

**VOLUNTARY ARBITRATION PROCEEDINGS
FEDERAL MEDIATION AND CONCILIATION SERVICE**

In the Matter of the Arbitration	(Opinion and Award
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Between	(Case No.: 12-55044-6
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US Department of Justice, Federal Bureau	(Grievant: Zachary Moore
of Prison FCI Elkton, Ohio	(Date of Hearing: December 4, 2013
	(
and	(Record Closed: February 6, 2014
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American Federation of Government	(
Employees Local No. 607	(Date of Award: March 6, 2014
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Representing the Agency:	Justin T. Golart, Esq. Attorney Advisor, Federal Bureau of Prisons
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Representing the Union:	Philip W. Hulett Chief Arbitration Advocate
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William J. Miller, Jr.
Arbitrator

I. THE GRIEVANCE

Zachary Moore, the grievant herein, is an employee of the Federal Bureau of Prisons at FCI Elkton (hereafter referred to as the “Agency”) and a member of the American Federation of Government Employees, Local No. 607 (hereafter referred to as the “Union”). February 2, 2012, the grievant filed a grievance alleging the Agency violated the March 9, 1998- March 8, 2001 collective bargaining agreement between the parties (hereafter referred to as the “Agreement”) when it suspended him for three days for leaving an inmate classified as out custody in a hospital room restrained to the bed by handcuffs while he went to use the closest public restroom.

The parties being unable to resolve the matter, the Union appealed to arbitration. The arbitrator was selected by the parties through the Federal Mediation and Conciliation Service to hear and decide the issue. Accordingly, a hearing was held in Elkton, Ohio on December 4, 2013. Prior to the hearing the Arbitrator denied the Agency’s Motion for Summary Judgment. During the hearing, the parties were able to present evidence, both oral and written, to examine and cross-examine witnesses, who were sworn and sequestered and to argue their respective positions. The record was closed on February 6, 2014, following receipt of the closing briefs.

II. STIPULATIONS

The parties stipulated to the following facts:

1. On January 26, 2011, Officer Zachary Moore (“the Grievant”) was assigned as escort officer for Inmate Richard Tice, Register Number 42413-039.
2. The purpose of the escort was a medical appointment for Inmate Tice at the Northside Medical Center in Youngstown, Ohio.

3. At the time, Inmate Tice had served approximately nine months of a 33-month sentence for violating 18 U.S.C. & 922(g)(1), Felon in Possession of a Firearm.
4. During the hospital escort, Inmate Tice was an "OUT custody" inmate. Program Statement 5100.08, Inmate Security Designation and Custody Classification, defines "OUT custody" AS "[T]he second lowest custody level assigned to an inmate requiring the second lowest level of security and staff supervision. An inmate who has OUT custody may be assigned to less secure housing and may be eligible for work details outside the institution's secure perimeter with a minimum of two-hour intermittent staff supervision." (Chapter 2, Page 5)
5. The hospital escort occurred during the day watch shift.
6. The Grievant was the only escort assigned to Inmate Tice.
7. During the escort, the Grievant departed Inmate Tice's room, leaving Inmate Tice alone.
8. The Grievant did not call the operations lieutenant prior to leaving Inmate Tice's room.
9. The Grievant did not have permission to leave Inmate Tice unattended.
10. Nurse Dorothy Nelson observed Inmate Tice unattended, and subsequently called Janet Bunts, Health Services Administrator at FCI Elkton.
11. While Nurse Nelson was speaking with Ms. Bunts, she saw the Grievant returning to Inmate Tice's room.
12. Hospital security was called to Inmate Tice's room during the period of time when the Grievant was away from it.

III. BACKGROUND

The Agency presented as its witness Gilbert Garcia who testified he is the unit manager at the FSL at FCI Elkton. He stated he began working in that position in December 2011 and prior to that he was the special investigative services lieutenant from 2008 until 2011. He said that he investigated the misconduct involved in this matter. He

recalled there was a complaint from an outside organization, the hospital, hospital staff, that prompted the investigation. He testified that the hospital staff called expressing concern that one of the nurses came into the room and did not see a staff member there. He said he began his investigation on February 7, 2011 and ended on May 3, 2011. He stated that there are policies that govern investigators which laid on groundwork giving guidance and guidelines in spelling out procedures. He indicated that there are no timelines in the policies and some investigations take longer than others based on the complexity of the case, number of people involved, availability of witnesses and availability of inmates. He stated that investigators deal with issues other than allegations of staff misconduct. He said that the 2004 OIG report does not constitute Agency policy. He stated that how long it takes to complete a staff investigation is primarily driven by the case and how complex it is. He said that the inmate involved in this matter was Richard Tice who was recently transferred because he was caught with tobacco products which are contraband.

On cross-examination he stated that Mr. Tice was transferred in April 2013. Upon reviewing documentation he agreed that the proper inmate with the last name Tice that was actually involved in this matter was released on November 16, 2011. He admitted he could have mixed up two inmates with the last name Tice and that the inmate involved in this matter was not the one who was transferred because he was found with contraband. He read that the recommendation from the OIG report states “establish written time guidelines for the investigative and adjudicative phases of the disciplinary system.” He continued to read “As a result of these issues, the BOP proposed its own internal time expectations for investigative work[]” and “The upper limits would be 120

days from local investigations and 180 days for OIA investigations. The BOP also said that it would establish an upper limit for completing the adjudication of misconduct cases at 120 days.” He testified that he is aware of the October 31, 2006 memorandum from Kathleen Kenney, the Assistant Director/General Counsel for the BOP. He read from this document “in all cases of local staff misconduct investigations completed on or after January 1, 2007, local investigative staff SIAs and SISEs must forward the complete investigative packet directly to the office of internal affairs for approval before forwarding it to the CEO for action.” He testified that he completed his investigation and sent it directly to OIA. He agreed that this document indicated that local investigations should be completed within 120 calendar days of the date the local investigation was authorized. He said that it is common for the OIA to refer allegations which have been classified as level 3 back to the institution for investigation. He stated that the OIA investigative report lists the offense but he does not recall if it says whether it’s category 1,2, or 3. He said that it is hard to say what type of offense the charge of failure to follow policy would be classified as without knowing more details of the type of the offense, it could be category 3. He testified that he worked as a special investigative supervisor for approximately 3 1/2 years during which time he had a variety of cases. He said he did not recall what classification the OIA assigned in this matter. He agreed that complexity is one factor that can affect the timeframe of the investigation. He stated that he did not believe there were any complexities that existed in this matter at the time the investigation was ongoing. He stated that he does not recall if any of the witnesses were unavailable for an extended period of time.

On re-direct he reread that “in all cases of local staff misconduct investigations

completed on or after January 1, 2007, local investigative staff, SIAs and SISEs must...” and that “local investigations should....”

