onto the range, for any reason, the presence of the staff on the range was considered a round and recorded as such. Davison recorded a round being conducted at 5:37 a.m.

A review of the video[1] evidence shows that Davidson did not conduct a round in person after the arrival of Officer Mahony, SHU #2. Officer Mahoney went down range to conduct purposeful rounds. Officer Mahoney began serving breakfast to inmates around 6:15. Davidson testified that the serving the meal counts as a round because the staff member serving the meal interacts with each inmate. Davidson indicated the 600-630 round had been completed at 6:20 based on the time the breakfast could have been served on Range 2, but he was not observing the feeding process and was not aware of how long the officer was engaged on Range 2 or any of the other two ranges holding inmates. The video record shows that Range 2 feeding actually started at 6:31.

Coincidental to the breakfast meal, a medical staff member (correction officer Nurse) was admitted by Davidson to Range 2 at 6:32 according to the video record to administer insulin to an inmate (or inmates) requiring that medication. Shortly after the arrival of the medical staff officer, inmate EM was found dead or near death in his cell. Normal breakfast operations on Range 2 were stopped and Davidson was attending to opening doors for responding staff for approximately 20 minutes. At 6:55 breakfast feeding resumed on Range 2.

[1] I admitted the videos in evidence, but find in hindsight that the surveillance recordings were not reviewed by Warden Boncher in her decision making process. They do confirm the Employer's version of how rounds were conducted or not conducted on June 16, and give insight into what Captain Bollinger reported to OIA/OIG but are otherwise not dispositive.

At 7:17 medical and SHU2 entered Range 2 but there is no showing that they conducted cell-by-cell checks to determine the status of the inmates remaining on Range 2.

At 7:43 Officer Isaac Croteau entered Range 2, conducted a round and left the range approximately one minute later. There is no evidence that Croteau conducted rounds on the other ranges.

When questioned initially by Captain Bollinger, Davidson reported that he had not filled in the round sheet after the required round was completed, but had prefilled the round sheet with the intent of correcting the times, if necessary, but that on June 16 he was unable to remediate any inaccuracies because the check sheets were removed from his control after the inmate suicide.

Officer Bollinger reported the suicide and Davidson's and Mahoney's actions to Warden Grondolsky, who referred the incident to the BOP Office of Internal Affairs (OIA) The referral alleged,

> "Captain M. Bollinger conducted a review of the Special Housing Unit camera system and discovered Officer Davidson did not conduct rounds of SHU as documented on the 30-minute rounds. Davidson alleges rounds were conducted at 5:37 a.m. and 6:20 a.m. The camera revealed Davidson conducted rounds at 5:02 a.m. and no rounds were conducted until the unresponsive inmate was discovered at 6:33 a.m. Policy dictates rounds will be conducted on an irregular basis every half hour but no more than 40 minutes."

OIA in turn referred the matter to the DOJ Office of Inspector General (OIG) to conduct [2]an investigation of possible violations of 18 U.S.C §1001[3]

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[1]**(a)**Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

On November 15, 2017, after advising him of the purpose of the investigation Special Agents Daniel Benedict and Mary Kelly interviewed Davidson with his Union representative present. Davidson offered a statement which figured strongly in subsequent disciplinary decisions. He told the agents the following recorded as a sworn affidavit: :

1) "the last round I completed for that shift on June 16, 2017 was approximately 5:00 am; 2) the next round was completed for the Special Housing Unit was approximately 5:37 am. I was not the officer completing the round an officer retrieving an inmate for the bus entered the range and I considered that a range for the logbook. 3)…due to the fact that there were other staff member who entered the unit I considered them as conducting a round as they had been down range. Specifically on the manual sheet, I indicated that rounds were conducted at 6:20, 6:52, 7:18 and 7:48. 4) These rounds I did not complete but filled out the sheet a head of time. My assumption was that the other staff members entering the unit and walking the range sufficed as a round completed. It was not my intention to deliberately falsifying a document…at no time did I ask any individual to alter or conceal this information."

The record shows that at some time early in March, 2018, the OIG's information was made available to the office of the U. S. Attorney for the District of Massachusetts. The AUSA elected to take no action against Davidson.

The OIG report of their interview of Davidson (and his Evening Watch SHU #1 counterpart, Officer Judson accused of the same misconduct[4]) was not formalized and submitted to the facility until March 7, 2019. The completed report determined that: 1) Davidson did not conduct some of the rounds they recorded on the check sheet; and 2) that both "pre-filled" the check sheet so that it would appear the rounds were conducted.

