IN THE MATTER OF THE ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 0222 COUNCIL OF PRISON LOCALS Union,	FMCS NUMBER 2111211-02212
and	
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS FEDERAL MEDICAL CENTER DEVENS, MASSACHUSETTS Employer.	Grievance (30-day suspension Judkins)

ARBITRATOR:	John F. Markuns
DATE OF AWARD:	December 19, 2022
HEARING SITE:	Hilton Garden Devens Commons 59 Andrews Parkway Devens Massachusetts (Days 1 and 2) Virtual via video (Days 3 and 4)
HEARING DATES:	May 25 and 26, July 21 and August 22, 2022
RECORD CLOSED:	November 17, 2022
REPRESENTING THE UNION:	Robert W. Klein Jr., Esq. Legal Rights Attorney AFGE 2nd District P.O. Box 159 Clayton, NJ 08312
REPRESENTING THE EMPLOYER:	Adam G. Eisenstein Asst. General Counsel U.S. Dept. of Justice Federal Bureau of Prisons 320 First St., N.W. Suite 256E Washington, D.C. 20534

JURISDICTION AND BACKGROUND

The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of the Federal Mediation and Conciliation Service. The Employer is the Federal Bureau of Prisons, Federal Medical Center), Edgefield, Devens, Massachusetts ("Agency," "BOP" or "FMC Devens"). Employees are represented by American Federation of Government Employees (AFGE) Local 0222, Council of Prison Locals ("Union"). The Grievant is Correctional Officer Jason Judkins. The subject of the grievance is a thirty-day suspension for Failure to Conduct Special Housing Unit (SHU) Rounds and Providing Inaccurate Information on a Government Document. Arbitration was invoked on December 7, 2020.

Four days of hearing in this matter were held by agreement of the parties: two in person on May 25 and 26 2022 and two virtually via video July 21and August 22, 2022. A transcript was taken. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimonies were subject to cross-examination. The Agency presented as witnesses Senior Special Agent Daniel Benedict, Human Resources Manager (HRM) Kay Reed and Warden Amy Boucher. The Union presented Tool Control Officer and Union Local President Jason Basil, Lieutenant Justin Petronick, the Grievant, Lieutenant Michael Bernier and Senior Officer Specialist and Union Local Executive Vice President Michael Guerriero.

The parties offered several joint exhibits: the applicable Master Collective Bargaining Agreement (CBA) (Joint Exhibit 1 [J-1]); June 30, 2020 Proposed Removal Notice (J-2); Agency Standards of Conduct (J-3); and October 14, 2002 30-day Suspension Decision Notice (J-4).

Several additional exhibits were relied on by both the Agency and the Union but were not agreed upon as joint exhibits: FMC Devens Rounds Checksheet for June 15, 2017 (Union Exhibit U2D and Agency Exhibit A4G); August 18, 2017 Minutes of Oral Response (U3C and A7); Written Response (U3B and A8); October 28, 2017 Grievance (U5A and A10); November 25, 2020 Grievance Response (U5B and A11); Invocation of

Arbitration (U6 and A12); Excerpted March 15, 2015 SHU Special Post Orders (U7A and A4C); Excerpted March 15, 2015 General Post Orders (U7B and A4B); Grievant Training Records (U8 and A16); March 7, 2019 Office of Inspector General (OIG) Report of Investigation (ROI) (U18 and A14); and March 3, 2017, 2015 SHU specific post orders (U7C and A15). For clarity, as these exhibits were all first introduced at hearing by the Union, they have been identified as Union exhibits.

Additionally, the Agency submitted the following: Grievant's Acknowledgement of Receipt of Standards of Conduct (A4A); SHU Post Order Signature Sheet for quarter starting June 11, 2017 (A4D); and June 17 2017 Daily Assignment Roster (A4F).[1]

The Union also submitted the following exhibits: Grievant's July 27, 2017 request to extend the time for response to the Notice of proposed removal (U3A); March 15, 2015 Special Post Orders (U7D); March 15, 2015 General Post Orders (U7E); Grievant's Suspension Standard Form (SF)-50 effective October 19, 2020 (U10A); Return to Duty SF-50 effective November 17, 2020 (U10B); October 31, 2006 Kenney memo (U11A); Office of Internal Affairs (OIA) Report FY 2016 (U11B); Review of Bureau of Prisons Disciplinary System Report 1 2004-08 (U11D); Regional Director Grievance Decisions September and October 2021 (U11E and U11F); Grievant's Awards (U12A, U12B and U12C); Grievant's Performance Appraisals (U13 A, U13B and U13C); Program Statement 2002.03 (Chapter 7) December 19, 2007 (U14C); Program Statement 1210.24 May 20, 2003 (U14D); Multiple Union information requests and Agency Responses (U15A through U 15S); Prior CBA 2008-2012 (U16C); and Prior CBA 1998-2001 (U16D); Multiple Comparator documents (U17A through 17G); undated cover memo OIG ROI (U18B); currently used checksheets (U19); video of Range 2 June 16, 2017 4:00 p.m. to 12:00 p.m. (U20); November 15, 2015 Roberts memo (U21); and MOU SHU Rounds Log Form (U22).