Robert Farley testified that he has worked for the Bureau of Prisons since 1994 and that he is currently the warden, chief executive officer, United States Penitentiary Big Sandy located in Inez, KY. He stated that he has worked at nine institutions during his time with the Bureau of Prisons in roles including correctional officer, lieutenant, captain, associate warden and warden. He testified that as a correctional officer his primary responsibility was to supervise inmates in their living quarters, perform area cell searches, provide security of the living areas of the inmates and work details. He said that as a lieutenant or shift supervisor his primary duties were to supervise the correctional officers. He stated that as the captain he was chief of security in the institution and served as an advisor to the warden and all security matters, was responsible for key controls, locks, security devices and emergency preparedness within the institution. He testified that as associate warden he provided administrative oversight of the various operations of programs within the institution. He said that as warden at FCI Elkton he was primarily responsible for administering all programs and operations and functions of the entire institution. He stated that he is now at the United States Penitentiary in Inez, KY and provides all oversight. He said he is one of 40 senior executive service wardens and one of 16 wardens of high security components within the 119 inventory. He testified that he is also responsible for being a Federal Bureau of Prisons firearms instructor and is the lead tactical trainer for the Agency. He described that as a tactical trainer for the Bureau of Prisons he works with the officers of emergency readiness located in DC and prepares doctrine lesson plans and also trains Bureau staff in

tactical operations, including individuals that become actual instructors within all special weapons and tactical within the Agency. He testified that he is still certified for basic prisoner transport which is not common for a warden. He said that in January 2012 he was assigned as the warden and chief executive officer at FCI Elkton. He stated that he was at FCI Elkton from January 2011 to July 2012. He said that approximately 2500 inmates were housed at FCI Elkton during his tenure. He stated that FCI Elkton during his time as warden was a low security institution. He recalled that he was responsible for approximately 360 staff members when he was warden at FCI Elkton. He testified that he has been involved with employee discipline during his career. He described the discipline process initiates with an allegation of staff misconduct and from there it is referred to OIA for investigation. He stated that the investigation process begins and at the conclusion of the investigation if misconduct is sustained it then goes before proposing official and then to a deciding official. He said that the employee has the opportunity to have Union representation during that time. He testified that when the person is going before the deciding official that would potentially render any type of discipline, they have an opportunity to make a statement in writing and also have the ability to present any factors in oral presentation as well. He stated that he has played the role of reporting official, proposing official and deciding official in different employee discipline processes. He stated that disciplining an employee is one of the most difficult things he needs to do because often times that results in a staff member either losing pay or their employment. He testified that he recalls the disciplinary action that is the subject of this arbitration and that he was involved in it as the deciding official. He recalled that 14 days suspension was proposed and that he mitigated it down to three days. He

described, referring to the proposal letter, that the facts of this matter were that on January 26, 2011, while assigned as the officer in charge at Northside hospital grievant departed the room and left the inmate unattended while using the restroom. He recalled that grievant made an oral response at the decision meeting and that he was represented by the Union at his response. He stated that grievant did not make a written response. He said he reviewed the disciplinary file prior to making his decision. He stated that he is familiar with Douglas factors and considered them in this case. He said that he considered the nature and seriousness of the offense, the fact the event occurred out in the community, the fact that grievant left the inmate unattended which could place the public at risk, could place the inmate at risk, and could place grievant at risk. He stated he also considered that the Agency has had inmates that escaped from outside escorted trips, that inmates have murdered staff on escorted trips, he has personal experience as a former captain at a location where staff were taken hostage from an escorted medical trip, and that as a lieutenant he was assigned to be the wit sec lieutenant and was in charge of inmates in that program to all areas of the country. He said he also considered as Agency tactical trainer, that he trained staff on privacy escorts when their escorting terrorists and inmate of broad publicity. He testified that considering grievant's job level and responsibilities he considered that grievant was a seasoned correctional officer and was performing his job at a satisfactory level. He stated that grievant had no prior discipline. He said that he considered that grievant performed all facets of his correctional officer duties and maintain a satisfactory level of performance. He stated that he considered the fact that grievant's supervisors continue to have confidence in his ability to perform his correctional officer duties. He said, in regard to what he considered regarding the

consistency of grievant's penalty, that it was well within the table of penalties established by the Agency which varies from a letter of reprimand all the way up to removal for violation of this policy. He said that during his time as warden he had seen violations of policy, but had never had an individual who violated this portion on escorting medical trip. He testified that he considered the fact that had this inmate escaped, it could have created a diminished confidence from the public in the entire Agency. He stated that grievant had received appropriate training for this event. He said that he was confident that based on this event grievant would be able to perform these functions in the future. He stated he considered grievant's response in his decision-making process including that grievant admitted he had been trained, admitted he was aware of the special instructions of the post orders, and stated that he was remorseful of the event and in future escorted trips he would understand his role and the significance of the event as to how it could impact the community. He testified that he considered alternative sanctions in this case including the 14 days the proposing official indicated that he decided to mitigate it down and give grievant only three days. He said that he felt three days was the appropriate response for the facts in this matter and to ensure that future acts of this nature would not occur. He testified that the 2004 OIG report is not Agency policy. He said he would describe it as a nine-year-old report which at that moment in time reviewed the Agency's disciplinary system for that moment in time and provided a number of recommendations for the Agency to review. He testified that the Bureau of Prisons is a policy driven organization. He said that policies derived from a number of factors within their system primarily relegated to the American Correctional Association finding. He stated they are governed by existing policies. He testified that Bureau of Prison policies are created with

subject matter experts and Union representation all of whom review, whether it be code of federal regulations, other governing statutes, things of that nature, which then drives the formulation of the policy. He stated that he is not aware of any specific timelines regarding employee discipline that are contained in statute, regulation or the Agreement. He said that each investigation is fact specific and time specific. He stated that as warden he has no overall expectation as to the amount of time an investigation will take. He said that the Union has the ability to negotiate existing policy and formulation of policy. He testified that it would not have ever been appropriate for grievant to have left the inmate unattended and unobserved at the Northside Medical Center.

On cross-examination he said that the proposing official actually makes the proposal for discipline. He stated that he was unaware of whether the proposing official actually drafted the proposal letter. He testified that when he acted as a proposing official he would prepare the proposal letter. Reading from the proposal letter he said “inmates under escort will be within the constant immediate visual supervision of escorting staff at all times...” “For those institutions using escort staff with out or community custody inmates, the institution will make prior arrangements to address the security and supervision of the inmate, in the event is as necessary for staff to use the restroom.” He said he was aware of the custody of the inmate in this matter and that he believed that it was an out custody. He stated that ordinarily the security requirements for an inmate who is classified as out custody is one staff member. He said that daily supervision for an inmate classified as out custody within the confines of the institution would be indirect supervision, probably anywhere from 1 ½ to 2 hours and when they’re on and escorted trip outside in the community, it is direct and constant supervision. He testified that

inmates classified as out custody are always escorted under direct staff supervision for purposes of a medical trip. He said that the satellite camp of the USP Big Sandy there are a few inmates who are classified as out custody. He testified that he imagines that it can occur that an inmate who is classified as out custody is placed in a certain status and sent out on a medical appointment. He stated that when he was the warden at FCI Elkton inmates who were classified as community custody were housed at FCI Elkton. He said that he was not aware of any prior arrangements that were made to address the security and supervision of the inmate when grievant needed to use the restroom. He stated that it is reasonable to assume that during an eight hour period of time a staff member responsible for the supervision of an inmate may need to utilize the restroom. He read from Article 3 of the Agreement that "both parties mutually agree that this agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not higher government wide laws, rules and regulations." He read that Article 29, Section B states "employees will be provided with clean and sanitary toilet facilities which are readily accessible and separate from those used by inmates. Specific toilet facilities for taking of inmate urinalysis testing will be negotiated locally." "All toilet facilities will be capable of being locked by the employee while the employee is utilizing." He testified that this provision did not raise any concern with respect to this particular case. He stated that if grievant had followed the special instructions and contacted the institution, they would have made arrangements for the him to have a restroom facility available. He stated that because this was an out custody inmate no armed situation was necessary. He said he believes it would have been appropriate, with respect to this case, to have issued this document to the officer in question as instructions for him to follow on this out