The Human Resources Manager for FMC Devens, Kay Reed, testified that she received the report on March 8, 2019, when the report was submitted formally to BOP. Reed testified that she is responsible for reviewing charges after an investigation, matching the charges to the BOP table of offenses and preparing a draft of proposed adverse action toward Davidson. She drafted a proposed action letter recommending Davidson's removal because both charges had been sustained after the OIG investigation and the incident involved the death of an inmate. She

[4] Judson's disciplinary fate is not before the Arbitrator and played no role in this Decision..

testified she followed normal procedures, prepared a draft letter of the proposed adverse action to the BOP regional office, which in turn was reviewed by the BOP legal office, and ultimately it was returned to the warden's office. She testified that the BOP has no control over the manner in which OIG conducts investigations or how long it takes OIG to produce its report to BOP or the facility CEO. Reed testified that the time consumed and travel of the March 7, 2019 OIG report to the August 4, 2020 proposed adverse action (removal) notice to the grievant resulted from the engagement of her office and OIA in the parallel investigation of the death of another inmate and complications from the COVID 19 pandemic on her office's work load.

On October 19, 2019, the was promoted to Senior Officer during the pendency of the investigation of the 6.16.17 incidents and after Human Relations Manager Reed had received a copy of the OIG report.

The adverse action notice to Davidson did not issue until August 4, 2020. That letter, issued under the auspices of Captain Justin Rhodes proposed the removal of Davidson for two charges: 1) Failure to conduct SHU rounds on 6.16.17 between 530-600, 600-630, 630-700, 700-730 and 730-800. Quoting his November 15, 2017 statement to the OIG investigators, the adverse action letter asserts that the grievant admitted he understood his responsibilities as SHU #1 "is to conduct irregular 30 minute security rounds for each inmate… the last round I completed for that shift on June 15, 2017 (*sic*), was approximately 5:00 AM.; 2) Providing Inaccurate Information on a Government Document. Again, the notice letter relies on Davidson's November 15, 2017 affidavit provided the OIG as evidence that he committed the alleged infraction: "in your affidavit you did admit that "on the manual sheet, I indicated rounds were conducted at 6:20 AM, 6:52 AM, 7:18 AM and 7:48 AM. These rounds I did not complete but filled out the sheet ahead of time."

The notice letter provided Davidson with the specific rules allegedly violated. Charge 1, if true, would be a violation of the Correctional Procedural Manual, Program Statement 5500.14, and the Special Post Orders for SHU#1 directing the performance of rounds for which he received recent and regular training. Charge 2 argues that Davidson violated Standards of Employee Conduct, Section 34. (Jx14A), "Falsification, misstatement, exaggeration, or concealment of material fact in connection with employment, promotion, travel voucher, a record, investigation or improper proceeding."

The Union and grievant submitted a formal multi-page response to the adverse action notice on August 25 addressing the charges in depth and foreshadowing many of the arguments made at the hearing and its post hearing memoranda.

In the August 25, formal response, Michael Guerriero, Exec. V.P. of the local Union argued among other things[5] that: 1) Davidson had an excellent service record, having been promoted to the rank of Senior Officer Specialist the 2017 investigation and having received uniformly better-than-satisfactory performance ratings, and awards over his fourteen years of service; 2) the Agency's investigation was biased against Davidson and presumed his guilt on the charges based on Captain Bollinger's referral letter which asserted the grievant "falsified the round sheet."; 3) the Agency violated Davidson's right to notice of the charges protected by the CBA (Master Agreement, Section e.) by failing to provide him with the video records of Range 2 for the times relevant to the charges; 4) the investigation was not completed according to the OIA's time lines (Program Statement 1210.12.e)and the time limits established by the management of OIA. Citations omitted. The untimely disposition of the investigation is a critical flaw that violates the Grievant's due process rights. Citations omitted; 5) the proposed removal was excessive under the Agency's own table of penalties set out in Program Statement 3420.11, Standards of Employee Conduct, and arise from the failure of the proposing official, Captain Rhodes, to properly consider the Douglas mitigating factors—the offense was not deemed so serious as to keep Davidson off work for the pendency of the investigation, he had no discipline of record, and excellent work record, the charges were not deemed to affect his ability to continue to perform his duties at a high level and show that he had an excellent prognosis for rehabilitation, the proposed removal for inattention to duty for a first offense was inconsistent with the parties agreement endorsing the concept of progressive discipline memorialized in the Master Agreement; and finally, that the proposed removal is inconsistent with parallel principle of progressive discipline found in Douglas factor 12, that the Employer should consider alternative discipline and whether a lesser punishment would deter future misconduct.

Davidson and Guerriero met with Warden Boncher on August 25. Davidson was afforded the opportunity to present additional information that might provide additional guidance to the

[5] I paraphrase what I deem the salient arguments made in the seven-page, single spaced August 25 response which includes other subtle arguments that are relevant, but not dispositive and will not be addressed at length.

review of his actions and the Douglas factors application to her decision on the proposed removal. The written record of his oral presentation shows he did not argue that he had performed the rounds as indicated on the check sheet he completed, but he did offer the following (paraphrased).. The Friday in question was very busy—LT showed up to move inmates from SHU around 5:45, then SHU2 arrived, medical staff too, around 6:00 am. He stated that's when EM was found and after SHU 2 arrived, he could not go down range because SHU 2 had keys to the cells and he had to control the doors (grill) "It was a hectic night. I am sorry for what happened; however, I was not sleeping. SHU2 and Medical were down range so I assumed the rounds wee conducted. It's been a hard 3 years to not know what is going to happen. I like my coworkers and my LT likes me. I have been awarded and promoted. This has been hard and tough to deal with. I am sorry that you had to come and see Devens like this. I have 17 years of service with the BOP and I don't want to lose my job.:" His representative, Jason Basil, added that he understood that at the time of the incident, if staff were on the range during the time rounds were to be conducted it was counted as around. "Things have changed since then, but during that time frame that's when and how the rounds were conducted. Medical and other staff on the range were not questioned…he has also worked on the SHU for the last three years with no issues.

On October 14, 2020, Warden Boncher issued her decision upholding the charges that he failed to conduct rounds in accordance with policy and provided inaccurate information on the SHU rounds check sheet. She took into account his service record and performance with the agency, but found he was still "responsible for the accountability of inmates while on duty in order to ensure safe and secure institutional operations. It is essential that you conduct rounds in accordance with policy, including SHU Post Orders…" Boncher rejected his explanation for his SHU record keeping. "…it is critical that you provide accurate information on all documents that relate to the Bureau of Prisons, as staff candor and credibility are essential to the Agency's ability to effectively enforce and impose penalties…your actions could subject your witness testimony in any future, civil, administrative, and/or third party proceeding to impeachment and seriously compromise the Agency's ability to enforce said violations…

Boncher did not accept the proposed removal and I reduced the penalty to a thirty-day suspension. She explained her decision:

> "In determining the appropriate penalty, I considered among other factors, you have no prior discipline within the reckoning period, your work performance is at an acceptable level, you have more than 17 years' service with the Agency and you apologized for the incident. However, I also considered the seriousness of your failing to conduct rounds within the SHU and providing inaccurate information on a government document. Additionally, I considered that the required SHU rounds on the morning of June 16, 2017 may have assisted in preventing the suicide of [EM) who was found unresponsive in his cell around 6:33am…Therefore, its is my decision that a thirty (30) calendar day suspension should have the desired corrective effect…This suspension is warranted and in the interest of efficiency of the service."

Warden Boncher testified that she became aware of EM's suicide and the proposed removal of the grievant shortly after assuming the position of Warden of the Devens facility in July 2020. She had prior experience in various senior psychologist titles and prison administration before arriving at Devens. She testified that she reviewed the original Bollinger referral to the Warden Grondolsky, the other evidence in the file, the investigation notes, Davidson's affidavit, the round check sheets from the day in question, Davidson's written and oral responses to the proposed removal and the Douglas [6]factors before reaching the decision to suspend the grievant for thirty-days. She testified that she did not dispute Davidson's assertion that the SHU was very busy on the morning of June 16, but the press of work alone did not excuse the failure to conduct SHU rounds because there is an increased risk of suicide in the SHU. Many inmates housed there are mentally ill and the increased risk requires heightened protective eyes on the inmate to observe behavioral changes and protect the inmates housed there. Davidson and the Union did not argue that he had not violated agency policy on rounds or that he did not in fact pre-fill the rounds sheet. She testified that his actions were not intentional or malicious but the failure to conduct rounds and accurate record the rounds were serious errors. She concluded that removal was not appropriate because of mitigating factors (past job performance, no prior discipline) but the seriousness of the misconduct caused her to lose confidence in his ability wo work and his integrity. The protracted delay in concluding the investigation and presenting the results to management was also a factor. There were no other similar cases to serve as comparators, according to the Regional Office. But she rejected imposing a reprimand because

[6] *Douglas v. Veterans Administration*, 5 MPR 280 (1981)

his job was critical and it was important to protect the mandatory nature of rounds in the SHU. The fact that rounds were not conducted according to policy also left unanswered the question of whether or not adherence to the rounds policy would have presented the suicide of EM.