custody inmate considering the fact it was an unarmed post. He testified that he says that because under the basic prisoner transportation policy, based upon the custody level of the inmate, the person could be armed or unarmed as far as the escorting officer. He said the tenants of the program statement as related to the escorted trips pertain to that individual. He pointed out that the example he mentioned earlier where staff was taken hostage included unarmed escorting officers so he believes that whether the person is armed or unarmed he would still say they need to follow the tenants of post orders. He stated that the grievant should have called into the institution before going to the restroom. He stated he could not point to specific information in the document where it gives special instructions for the outside hospital officer requiring them to call back prior to going to the restroom. He said he may need more time to review the document, but he does not see that language contained in this specific document. He stated that in this case there was a requirement for constant staff supervision of the inmate which should be contained in the conditions of the escorted trip. He indicated that the staff member could use the closest public restroom provided the constant visual supervision of the inmate was maintained. He indicated that he was handed a blank copy of an escort trip authorization form. He said he does not recall whether the inmate was actually escorted by grievant from the institution to the hospital. He stated that the escort form says the inmate will remain in full restraint at all times while in the hospital, unless directed by the captain prior to the trip departing or authorization is obtained from the operation lieutenant for required medical reasons. He said that an out custody inmate would not be required by policy to be in restraints while at the hospital, but it could have been recommended by the captain. He testified that if such a recommendation was made it

would have been on the escort trip authorization form. Reading from the general escort trip authorization form he stated that it says “all inmates escorted from FCI Elkton into the community for medical treatment will be transported in full restraints to include handcuffs, Martin chain and the leg irons, unless emergency medical conditions preclude such use. All escort staff will wear bullet resistant vests.” He said that out custody inmates are not ordinarily taken out in full restraints, but they can be. He stated that he is unaware the out custody inmate in this case was in any type of restraints other than what is listed in the file where the grievant indicated that when he left the restroom he placed restraints on the inmate. He testified that for an out custody inmate a bullet resistant vest is not required.

On re-direct he stated that in his opinion Article 29, Section B relates to a federal prison not a public hospital. He testified that prior to an assignment staff members have an opportunity to review post orders. He said they are tracked by post orders signatures. He stated that he believes there is a security component assigned to the Northside Medical Center. He said that FCI Elkton collaborates with those security officers during escort trip Northside. He stated that they collaborate on arrival and departure and also have an opportunity to collaborate depending on the custody level of the inmate. He testified that if a staff member would have to step away for a temporary time the security component at Northside can insert themselves to provide coverage. Looking at number three on the post orders he read “escort officers will maintain constant visual contact with the inmate at all times.” He also stated, looking at number 13 of the post orders, that it says “do not leave your post without the approval of the operation lieutenant or until proper relief has been provided.” He said that this is a clear statement. He testified that

the inmate grievant was escorting was not on furlough.

On re-cross he stated, looking at the program statement 5538.05 on escorted trips that it says “and escorted trip merely extends the limits of the inmate’s confinement.” He said that that means that the inmate is still under the care and custody and control of the Bureau of Prisons while the inmate is out in the community. He testified that the same expectation exists of an inmate and staff member at an outside hospital as it would in the secure confines of the institution. He stated that in his opinion the Agreement applies only on institutional grounds. He testified that he indicated that the escorting officer could contact the institution and in turn the operation lieutenant could make contact with security at the hospital in order to provide relief if needed. He said he is not aware where that might be written. He stated he believed it would be important for the staff to be aware that they needed to contact the shift supervisor. Reading from the correctional services procedures manual he stated that number nine on page 4 says “Impact on Master Agreement. This document is to be reviewed in conjunction with the negotiated Master Agreement. If there are any contradictions between the two documents, the Master Agreement will prevail.” He testified that he is unaware if grievant had access to the post orders for outside hospitals on the date in question. He stated that when he asked the grievant if he was aware of the post orders and what was contained within the grievant said yes. He said he believes it is important for the post orders to be provided and made available to staff who are assigned to these positions. He said, reading chapter 8, page 1, number 801, that it says “competent and qualified personnel will supervise inmate sent from Bureau institutions to local medical facilities for medical treatment. Either institution correctional staff or staff secured through a contract between the institution

and a local security form, companies or individual will provide guard service. Since the quality of contract guard service varies, each institution must evaluate its specific needs and choose an option or combination of options which best fulfill requirements.” He testified that he is unaware of any contracts with the hospital to use its guard service. He stated that a narrow interpretation of the Program Statement might require that, but in a broader context, perhaps not, especially if it’s going to be a temporary measure. He said that the Program Statement is implying for a contracted guard service that would fulfill a full-time oversight of an inmate where’s the measures were referring to are a temporary measure for the staff member to utilize facility or some other consideration. Reading from chapter 8, page 2 number 802 he said that the document says “the contractor must provide either documented evidence or assurance certification that each employee used as a contract guard service meets all the following requirements[.]” Looking at the OIG report he indicated that it says “However, we identified deficiencies in the BOP’s disciplinary system that prevented from ensuring the disciplinary decisions are reasonable, consistent and timely.” He testified that he does not know why it took almost 12 months to complete the investigation and adjudication of this particular incident. He stated that he does not recall who the lieutenant was who was on duty when this particular incident occurred. He said that he was not aware of the performance evaluations that were issued to grievant shortly after this incident occurred. He testified that staff are supposed to be able to maintain supervision of the inmate. He stated that there are ways to maneuver the inmate within the hospital room itself in order to maintain supervision while using the restroom. He said he does not know the specifics of that room, but there are ways to do it.

On re-direct he stated that the disciplinary system that was addressed in the OIG report is not to his knowledge the same one that was in place at the time of the decision related to grievant. He said he thinks that the disciplinary system was changed at least two times since the report and maybe three.

Tim Minter testified that he began work at FCI Elkton on May 27, 2007 and he is currently the senior correctional officer. He said that he has taken escorted medical trips and performed security for inmates at the outside hospital. He stated that he has performed security for an inmate who is classified as an out custody. He explained that the minimum requirement and the minimum equipment for an out custody inmate are one set of handcuffs, one restraint key and his cell phone from time to time. He said that the inmate would sit in his hospital bed or his chair freely to move around anywhere he wants to go and that there is really no outline security procedure for an out custody inmate. He testified that on occasions when he has provided security for an out custody inmate at an outside hospital he has had to use the restroom and used the public restroom that was closest to the room. He explained that out custody inmate does not have to be restrained and have two hour minimal supervision requirements, meaning that you can technically go away for two hours and come back and make sure that he is still there and okay, but they never do that at the hospital. He testified that what he did was use the restroom closest to the room. He said that on occasions when he provided security on an out custody inmate the post orders were not present at the time of escort or in the hospital. He stated that the post orders were available at the institution, not the actual duty station. He said there have been a number of times where he has departed directly from home and gone straight to the hospital duty station. He stated that in this case, if there are new post

orders, he cannot review them at the station and must wait until he goes back to the institution to review them. He testified that what he relies on to ensure that he was maintaining the proper security procedures of that particular inmate is something they call sound correctional judgment or sound correctional procedure. He explained that it is basically just making good judgment calls based on the knowledge you are aware of the policies you are aware of and the post orders that you're aware of. He testified that the escort instructions are sometimes available and sometimes not, it is not consistent. He said he cannot count on it every time he goes to a hospital room to have those instructions present. He stated that given the fact he has no instructions, no post orders, the only way he would be able to tell whether an inmate needs constant supervision would be to refer to sound correctional judgment. He explained that if he is assigned to a hospital room and there's one inmate and one staff member, he knows automatically that it's an out custody minimal security inmate. He stated that if there are no instructions provided to him he knows to fall back on sound correctional judgment and do what he knows and make the judgment calls. He testified that he is a certified firearms instructor at FCI Elkton. He stated that he has been a firearms instructor during the period of annual refresher training that conducted at FCI Elkton he said that during that training BPT training only pertains to the course of fire and the 9 mm handgun, there is no instruction on policy, procedure or escort instructions in general.

On cross-examination he stated that the Program Statement said that out custody inmates are eligible for two hours without supervision. Looking at the post orders he read from paragraph 3 which they "escort officers will maintain constant visual contact with the inmate at all times." He stated that it is safe to say that if the post orders had

been read they would know to do that. He testified that he does not think it's safe to say that escorting officer at a hospital could walk away for two hours and go to Subway and watch a movie, but in the circumstances were referring to now when there's a single officer in the room and the relief in sight, if you need to walk 20 feet to use the restroom he wouldn't call back to anyone and never has. Reading from the post orders on the last page he indicated that it says "Do not leave your post without the approval of the operations lieutenant or until proper relief has been provided."