Jason Basil represented Davidson at his meeting with Boncher and at other times assisted in the preparation of his response to the proposed adverse action. He testified that at some point after the suspension notice issued but before it was imposed, he was in Boncher's office and asked her if she would consider reducing the suspension. He recalled that she said, "no" and she was "unable to do this at the time. (TRII, 123:7-18). Michael Guerriero prepared the Union's grievance and assisted Davidson during the grievance process. He testified that Basil reported that he had proposed a lesser sanction to Boncher. (TRIII, 142-143)

The Union filed a grievance contesting Davidson's suspension on October 28 alleging violations of the Master Agreement (Article 6 and Article 30). Timeliness of the discipline under OIG Report 1-2004-08, 5 USC § 7503(a) and 5 CFR, Subpart B, and Program Statement 3420.11, Standards of Employee Conduct/Schedule of Disciplinary Offenses and Penalties..

N.C. English, BOP Regional Director, denied the grievance on November 25, 2020. He asserted the grievance was procedurally defective as it failed to document a "reasonable and concerted effort toward informal resolution prior to filing a grievance" , allegedly required by Article 31 (b) of the contract. He also denied the grievance as failing to articulate specific violations of any of the cited provisions and/or failed to provide evidence supporting such violations.

On December 7, 2020, the Union notified the Employer that the grievance would be moved to arbitration. I accepted the appointment to hear this grievance on January 15, 2021. Disputes over whether the hearing could be conducted remotely under then-effective COVID-19 protocols and other administrative delays prevented the hearing of the grievance in arbitration until March 2022.

RELEVANT CONTRACT PROVISIONS

ARTICLE 30-DISCIPLINARY AND ADVERSE ACTIONS

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

[…]

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in pay or grade, or furloughs of thirty (30) days or less.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that there are offenses as to warrant severe sanctions for the first offense up to and including removal.

Section d. Recognizing that circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of grievances and disciplinary/adverse actions.

[…]

ARTICLE 31. GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC §7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and should always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

[…]

POSITIONS OF THE PARTIES

The parties' arguments have remained constant throughout the history of this grievance and are summarized in this section. The summary is offered wth the caution that the arguments of the parties were strong, nuanced and well-articulated. Any summary must of necessity detract from the richness of the parties' efforts, but is required in the interest of economy.

The Employer denies the grievance has any merit. The Employer cites record evidence showing that: 1) Davidson committed the charged misconduct; 2) Warden Boncher considered all twelve Douglas factors and concluded that a 30-day suspension was for the efficiency of the service and reasonable; 3) the suspension is consistent with the "just and sufficient cause" requirement in the Master Agreement.

The grievance should not be before the Arbitrator, according to the Employer, because the Union failed to adhere to the most basic procedural agreement memorialized in Article 31, Section b. by failing to make any effort to informally resolve the dispute over the adverse action issued Davidson. The contract dictates the parties devote at least ten days toward an informal resolution and the evidence does not show the Union made any serious efforts to meet the requirements of the contract.

> "The Union presents a myriad of distracting and deflecting arguments, including its argument that the Agency did not timely impose the adverse action. It is undisputed that neither the parties' collective bargaining agreement nor any Agency policy contains any deadline within which an investigation conducted by an external entity over which the Agency has no control, must be completed; nor any deadline by which an adverse action must be adjudicated. Following the completion of the investigation and disciplinary process, the Warden rightfully concluded that corrective action was still warranted. However, the Warden radically mitigated Grievant's discipline from a proposal of removal to a thirty-day suspension." (Employer Brief, p.2)

The Employer carefully reads the evidence and concludes a preponderance of the evidence supports the charges. Davidson has never denied that he did not conduct rounds at certain times on 6.16.17 which he documented on the SHU check sheet as having been performed at very specific times. He admitted he did not conduct the required rounds in his first interview with the OIG Special Agents; he admitted that he prefilled the round sheet with times that did not reflect

when (or if) a round had actually been conducted. The Union's objections to the evidence against Davidson are hollow and a smoke-screen deflecting guilt away from the grievant who has acknowledged his violations of the Standards of Conduct, General Post Orders, and Special Post Orders.

Grievant's obfuscating testimony aside, he has admitted the substance of both charges and the rationalizations offered at the hearing should not detract from the fact that Warden Boncher had substantial evidence supporting her conclusion that he committed the charged infractions.

The Arbitrator should not disturb the Warden's conclusions on the appropriate degree of discipline imposed on Davidson. The Warden testified at length regarding her careful consideration of the Douglas factors. The Union's dissatisfaction with the results of her deliberation are groundless and no basis for overturning a reasonable determination that removal was not required, but a substantial suspension was called for because of Davidson's misconduct was fundamental, egregious and intolerable. The contract demonstrates the parties' commitment to progressive discipline but also acknowledges that some offenses warrant "severe sanctions for the first offense up to and including removal." Article 30.Section c

The Union's attempt to overturn the suspension because of the time lapse between the incident and the disciplinary decision should be rejected. The contract does not contain any deadlines for completing investigations or imposing discipline. The documents the Union relies on are guidance and policies, not hard and fast directions. Beyond the lack of a contractual basis for the charge that the imposition of the suspension violated Davidson's rights, the Arbitrator should note that the investigation of the June 16 incident was conducted by the OIG and independent office under the Department of Justice over which the Employer exercises no influence or control

The Employer rejects the other challenges the Union has raised to the suspension. The Employer conducted a careful, fair investigation, properly weighed the evidence and the range of appropriate discipline for the two offenses. Warden Boncher determined that some factors mitigated the Grievant's admitted misconduct, and reduced the proposed discipline from a removal to a thirty-day suspension because Davidson's conduct was unacceptable, undermined confidence in his integrity and because the misconduct occurred in relation on an inmate suicide contravening one of the major responsibilities of the Employer to keep inmates in the custody of

the BOP safe from harm. The Arbitrator should not disturb management's decision without a showing that the level discipline imposed was arbitrary or violated the contract.

The Union argues the imposition of a thrifty-day suspension on Davidson is inconsistent with Article 30—there is not just and sufficient cause for the suspension, and the long delay in bringing the investigation of the events to a proposal and decision violated the promise of Article 30, Section d. of "timely disposition of investigations and disciplinary/adverse actions. It took well was well outside the time lines provided in the BOP policy statements on proper investigations. Other shortcomings in the process included failure to produce evidence relied upon by the investigators and decision maker until shortly before the arbitration hearings in violation of his due process rights. The Union contends the Warden did not properly weigh the Douglas factors and imposed punitive, not progressive discipline as required by Article 30, Section C.

DISCUSSION AND DECISION

As a preliminary matter I deny the Employer's contention that the grievance is not arbitrable because the Union failed to follow Article 31, Section b. This provision is precatory at best and does not provide any instructions on how to gauge the efforts of a party at making a reasonable and concerted effort to informally resolve a dispute before filing a formal grievance. Basil testified that he approached Boncher and proposed a further reduction in the suspension but was told that she could not or would not entertain that proposal. I credit his testimony and while it may be less effort than the Employer expected, I do not agree that it was unreasonable for the Union to conclude that Warden Boncher would change her position based on the fact that she had already reduced the proposed removal to a suspension. Beyond the meager evidence on this question, there is also no evidence that more effort is require to satisfy the contract.

In order to successfully defend the suspension, the burden is on the Employer to produce a preponderance of credible evidence that the grievant committed the offenses charged in the notice and decision letters, that those infractions were just and sufficient cause to take the adverse action, that the discipline promoted the efficiency of the service and that there is a nexus between the discipline and the efficiency of the service.

Despite the objections of the Union ,testimony of the grievant and other Union witnesses, I find there was strong probative evidence in the investigatory file establishing that the grievant failed to conduct rounds as required by his training, and post orders, and that the produced misleading round sheets that contained incorrect times contrary to the same post orders and the broader understanding that he was a law enforcement officer responsible for complete and accurate record keeping on the SHU round sheets.