On re-direct he testified that the post orders he was asked to read from appear to apply to a higher custody level of inmate because they specifically state that it is for an armed post which means everybody's going to carry a weapon and will wear a bullet resistant vest which is not something you have to do with an custody inmate. He pointed out that the Post orders say that all inmates will be fully restrained and that is not applicable to an out custody inmate. He stated that he said in a previous statement that when he goes out he carries a set of handcuffs and the key, not a full set of restraints, so this appears to him that it could be referenced for a higher custody level set of instructions. He testified that based on his experience these special instructions are not specific to an out custody inmate.

On re-cross he testified that the case management coordinator would determine the security of an inmate that's going to be escorted to a hospital. He said that the escorting officer does not determine the inmate's custody level, it would have been determined by someone else prior to leaving the prison. He testified that it would depend on the situation and the custody level of inmate whether or not the escorting officer had the ability to determine which security procedures applied to the trip. He testified that the

security procedures outlined in the post orders are very, very vague. He stated that there are security procedures that apply when a correctional officer is escorting an inmate to a medical facility. In response to whether or not the security procedures are determined by the escorting officer or by someone else he said that it depends, the escorting officers have the ability to make a judgment call when it is necessary.

On re-direct he explained that an escorted trip starts at the institution and several things have to take place in order to go from point A being the institution to point B being a hospital. He said that an outside hospital post would be the post at the hospital.

Thomas Zackasee testified that he has been at FCI Elkton for 14 years. He said he was a corrections officer for 7 ½ years and has been a case manager for six years. He stated he has been chief steward for the Union for the past six years. He stated he has been a steward for most of his 14 years. He said he is familiar with the situation that is before the arbitrator today. He testified that he did not represent grievant when he went before the investigative unit, he believes Joe Thompson did that. He said that after grievant got his letter and had 10 days before he appeared before the warden to give either a written or verbal response that is when he represented grievant, at the appearance before the warden. He indicated that he signed the grievance. He pointed out that the grievance indicated that the violations included, but were not necessarily limited to the following provisions of the contract, Article 6, local supplement agreement, and 5 USC. He testified that he did not intend to limit the grievance to Article 6 of the Agreement. He explained that he has filed other grievances where he has put the specific article and not included the language including but not limited to. He explained that the reason that under the request for remedy he asked for the three day suspension to be changed to a

written reprimand was that grievant is entitled under the Agreement to be treated fairly and equitably and most of the people that the Union knew about in similar areas were given a written reprimand. He testified that they didn't ask for less because they felt other people had been given written reprimands what they were asking for was for this guy to be treated fairly and to get the same thing other people got not better and not worse. Looking at Article 29 on page 69 he read "Employees will be provided with clean and sanitary toilet facilities which are readily accessible and which are separate from those used by inmates." He stated that this was brought up in the informal process when they spoke with the warden. He described an ISDS sheet as something that is generated by the collaborative effort of the unit team, psychology, recreation, and education and it tells you about the inmate's needs and goals and what you should be recommending and what you should do. He recalled that they brought the wellness portion which encompasses health services of the ISDS sheet for the inmate in question in this matter because he hit two of the three criteria regarding questions about intravenous drug use, ever having promiscuous sexual encounters, and something about having tattoos in the prison system or on the street as opposed in a parlor. He stated that they brought this up in front of the warden saying that he would not have used the facility in the room because this inmate had some stuff in his past. He testified that there's a wide variety of training on communicable diseases regarding inmates that includes everything including MRSA, AIDS and TB. Looking at the ISD sheet for the inmate in question he explained that minimum out means that you are basically a camp level inmate. He explained that the custody level is out meaning in custody, out custody, community custody. He said there are variations that depend on the structures inside the facility because you are to be

housed in a facility that's commensurate with your security needs and a wide variety of things from staffing and how often you need to be checked on based on your security level. He stated that out custody level inmates, campers, only need to be checked on every two hours. He said that every two hours they report to a staff member when they are outside. He recalled that when he explained the Union's side of the story to the warden they explained that the inmate was minimum out custody and there are policies regarding him specifically for these medical trips and that the Union's position was that there was minimal to no concern of a threat to society or a hostage situation or escape. He stated that the BOP dictates this inmate's security needs and basically say that one guard is with them at all times and if they have to go to the bathroom, which was the case here, you slap extra restraints on the guy, give your partner your weapon and go to the bathroom. He stated that there is a whole section in their about four institutions who choose to use staff members on these particular inmates because policy does not dictate that the staff need to be there at all. He explained that the inmates can be what is called furloughed to the hospital, meaning a minimum out custody level inmate can be at the hospital 24/7 without supervision. He testified that he told the warden he felt that the warden's reasoning of concern for society or the prisoner escaping because grievant left to go to the restroom for 2 to 3 minutes were unfounded because the inmate could actually be left there for 24 hours a day by himself. He explained that there are different types of release including good conduct time and full-time release. He said that this inmate was designated for good conduct time release and that three years of supervision after his release was going to be imposed.

On cross-examination he explained that he asked for a written reprimand based on

what he thought was appropriate for what he thought the charge should be which was a post order violation, not a policy violation. He stated that the inmate in this case was minimum out. He said the inmate was not furloughed. He testified that he was not aware of the situation in the warden's past where to inmates on and escorted trip who were classified as out custody escaped, took a weapon from an officer, and one of those inmates ended up using the weapon to kill himself. He said that seemed quite strange because why would an officer have a weapon on an out custody inmate.

On re-direct he testified that at 1 o'clock there will be inmates walking around freely. He explained that they are gate pass inmates, basically the minimum out custody inmates. He stated that they are outside most of the day 7:30 a.m. to 3:30 p.m. and if they chose to they could just leave at any time.

Anthony Beshara testified he has been a corrections officer at FCI Elkton for 16 years. He said that he has been assigned as an outside hospital officer on an out custody inmate. He said that an out custody inmate does not require any restraints while an in custody inmate requires restraints. He stated that also, to his knowledge, and out custody inmate only requires that the officer make sure he's there every two hours and does not require direct supervision. He said that he probably escorts an out custody inmate to the hospital a couple times a year, it happens a lot more for in custody inmates because there are a lot more of in custody inmates. He testified that he departs from the institution if he is working right before his shift at the hospital or, if he is at home prior to his shift at the hospital, he departs from home. He explained that when he has departed from home and arrived at the hospital what is present in the way of security is the officer that he is relieving, a set of handcuffs and a key. He said that post orders are sometimes present

but more often are not present. He read from the escort instructions that it states "Out custody, restraint equipment may be used at the discretion of the escorting officers." He testified that when he was on an out custody inmate at the hospital and had to use the restroom he used to the closest public restroom to the inmate's room which was most likely down the hall. He said sometimes there is a restroom in the inmate's room if they are in ICU but the nurses tell them not to use that restroom because they could get sick from going in there and that there is a bathroom to use down the hall, he said other times there is no restroom in the room. He stated that a regular room might have a bathroom but it is usually dirty and although he may go in there to urinate he wouldn't go in there to do other things. He said that when he was new, probably 15 years ago, he called back to the institution to get guidance and as far as he remembers was told the inmate was an out custody inmates who he doesn't need to be watched but every two hours, go down the hall to use the bathroom and that is the way he has been doing it ever since. He testified that he has not felt the need to call back to the institution in any recent years. He stated that there has never been a situation where he has contacted the security services of the hospital to request them to come and provide relief so that he can go use the restroom when he has been assigned as the officer on an out custody inmate at the hospital. He said that he has never read or been told anything that would be appropriate for him to do. He testified that while sitting on an out custody inmate at the hospital he has not been required to wear a bulletproof vest and has no weapon. He stated that an out custody is not an armed post. He said that the special instructions for Post: Outside Hospital Officer are not appropriate for an out custody inmate because an out custody inmate is not an armed post. He stated that not to his knowledge have there ever been any prior

arrangements to address the security supervision of the inmates in the event it was necessary for him to use the restroom on an escorted trip with an out custody inmate. He read from the Program Statement "An escorted trip nearly extends the limits of an inmate's confinement." He testified that to him this means that in custody are more confined to need to be restrained whereas out custody inmates are not restrained and only need to be checked on every two hours. He stated that he has the same authority in the hospital room as he has inside the secure confines of the institution. He said that he has the same rights pursuant to the Agreement at the hospital as he does on duty inside the secure confines of the institution.