I credit in part his attempted explanation for why the rounds were not conducted. I find that there was confusion over what constituted a proper round in the SHU, and whether a staff presence on a range alone amounted to a round, but that he also understood that rounds were essential for the safety and well-being of SHU housed inmates. He, Basil and Guerriero testified credibly that SHU#1 cannot enter a range when SHU#2 or any other staff with keys to the cells is on a range. The reasons for this prohibition on the officer in charge is elemental and doesn't require extended discussion. It may be true that he acted in good faith and attempted to be consistent with the directive restricting the movement of keys inside the range, but I am not persuaded that the common practices in the SHU before June 16 shields him from the clear directions in the orders. He testified that he did not watch the Compound Officers who came to retrieve an inmate for bus transport, and did not observe the others who went down range that night into morning. His confidence that other staff would perform the rounds which were his responsibility to ensure were completed was misplaced and the consequences were consequential.

The Union criticizes Warden Boncher from considering the inmate's suicide as a factor in weighing Davidson's discipline, but her conclusion that Davison's failure to perform his duties created plausible uncertainty about whether EM's suicide would have been prevented had rounds been conducted per the post orders is unquestionably correct. In this case, following the rules might not have prevented the inmate's death, but if the rounds had been conducted properly, there would be no question that the grievant and the Agency had fulfilled their obligation to the inmate. Given the gravity of the possible consequences of the missed rounds, Warden Boncher acted reasonably in framing at least part of her consideration of the Douglas factors on the loss of the inmate's life in the custody of the facility.

Warden Boncher relied on Davidson's affidavit to the OIG Special Agents, his written and oral responses to the proposal notice in reaching her decision to find he committed the charged

infractions. Nothing in his affidavit or interview with Boncher indicates that Davidson was unfamiliar with his obligations or had not been instructed properly in his duties (and the rules prescribing the SHU#1 duties. Notwithstanding his testimony, and that of his Union representatives, Boncher could reasonably find that by his own admission he violated the post orders, did not conduct rounds (or ensure that other competent staff did) and that he prefilled the SHU rounds sheet because he expected to be very busy because it was a Friday when prisoners are commonly transported from the facility for various reasons. I find that while he was able to offer a more detailed defense of his inaction during the hearing, to his credit, he never disavowed the admissions made in the November 15, 2017, affidavit. I find that she gave due consideration to his explanation for the non-performance of rounds and for the creation of inaccurate unreliable records and concluded that his conduct was not malicious, or intentional, or undertaken with the intent to deceive or defraud. Davidson gained nothing by his misconduct and repeatedly expressed his contrition for his dereliction of duty.

Because I find the decision to suspend the grievant was not influenced by the security videos, I cannot agree with the Union's contention that the failure to provide the videos until shortly before the hearing was harmful to the grievant or hindered his ability to vigorously pursue his contractual rights. Other deficiencies in the investigation likewise do not show the investigation was not fair or impartial. For example, the allegation that the grievant was prejudged as guilty of not conducting rounds and submitting incorrect round sheets because of the verbiage in Captain Bollinger's referral memorandum is not convincing. It appears that he framed his referral around admissions the grievant made to his Captain, and the confirmatory videos of Range 2 in the SHU. In other words, Davidson was truthful and frank in his communications with a superior officer who in turn reported those admissions to the OIA for action. Neither the OIA or OIG appear to have formed conclusions about his breach of the rules and post orders until after the completion of the interviews.

Putting aside the evidence of Davidson's failure to make rounds and his misleading preparation of the round sheet for the 6.16. 17 morning watch, I am persuaded that this suspension is not consistent with Article 30, Section d and widely understood principles of just cause and arbitral due process. The fact that the decision maker considered the extraordinary failure of the investigator to produce a timely report that could be the basis for the proposal notice is

noteworthy, but is not a fair measure of the injustice entailed by the unexplained lapses in finishing the investigation.

The records shows that his supervisors referred the incident to OIA on June 21, 2017. OIA in turn referred the matter to OIG to review the allegations to determine if there was a basis for considering the investigation of the incident might result in criminal prosecution. OIG conducted interviews of Davidson (and a colleague) on November 15, 2017. For reasons unexplained in this evidence the Special Agent in charge of the investigation did not provide the investigative report to the BOP until March 7, 2019, or 417 days after the interview with Davidson where he submitted an affidavit and the prefilled SHU round sheet to the investigators. No other staff at the facility were interviewed. OIG had learned the incident was not deemed worthy of federal prosecution on March 18, 2018 and there is absolutely no evidence that there were any investigatory activities in the nearly a calendar year between the ASUA's decision and the proffer of the investigation report to the BOP. Practically all the material findings of the report, aside from analysis of the operative rules Standards of Conduct, was the evidence collected on November 15, 2017. This was not a complex case requiring additional interviews after Davidson gave a sworn statement to the agents admitting his misconduct.

HR Manager Reed testified that she received a copy of the OIG report on March 8, or October 8, 2019. The proposal removal action was not issued to the grievant until August 4, 2020, or more than a year (515 days if measured from March 8, 2019) from the date the report came to the facility regardless of whether the report was in the hands of the HR department and/or the SIS officers at Devens. There is no evidence that the proposed removal notice was advanced in any manner during the entire tenure of the prior CEO/Warden, or from January 2018 to May 2020.

Davidson's performance and reliability during the pendency of the investigation and preparation of the removal notice cannot be dismissed. His performance evaluations are highly laudatory, he was promoted to a higher grade tittle (Senior Officer Specialist) and while he was not allowed to bid on the SHU#1 post for some period, he testified that he was allowed to work the SHU#1 morning watch six times between September and November 2019. Warden Boncher testified that she deemed the proposed removal inappropriate in part because of the delay in

proposing discipline. She also considered Davidson's post-incident conduct as a mitigating factor under Douglas but it did not change her conviction that a suspension was required.

Nonetheless, because of the gravity of the charges, she concluded that a 30 day suspension would "have the desired corrective action". In her decision letter she did not describe the suspension as a necessary deterrent to others and it appears that some of the Union's objections to SHU record keeping and rounds practice had been addressed after the incident. There is no evidence that the Union resisted the facility's insistence that a proper round required actual eyes on the inmate or that the round check list could be prefilled to save time.

Where there is no showing that the suspension was actually aimed at correcting Davidson's conduct as a correction officer, or was a legitimate effort to enforce post orders that were being abused by employees, I do not find that suspension was "designed primarily to correct and improve employee behavior" as agreed in Article 30, Section c. Nothing in the record suggests that the approach to conducting rounds evidenced by Davidson on June 16, 2017 was anything more than an isolated, regrettable episode. Davidson's performance and conduct was not improved or corrected by the suspension and indeed, there is no evidence that his abilities and skills were not still highly prized by his supervisors. The conclusion that a single incident of non-malicious, unintentional errors easily corrected with clarifying instructions can only be rectified by a substantial suspension seems disconnected logically from the objectives identified in the contract, and while Davidson's failure to insure that rounds were conducted and prefilling the round sheet violated standards of employee conduct, the level of discipline makes sense only for an employee who is troubled and requiring hard correction to conform to the expectations of management.

The Employer and Union offered divergent arguments on whether the failure to timely investigate and dispose of alleged misconduct can be a reason to reverse discipline. The Employer correctly observes the lack of any hard deadlines for conducting investigations or bringing charges forward. Article 30, Section d. reflects the parties understanding on timeliness: "Recognizing that circumstances and complexities of individual cases will vary…" indicates that there was agreement in principle on the need for a "timely disposition of investigations and disciplinary/adverse actions.", without agreement to impose one deadline for the full range of discipline and adverse actions. This language was negotiated to give general guidance under the

concept of "timely disposition" of matters subject to disciplinary clause, and consistent with the promise that any discipline must also be for just and sufficient cause, promote the efficiency of the service and have a nexus to the efficiency of the service. As noted above, the admissions of Davidson greatly simplified the investigation effort and the question of criminal responsibility had been disposed of at least a year before the investigatory report was forwarded to BOP.

The parties offered numerous cases on each side of the question of whether a failure to follow the concept of a timely disposition of an investigation or adjudicating an adverse action can be reason to find there was not just cause. As expected, the cases turn on circumstances and details. I will not examine the relevancy of all the twelve cases offered by the Employer or the eight decisions and award cited by the Union. I find the recent decision of Arbitrator Reilly in *AFGE Local 3690 and BOP, FCI Miami FL*, FMCS #210121-03206, (2021) addressing the 2020 removal of an employee for alleged misconduct in 2017-18 to be sufficiently on point with the time and delay issues in this case to be useful guidance.