On cross-examination he stated that to the best of his knowledge an out custody inmate could be left unattended for up to two hours while at the outside medical facility. He read from the post orders "escort officers will maintain constant visual contact with the inmate at all times." He said that he would not agree that these orders are an Agency policy that are applicable and require escort officers to maintain constant visual contact with the inmates at all times because this would not be the first time the post orders are conflicting with how they actually do things. He reiterated that this would not be the first time that the post orders, let alone escort post orders or outside hospital post orders, are conflicting with how things actually get done or can get done. He stated that he contacted his supervisor a long time ago because he had use the bathroom and they told him that the inmate only needed to be supervised every two hours which would conflict with these post orders. He stated, in response to questioning about why he would leave the inmate alone but would not feel comfortable leaving him with the hospital security team, that he would rather no one be around the inmate because he does not know the

security team. He said that he has run into situations where the hospital staff have known the inmate and that he would rather hurry down the hall and use the bathroom and come back as quickly as possible without anyone watching the inmate. He stated that at the institution he is not required to maintain visual contact of every inmate at all times. He said that as a correctional officer working at FCI Elkton there are a lot of policies governing what he must do. He stated that there are different policies that govern what is done on escorted trips. He said there are a number of instances where he has left an out custody inmate unattended and unobserved while conducting an escorted trip to a medical facility. He stated he never reported those instances.

On re-direct he read from Article 3, Section A of the Agreement which states "Both parties mutually agree that this agreement takes precedence over any bureau policy, procedure, and/or regulation which is not derived from higher government wide laws, rules, and regulations." He testified, looking at Article 29, that it means exactly what it says, that employees will be provided with clean, sanitary toilet facilities which are separate from what the inmates use. He stated that he believes the Agreement applies to him when he is outside the confines of the institution.

James Wolfe testified that he is a correction officer, senior officer specialist. He stated that he has been at FCI Elkton for almost 17 years. He said during this time he has had assignments as the outside hospital officer on out custody inmates. He stated that what they did was pick up the inmate, a set of handcuffs, a cuff key, cell phone and charger and then taken to the hospital. He testified that no restraints were placed on the out custody inmate, you just carry them in with you in case you would happen to need them, it is your discretion when to use them. He said that he has had occasion to go

straight to the hospital to provide security on the inmate after the inmate was already transported to the hospital. He stated that when he arrived there what was present were handcuffs, a key cuff, a cell phone, and a charger. He said no post orders were present. He said that an escorted trip authorization would usually be there. He testified that on occasions when he has been assigned as an outside hospital officer on an out custody inmate there have never been any prior arrangements made to address the security and supervision of the inmate in the event it was necessary for him to use the restroom. He recalled that when he has been assigned on an out custody inmate and needed to use the restroom he goes down the hall and uses it. He stated that he is not going to use the restroom in the room because he does not know what the inmates have and after surgery they are a mess. He stated, looking at the Post: Outside Hospital Officer special instructions that he has never been required to wear a protective vest on an out custody inmate because he does not take a weapon. He testified that he has never felt the need to call back to the institution to get permission from his supervisor to depart the room to use the restroom. He stated that when assigned on an out custody inmate he has never felt the need to contact, or ever believed that he needed to or was entitled to contact, the hospital security to provide relief to him so he could use the restroom. He stated the reason for this is that an out custody inmate is technically able to be unobserved for two hours and it takes two minutes to use the restroom. He testified that the language constant visual contact with an inmate means that they don't leave your sight. He said that if it applied to an out custody inmate it would say out custody inmate. He stated he has never seen where it says anything like that. He said that if an out custody inmate required constant visual supervision that would be designated on the post orders or on the escorted trip

authorization, but he has never seen that on an out custody inmate.

Grievant testified that he is a senior officer. He said he was shocked when he received the letter that proposed 14 days suspension. He stated that he worked at FCI Elkton from 2006-2008 and from 2011 to current. He said from 2008-2011 he worked for homeland security as a federal air marshal. He testified that when he came back to the Bureau of Prisons he got reinstated at FCI Schuylkill. He stated that when he first started his career he worked at the Federal detention Center in Philadelphia which included all custody levels including females, witness protection inmates, out custody inmates, and all other kind of inmates. He testified that he has been responsible as the outside hospital officer on out custody inmates several other times. He stated that on the date in question he did not believe that leaving the room that the inmate was in to go down on the hallway to utilize the restroom was out of the ordinary. He said he felt that was the way he was to do things. He stated that he has read the post orders. He testified that on the date in question he was not required to wear a protective vest and that there was not one on-site. He said that the restroom in the room was totally unsanitary. In response to reading the sentence that says he is to maintain constant visual contact with the inmate at all times, he stated that it is impossible to do that because even if he uses the restroom in the room he has to close the door and then the inmate will be out of his vision and if he leaves the door open it goes against his own privacy. He stated that on the date in question when he arrived what was present in the room was a set of handcuffs, a handcuff key, a logbook and a phone. He said that neither the escorted trip authorization nor any post orders were available when he arrived on post. He testified there was nothing else present that he could defer to for direction on what the specific instructions

were regarding the supervision of that inmate. He said he did not take the inmate to the hospital, he went straight from his house to the hospital. He stated there was no equipment bag there which is usually where the Post orders are, all that was there was the pair of handcuffs, handcuff key, phone and logbook. He stated that he did not receive additional BPT training when he returned to the Bureau of Prisons from the air marshals service. He clarified that he went to the range and shot and qualified for BPT but that he was not refreshed or given classroom teaching on any sort of rule changes during the two years he was absent. He testified that as far as annual BPT you don't receive training, you just go and shoot each year at to requalify. He said there is no training with regard to the escort procedures annually. He stated that on the date in question Lieutenant Osborne was the lieutenant. Looking at his performance evaluation signed April 2, 2011 done by Lieutenant Osborne, he stated that he received this after the incident occurred. He said he spoke to Lieutenant Osborne on the day of the incident and Lieutenant Osborne was the one who issued the performance evaluation. He indicated that he was given an E which means excellent under the element of supervising inmates, and was given an O for outstanding under follows security procedures. He testified that it was a little confusing to have one part of the Agency telling him he messed up and have a supervisor telling him he was doing a wonderful job when the supervisor was aware of the whole incident. He said that the escort instructions were not present when he assumed his duties on the day at the hospital because there was no paperwork there besides the logbook. He stated that he has previously filled out escort instructions so he is familiar with the document. He testified that in section 2 where references out custody it means exactly what it says, that restraining equipment may be used at the discretion of

the escorting officer, meaning he is in charge. He stated that if at any point he feels the inmate needs additional restraints, the handcuffs he is provided with, he can apply them. He recalled that on the date in question, prior to departing for the restroom, he took the additional security measure of handcuffing the inmate to the bed. He said he did that just on instinct or judgment. He stated that it was not done because the inmate was out of control or behaving badly. He said that if the inmate would have gotten up and walked out of the room and left the hospital he would have been shocked because he had never experienced anything like that but he would have called the institution to report the walk off. He stated that it was not uncommon at FCI Schulykill when he worked at the camp to have walk offs and they would just report that to the local authorities. He testified that they are taught self-defense but they are not given any kind of training to subdue or fight an inmate so he has no idea what he would do with the situation when someone was walking off. He said he has not been trained in offensive techniques in that respect. He stated that while at FCI Elkton he has never called back to the institution to request permission from the supervisor to depart the room and utilize the public restroom while assigned on it out custody inmate at the hospital.