Aside from evidentiary issues not relevant here, there, as in this case, the Employer argued that absent a finding that the procedural error was prejudicial to the grievant the Arbitrator should not disturb management's judgement on discipline unless the Union can show that the alleged error is likely to have caused the agency to reach a flawed conclusion. Citing *Pleasant v. Dep't of Housing and Urban Dev.* 98 MSPR 602 (2005). In *FCI Miami* the Union countered with some of the cases finding that inordinate delay in investigating or taking disciplinary action can be a reason to reverse resulting discipline, e.g./ *AFGE Local 3690 and BOP FCI Miami,* 111 LRP 22797 (2009). Arbitrator Reilly upheld the Union's grievance on several due process grounds including undue delay in investigating the alleged misconduct and administering discipline. It is not harmful or prejudicial error alone that makes undue delay a violation of an employee's rights. Citing *DOJ,BOP Beaumont*, FMCS # 12-54698 (Cipolla 2013). "…, timely action is fundamental to the determination of whether just and sufficient cause exists for contested discipline. When an agency unduly delays the imposition of discipline after learning of the misconduct, its action cannot be deemed fair and reasonable. Instead, unreasonable delay renders the discipline arbitrary and punitive, and thus, contrary to the standard of just and sufficient cause". Arbitrator Reilly's reading of the contract, like mine, finds nothing in Article 30. Section d dictating a certain time for completing an investigation or imposing discipline. I also agree with his conclusion that the

investigatory policy statements on timely investigations, etc. is not meant to be binding on management, but instead provides aspirational timelines and best practices for managers and decision makers. Even though the parties have agreed not to unduly burden management's investigatory and disciplinary decision making, undue, unexplained delay should be judged by whether such delays destroy the underpinnings of the just and sufficient cause promised in Section A. "When an agency allows an inordinate amount of time to elapse, whether in the investigative or adjudicative phase, the action ultimately taken becomes stale causing it to have more punitive than corrective effect." P. 42. The impact on an employee is not simply whether the delays prejudiced the ability of a grievant to present their case, but on whether protracted delay distorts how management weighs the degree of discipline imposed in the contest of progressive discipline.

In this case, putting aside the delay in OIG bringing the case back to the BOP for adjudication, more than 16 months lapsed between the handover of the investigation report and the issuance of the proposed removal. And as suggested by Arbitrator Reilly, the mere passage of time, plus the extended opportunity for the grievant to demonstrate that he did not need discipline to correct his performance as correction officer, rendered the suspension punitive not corrective and unnecessary to ensure the efficiency of the service.

I conclude that on the basis of the gross unexplained delay in bringing the OIG report to an adjudication of the Grievant's admitted misconduct after it was returned to BOP, the grievant was disciplined without just and sufficient cause and without any showing that his much delayed punishment promoted the efficiency of the service. This finding is not dependent on the OIG's delay, but on the extended unexplained delay in adjudicating the case after it was returned to the BOP.

This finding is not intended to in any fashion detract from the findings that Davidson failed to follow post orders and the Standards of Conduct when he failed to conduct rounds and improperly documented the rounds as having occurred. Warden Boncher's determination that such misconduct can undermine the usefulness of an employee and bring their integrity into irretrievable disrepair is valid. The delay in bringing this incident from investigation to adjudication was not the responsibility of her office and does not detract from her otherwise careful weighing of the Douglas factors except to the extent she unreasonably failed to factor in

the Grievant's lack of need for corrective punishment. The failure to adhere to even the concept of "timely disposition" of the investigation and adjudication of the June 16, 2017 incident, however, rendered the imposition of the thirty day suspension punitive and not corrective contrary to the promises of Article 30.

The remedy proposed by the Union is reasonable and consistent with the law. A violation of the contract is considered an unjustified or unwarranted personnel action for purposes of the Back Pay Act. Davidson should be made whole pursuant to the statute for any pay and benefits denied because of the suspension which I find to be an unjustified personnel action. I defer on the question of the whether attorney fees are also appropriate, pending application by the Union's counsel and an opportunity for the Employer to respond.

AWARD

The Agency did not have just cause to discipline the Grievant with a 30-day suspension for the two charges of failure to conduct Special Housing Unit ("SHU") rounds and providing inaccurate information on a government document in the decision notice dated October 14, 2020. The suspension was inconsistent with the agreement that management will discipline employees or impose adverse actions only for just and sufficient cause and to promote the efficiency of the service.
The suspension of Davidson was unduly delayed from the time the OIG delivered the investigatory report to the BOP and the resulting discipline was rendered punitive and not corrective, contrary to the Master Agreement.
The Grievant shall be made whole for all back pay and other lost benefits incurred because of the thirty day suspension.

Respectfully submitted,

Timothy J. Buckalew, Esq.