On cross-examination he stated that his performance evaluation was issued while the investigation into the misconduct that is the subject of this hearing was still going on. He said that at the time he had not sustained any charges for misconduct with regard to this incident. He stated that he did not recall either himself or Mr. Zackasee bringing up the issue of the two hour window that an inmate could be left unattended at the hospital with the warden when they had the opportunity to go before him. He said he does not know why he did not bring this up, he said he just answered the questions the warden

asked him. He stated that the warden did allow him time to talk. He testified that he would not say he apologized for the incident, but apologized for sitting in front of the warden under those conditions. He stated that he did not feel he did anything wrong and was not apologizing for that. He said that he honestly does not know what he would do if you were presented with the same exact set of facts on his next escort of an inmate because no one has ever clarified what he should do. He stated that if he had stayed at the institution he would have stayed up to speed on what current policy was worth BPT if they offered the training. He read from Special Instructions Post: Outside Hospital Officers that it says do not leave your post without the approval of the operations Lieutenant or until properly relief has been provided. He stated that he will not leave an out custody inmate unsupervised at a hospital ever again.

On re-direct he stated that he is not aware of anyone ever calling in to the institution while assigned to the outside Hospital on an out custody inmate.

IV. AGENCY POSITION

It is the Agency's position that it had just cause to discipline the grievant with a three day suspension. The Agency argues the grievant's suspension was for just and sufficient cause based on the Daugherty test. First, the Agency contends that there was a reasonable rule or work order. The Agency submits that the rules governing escorted trips are straightforward and reasonable. The Agency points out that escorted trips remove inmates from the confines of a federal prison and bring them into the community, therefore, in order to maintain the safety of the public, the inmate, and agency staff, that

Program Statement 5538.05 states: "Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times." The Agency goes on to point out that the FCI Elkton Special Instructions, Outside Hospital Officer, which clarify Agency policy for institution staff, instruct escort officers to "Maintain constant visual contact with the inmate at all times" and "not leave your post without the approval of the operations Lieutenant or until proper relief has been provided." The Agency argues that this reinforces the Program Statement mandate that the staff maintain constant visual supervision of inmates under escort at all times. The Agency contends that the documents clarify what escort staff should do, contact the operations Lieutenant, if they must depart their post. The Agency points out that the warden testified it would never have been appropriate for grievant to leave the inmate unattended and unobserved at the Northside Medical Center.

The Agency argues that grievant was given proper training because he was trained on BPT in October 2006 and requalified in 2007, 2009, and 2010. The Agency points out that grievant testified he was trained on prisoner transport and that he had read the FCI Elkton Special Instructions, Outside Hospital Officer.

The Agency argues that a sufficient investigation was conducted because the OIA conducted a thorough investigation into grievant's misconduct. The Agency contends a fair investigation was conducted because Mr. Garcia began his investigation on February 7, 2011 and completed it 85 days later on May 3, 2011. The Agency points out that his investigation included affidavits from all relevant witnesses, including the grievant. The Agency further points out that grievant, accompanied by his Union representative, was provided an opportunity to tell his side of the story and respond to the evidence that had

been gathered. The Agency argues there is proof the incident occurred because grievant admitted it occurred and the facts leading to the discipline have been stipulated to. The Agency contends that the equal treatment prong of the test is met because the warden testified that it was the first time he had imposed discipline for failure to follow policy regarding an escorted trip. The Agency points out that FCI Elkton's disciplinary/adverse action tracking log shows that grievant was one of 10 employees to be disciplined by the warden for failure to follow policy and of the 10 employees, three (including grievant received three-day suspensions), two received one day suspensions, and five received letters of reprimand. The Agency contends that grievant's suspension was clearly consistent with prior decisions at FCI Elkton.

The Agency argues that appropriate discipline was issued. The Agency contends that the heart of the difference in opinion between the warden and the Union is whether a three-day suspension or a letter of reprimand was appropriate. The Agency points out that the warden's testimony reflects that he considered the Douglas factors when he made his decision. The Agency argues that it is fairly intuitive to understand the warden's concern about an unattended inmate posing a threat to the public, but the warden also considered the risk posed to the inmate as well as the risk posed to grievant. The Agency submits that the warden has unique qualifications which justified deference to his decision. The Agency contends that the Union's position downplays any threat to society or possibility of escape which were described by Mr. Zackasee as minimal to none because the inmate was an out custody inmate. The Agency points out that the warden's extensive background, including his experience as a captain with an inmate escape during an escorted trip caused him to view the risk differently. The Agency submits that the

warden's decision cannot be cast aside or altered because of a difference in opinion regarding the severity of the grievant's misconduct. The Agency argues the warden's decision was well reasoned and appropriate and that there is no evidence indicating otherwise.

The Agency argues that the grievant's discipline was not materially delayed. The Agency submits that the investigation and adjudication of grievant's discipline were completed in an appropriate period of time. The Agency contends that the Union first argued the issue of untimeliness at the arbitration hearing and did not give the Agency a written statement of this issue when it invoked arbitration as required by Article 32(a) of the Agreement. The Agency contends that the 2004 OIG report analyzed an outdated disciplinary system which the warden testified has changed at least two times since the report was written. The Agency argues the report has no bearing on this case, has never been agency policy, and did not evaluate the disciplinary process governing the agency at the time of this case. The Agency contends that the investigator's analysis took only 85 days which was well within the OIA's 120 day suggestion from 2004. The Agency submits that neither the Agreement nor agency policy set a specific timeline within which investigations or adjudications must be completed. The Agency argues that the Arbitrator cannot create agency policy because he has no power to add to, subtract from, disregard, alter, or modify any terms of the Agreement which contains no timeline for investigations or adjudications. The Agency goes on to argue that even if the discipline process was delayed, it did not result in harmful error to the grievant. The Agency contends that grievant is required to show that the error was harmful and that he was substantially prejudiced by the delay and that such harmful procedural error cannot be

presumed. The Agency submits that the Union made no argument that the grievant was substantially prejudiced by the duration of the investigation and adjudication.

The Agency argues that the three day suspension was reasonable, and in fact, was generous. The Agency contends that despite the warden's belief that grievant placed the public, the inmate, and himself at risk, the grievant's work record and oral response led the warden to mitigate the 14 day proposal and issue only a three day suspension. The Agency submits that to alter the warden's decision would be to substitute the opinion of the Union for the reasoned decision of a senior agency official. The Agency contends that it is the warden who is entrusted with the responsibility of determining a reasonable penalty that will prevent this misconduct from being repeated in the future. The Agency argues that the warden performed his duties in a reasonable manner and his decision should remain untouched.

The Agency addresses what it terms "distractions" by the Union. The Agency argues that no adverse inference should be drawn based on the fact that J.L. Norwood, Northeast Regional Director, was not provided as a witness because Mr. Norwood had no involvement in grievance discipline and his only relevance to the case with his denial of the Union's grievance.

The Agency argues that the Union's references to Article 29(b) which guarantees the right of employees to be provided with clean and sanitary toilet facilities which are readily accessible and which are separate from those used by inmates should be disregarded because the grievant was not disciplined because he used the restroom down the hall but because he did so without calling the operations lieutenant and left the inmate unattended and unobserved when he departed the room.

The Agency argues that the Union witnesses who testified that an out custody inmate can be left unattended for up to two hours while on and escorted trip should be disregarded because no policy was cited to substantiate this. The Agency contends that this theory appears to be a result of the idea that if an out custody inmate only requires observation every two hours at the institution, and an escorted trip merely extends the limits of inmate confinement, that observation every two hours is all that's required during an escorted trip. The Agency submits that such a theory clearly ignores Program Statement 5538.05 and the FCI Elkton Special Instructions, Outside Hospital Officer and also ignores the distinction between an escorted out custody inmate and an inmate on furlough. The Agency further submits that it defies logic because it leaves no room for Agency policy to govern escorted trips beyond reiterating policies that apply at the institution. The Agency contends that no inference should be taken from the Union's witnesses that testified to the existence of this "rule" because they were only a small number of the staff employed at FCI Elkton. The Agency points out that arbitral notice was taken that the "rule" was not approved by the warden.

The Agency argues that no consideration should be given to the grievant's performance evaluation which indicated his lieutenant maintained a high opinion of his ability to follow security procedures even after the incident because the OIA investigation was still ongoing. The Agency points out that the Agency distinguishes performance from conduct and the grievance suspension was due to his conduct not his performance.

For the foregoing reasons, the Agency requests that the grievance be denied in its entirety with prejudice, and that grievant's three day suspension be affirmed.

V. UNION POSITION

It is the Union's position that the Agency did not have just cause to discipline the grievant with a three day suspension for handcuffing the inmate to the bed and leaving the inmate unobserved in the room for a few minutes while grievant went to use the closest public restroom. The Union argues that the grievant's right to due process regarding the timely processing of the discipline was violated when the Agency took almost 12 months to complete the investigative and adjudicative phases of the discipline process. The Union cites authority stating "it is well-established that for discipline to be effective in instructive, such discipline must be administered in a reasonable and timely manner." The Union submits that the Agency has not provided any reasonable testimony or evidence which could have justified waiting almost 12 months to issue discipline to the grievant over a matter that occurred in January 2011 which was neither complicated nor complex. The Union cites Article 30 of the Agreement which states "recognizing that circumstances and complexity of the individual cases will vary, the parties endorsed the concept of timely disposition of investigations and disciplinary/adverse actions." The Union points out that Mr. Garcia, the Agency representative who conducted the investigation, testified that there were no complexities which existed at the time of the investigation and that he finished his investigation on May 3, 2011. The Union further points out that grievant received a proposal letter for disciplinary action on November 22, 2011 approximately 7 months after the completion of the investigation and then it was not until January 3, 2012 that he received a decision letter from the warden issuing a three-day suspension to take place January 7, 2012 through January 9, 2012 inclusive.

The Union submits that although the warden said he thought the Agency's disciplinary system had changed two or three times the 2004 OIG report the Agency submitted no evidence supporting this. The Union argues that the record shows that the Agency's disciplinary action was untimely and punitive in nature.

The Union argues the various elements of the Douglas factors were not observed or applied properly with respect to this case. The Union submits that grievant is and has been an upstanding employee and has received no other form of disciplinary action. The Union contends that the warden failed to consider the fact that grievant had left the BOP and was employed by another agency for two years and that upon returning did not receive any additional Basic Prisoner Transport training. The Union submits that without proper training grievant was left with no option but to refer to previous training and to use sound correctional judgment based off his knowledge of policy and procedure.

The Union argues that all bargaining unit employees have rights and protections pursuant to the Agreement and those rights extend to the employees even when they are assigned to an outside hospital to provide security coverage of an inmate patient. The Union points out that the Agency's own policy, Program Statement 5538.05, makes it clear that the hospital room is an extension of the inmate's confinement when it states "An escorted trip merely extends the limits of an inmate's confinement." Therefore, the Union argues that Article 29 of the Agreement applies in the hospital and provides that grievant has the right to separate restroom facilities from inmates. The Union argues it is the Agency's responsibility to provide assigned staff members with clear and unambiguous notice on what security procedures will be utilized in order to accommodate the staff member's right to use separate toilet facilities. The Union submits

that it is incumbent upon the Agency, according to their own policy set forth in the Program Statement, to ensure prior arrangements are made with the hospital when the classification of the inmate is “out custody.” The Union contends that by virtue of the absence of the medical escort authorization form, the only document which would have indicated what the required security protocol for the inmate in question was, at the hospital when grievant arrived, it has obviously been established that the Agency management failed to take the appropriate steps to ensure the level of security supervision they desired for the inmate was adhered to. The Union submits that the Agency cannot be permitted to take unwarranted disciplinary action against grievant due to their shortcomings and downfalls. The Union points out that in the absence of clear and unambiguous direction in this case grievant relied upon sound correctional judgment and his previous experience and decided to secure the inmate to the hospital bed before exercising his right and proceeding to the nearest public restroom in order to relieve himself and then returning as expeditiously as possible.

The Union points out that Program Statement 5538.05(6) states: “For those institutions using escort staff with OUT or COMMUNITY custody inmates, the institution will make prior arrangements to address the security and supervision of the inmate, in the event is necessary for the staff to use the restroom.” The Union argues that the Agreement provides staff with the right to use a restroom facility free from use or contact of inmates and which is clean and sanitary. The Union contends that pursuant to the program statement management had a responsibility to make prior arrangements for staff escorting out custody inmates for the use of restroom facilities. The Union submits that the warden’s testimony that there are ways and officer could utilize the restroom in

the room while still maintaining visual contact of the inmate would put the staff member at risk of violating the Prison Rape Elimination Act which states that any display by a staff member of his or her uncovered genitalia, buttocks or breasts in the presence of an inmate would be a violation. The Union contends this is simply a last-ditch effort to persuade the Arbitrator that the grievant's actions were inappropriate and that this option was somehow available in order to maintain constant visual supervision of the inmate.

For the foregoing reasons, the Union respectfully requests that the grievance be sustained.

VI. RELEVANT CONTRACTUAL PROVISIONS

AGREEMENT

ARTICLE 29(b)

Employees will be provided with clean and sanitary toilet facilities which are readily accessible and which are separate from those used by inmates.

PROGRAM STATEMENT 5538.05(6)

Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times. Restraints may be applied to an inmate going on an escorted trip, after considering the purpose of the escorted trip and the degree of supervision required by the inmate.

Except for escorted trips for a medical emergency, and inmate going on an escorted trip must agree in writing to the conditions of the escorted trip (for example, agrees not to consume alcohol).

...

For those institutions using escort staff with OUT or COMMUNITY custody inmates, the institution will make prior arrangements to address the security and supervision of the inmate, in the event it is necessary for the staff to use the

restroom.

An escorted trip nearly extends the limits of an inmate's confinement.

POST: OUTSIDE HOSPITAL OFFICER

THIS IS AN ARMED POST

ESCORT OFFICERS: Escort Officers will maintain constant visual contact with the inmate at all times. (Page 10)

VII. OPINION

The issues to be determined are: 1) whether the Agency had just cause to suspend grievant for three days for securing the inmate classified as out custody to the bed with handcuffs and then leaving the inmate unattended while grievant went down the hall to use the closest public restroom; 2) whether the investigation was conducted in a timely manner. A review of the relevant record reveals the following material facts. On January 26, 2011 grievant was assigned as a medical escort officer for an inmate with a medical appointment at the Northside Medical Center. The inmate was classified as out custody. Out custody inmates are escorted by only one officer. Officers escorting out custody inmates do not carry weapons and do not wear bullet resistant vests. The inmate was already at the hospital when grievant came on duty. Grievant left his home and reported directly to the hospital. When grievant arrived at the hospital the items that were present were handcuffs, a handcuff key, a logbook, and a phone. No post orders and no escorted trip authorization were present at the hospital. During the shift grievant needed to use the restroom. Grievant secured the inmate to the bed with the handcuffs. Grievant left the

room and used the closest public restroom. The inmate was unattended while grievant used the restroom. Grievant was suspended for three days, January 7, 2012 through January 9, 2012 inclusive, for leaving the inmate unattended and unobserved while he used at the restroom on January 26, 2011.

The first issue to be addressed is whether the Agency had just cause to discipline the grievant with a three day suspension for leaving the out custody inmate unattended and unobserved while he used the public restroom down the hall. The Agency argues it had just cause to discipline the grievant with a three day suspension because Program Statement 5538.05(6) states that "Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times." The Agency argues grievant failed to keep the inmate in his immediate visual supervision in violation of this policy. The Agency also points to the document entitled Post: Outside Hospital Officer which states on page 10 "Escort officers will maintain constant visual contact with the inmate at all times" as further evidence that grievant violated Agency policy. The Agency argues that if grievant needed to use the restroom it was his responsibility to call the institution and speak to a supervisor who could then make arrangements with the hospital so that grievant could use the restroom. The Agency also contends that the warden's reasoning for the three day suspension including the threat to the safety of the community, the inmate's safety and grievant's safety were sound based on his prior experience. The Agency argues that based on the violations of Agency policy and the warden's sound reasoning, the Agency had just cause to discipline the grievant with a three day suspension for leaving the out custody inmate unattended while he used the restroom down the hall.

The Union, on the other hand, argues that the Agency did not have just cause to discipline the grievant with a three day suspension for leaving the out custody inmate unattended. The Union argues that Article 29(b) of the Agreement provides that “Employees will be provided with clean and sanitary toilet facilities which are readily accessible and which are separate from those used by inmates.” The Union further argues that the rights under the Agreement extend to the employee even if they are not at the institution. The Union contends that the document entitled Post: Outside Hospital Officer does not apply to out custody inmates because a review of the document which includes requirements such as the use of protective vests and the carrying of weapons indicates it is for inmates requiring higher security procedures. The Union points to the testimony of several witnesses who testified that protective vests and weapons are not required when transporting an out custody inmate and submits that the document is not applicable for that reason. The Union argues that the Agency lacked just cause to discipline grievant for a violation Program Statement of 5538.05(6) because although the document states “Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times[.]”, it goes on to state “For those institutions using escorts staff with OUT or COMMUNITY custody inmates, the institution will make prior arrangements to address the security and supervision of the inmate, in the event is necessary for the staff to use the restroom.” The Union argues it was not grievant’s responsibility to call the institution to make such arrangements, rather, pursuant to the policy, it was the institution’s responsibility to have made these arrangements for the grievant. The Union contends that it was the Agency and not the grievant who violated the policy. The Union submits that the grievant used his sound

correctional judgment and prior experience to make the decision to handcuff the inmate to the bed while he exercised his right to use a clean and sanitary restroom, the public restroom down the hall. The Union argues the Agency did not have just cause to discipline the grievant with a three day suspension because grievant did not violate any policy.

I have considered the arguments of the parties in these regards with care.

The Agency makes a strong argument that it had just cause to discipline the grievant because he violated Agency policy stating that an inmate on an escorted trip not be left unsupervised and that in the warden's opinion to do so left the community, the inmate, and the grievant at risk. However, when the policies in question are reviewed in detail it demonstrates that it was the Agency and not the grievant who failed to follow proper policy thereby leaving the grievant in a situation where he had to decide what to do in order to use the restroom. I have reviewed the applicable policies with care. It is clear that the Agreement affords grievant and other employees, in Article 29(b), the right to use clean and sanitary toilet facilities which are readily accessible and which are separate from those used by inmates. It is also clear that the rights in the Agreement are rights grievant and other employees are entitled to while they are working for the Agency even if not at the institution. The Agency argues that the document entitled Post: Outside Hospital Officer which states on page 10 that "Escort Officers will maintain constant visual contact with the inmate at all times[]" is one of the policies grievant violated when he left the inmate unattended. The evidence clearly established that the inmate was an out custody inmate. The evidence further established through the testimony of many witnesses that out custody inmates are escorted without weapons and without bullet

resistant vests. The document entitled Post: Outside Hospital Officer clearly addresses inmates who are to be escorted with weapons, much of the document speaks to proper utilization of the firearms, and while officers are wearing bullet resistant vests. Out custody inmates are not escorted as armed escorts and the evidence simply fails to establish that this document is applicable to the escort of out custody inmates. Therefore, grievant cannot be found to have violated any policy set forth in this document. The Agency also argues that the grievant violated Program Statement 5538.05(6) which states: "Inmates under escort will be within the constant and immediate visual supervision of escorting staff at all times. Restraints may be applied to an inmate going on an escorted trip, after considering the purpose of the escorted trip and the degree of supervision required by the inmate." The Agency contends grievant failed to keep the inmate in his constant and immediate visual supervision and thus violated the policy set forth in Program Statement 5538.05(6). The Agency argues this violation gives it proper just cause to discipline the grievant and suspend him for three days. The Agency argues that if grievant needed to use the restroom he was responsible for calling the institution so that arrangements could be made with the hospital for him to use the restroom. Careful review of the Program Statement 5538.05(6) shows that just a few paragraphs below the one cited by the Agency is a paragraph which states: "For those institutions using escorts staff with OUT or COMMUNITY custody inmates, the institution will make prior arrangements to address the security and supervision of the inmate, in the event it is necessary for staff to use the restroom." It is my carefully considered and reasoned opinion that this language speaks specifically to out and community custody inmates and clearly and unambiguously establishes that it was the institution's responsibility to make

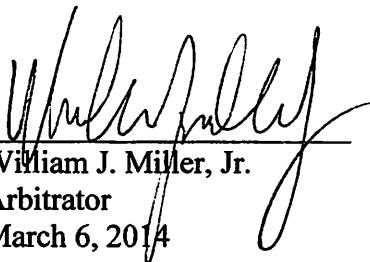
prior arrangements for the grievant to use the restroom. It is without question that an officer is likely to need to use the restroom during an eight hour shift at a hospital. The warden admitted during his testimony that it was reasonable to expect that a staff member would need to use the restroom during an eight hour shift supervising an inmate. As previously discussed the Agreement establishes grievant has the right to use a restroom which is clean and sanitary and separate from those used by the inmate. Program Statement 5538.05(6) makes it quite clear that the institution will make prior arrangements to address the security and supervision of the inmate for an out custody inmate when the staff needs to use the restroom. The evidence established that the Agency made no such arrangements. The warden testified that he was not aware of any such arrangements having been made and the Union provided several witnesses who testified no such arrangements had ever been made that they were aware of. In the absence of such arrangements having been made the grievant utilized his sound correctional judgment and decided to use the handcuffs that were issued to secure the inmate to the bed so that he may exit the room for a few minutes and use the public restroom down the hall. It is my reasoned opinion that the Agency violated the policy set forth in the Program Statement by not making prior arrangements for grievant to use the restroom and notify him of what those arrangements were. It is my further reasoned opinion that in the face of the Agency's violation of the policy, the grievant made a reasonable decision under the circumstances about securing the inmate classified as out custody so that he could exercise his right under the Agreement to use the restroom. It is my carefully considered opinion based on these circumstances that the Agency did not have just cause to discipline the grievant.

Based on the finding that the Agency did not have just cause to discipline the grievant, there is no need to address whether or not the Agency conducted the investigation in a timely manner.

When the entire record is carefully reviewed and considered, it is my determination that the evidence established that the Agency did not have just cause to discipline the grievant and, as a result, supports a finding that the grievance should be sustained.

AWARD

The Agency did not have just cause to suspend the grievant. The grievance is sustained. The Agency is ordered remove all references to the three day suspension from grievant's record and make him whole for all losses he sustained as a result of the three day suspension.



William J. Miller, Jr.
Arbitrator
March 6, 2014