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[1] One additional exhibit, Grievant's 2017 position description (A13) was identified but inadvertently not offered for the record. An advance copy was provided to the Arbitrator, however, and this document was used in questioning witness Gurriero without objection. Day 4 Transcript (D4Tr.) 147

By agreement of the parties, a transcript was taken for each day of hearing and an electronic copy provided to the Arbitrator. By agreement, the parties electronically submitted post-hearing briefs with accompanying arbitral awards on November 17, 2022 The Agency submitted fourteen awards and the Union eleven such awards. Both parties also extensively cited to Merit Systems Protection Board (MSPB) case law and court cases in their post-hearing briefs.

ISSUE

The parties were unable to agree on a joint formulation of the issue. Consistent with Article 32 section a of the CBA the parties each submitted their own formulation and left it to the Arbitrator to determine the issue or issues to be decided.

The Agency submits the issues to be decided by the Arbitrator are:

1. Should the grievance be denied on procedural grounds as filed in violation of Article 31 of the CBA because the Union failed to attempt to informally resolve the grievance or because the Union's grievance failed to be specific as to the alleged policy violation?

2. Was the adverse action taken for just and sufficient cause? If not, what shall be the remedy?

The Union offered the following alternative:

1. 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 14th, 2020 to promote the efficiency of the service? If not, what is the remedy?

2. If the Agency's stated charge is supported by a preponderance of the evidence, was a 30-day suspension imposed reasonable in relation to the proven offense? If not, what shall be the remedy?

D1Tr 13.

Upon review of the entire record including each party's post-hearing argument, the Arbitrator has determined that the following are the issues to be decided consistent with the CBA:

1. Should the grievance be denied on procedural grounds as filed in violation of Article 31 of the CBA because the Union failed to attempt to informally resolve the grievance or because the Union's grievance failed to be specific as to the alleged policy violation?

2. Was the adverse action taken for just and sufficient cause and to promote the efficiency of the service? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3, "GOVERNING REGULATIONS"

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***Section b**: In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.*

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ARTICLE 5 - RIGHTS OF THE EMPLOYER

***Section a.** Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:*

….

2. In accordance with applicable laws:

to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

….

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.*

1. *in exceptional circumstances ,the President, Council of Prison Locals, may immediately request that the appropriate Regional Director or designated official consider a stay of a removal or suspension in excess of fourteen (14) days until a decision is rendered by an arbitrator under Article 32, or an initial decision of the Merit Systems Protection Board is issued. Such requests must be made prior to the effective date of the contested action. Stay of actions will not apply to:*

   a probationary actions; or

   b. actions taken under 5 USC 7513, where there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed.

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 grade or pay, 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 the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.*

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

1. *when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and*

2. *employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.*

Section e. *When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations. Any notice of proposed disciplinary or adverse action will advise the employee of*

his/her right to receive the material which is relied upon to support the reasons for the action given in the notice.

Section f. *Employee representational rights are addressed in Article 6.*

Section g. *The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.*

Section h. *When an employee exercises his/her right to orally respond to a proposed disciplinary or adverse action, the reply official will allow ample time for the employee to respond at this meeting. Although the reply official may ask follow-up questions, nothing requires the employee to answer such questions during this meeting.*

Section i. *Supervisors are not required to annotate oral counseling sessions in an employee's performance log.*

Section j. *When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing. When adverse action is proposed, he/she will have fifteen (15) working days to respond orally or in writing. Approval or denial of extension requests must be provided within two (2) working days. These time frames do not apply to probationary employees or actions taken under the crime provision.*

Section k. *Employees making false complaints and\or statements against other staff may be subject to disciplinary action.*

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 will 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.*

Section c. *Any employee has the right to file a formal grievance with or without the assistance of the Union.*

1. *after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate;*

2. *if an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing;*

3. *the Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and*

4. *the Union has the right to file a grievance on behalf of any employee or group of employees.*

Section d. *Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.*

If a matter is in formally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

Section e. *If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.*

Section f. *Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of*

forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. *when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility , if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;*

2. *when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the Grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;*

3. *when filing a grievance against the actions of an employee, supervisor, or manager supervised by a specific BOP division, the grievance will be filed with the Assistant Director of that division;*

4. *when filing a grievance against a Regional Director, the grievance will be filed with the Director of the Bureau of Prisons, or designee;*

5. *in cases of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. This grievance must be filed with the Chief, Labor Relations Office; and*

6. *grievances filed by the Employer must be filed with a corresponding Union official*

Section g. *After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.*

1. *if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and*

2. *a grievance may only be pursued to arbitration by the Employer or the Union*

Section h. *Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:*

1. *by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or*

2. *through the conventional grievance procedures outlined in Article 31 and 32, w here the grieving party wishes to have the arbitrator decide other issues.*

Section i. *The employee and his/her representative will be allowed a reasonable amount of official time in accordance with Article 11 to assist an employee in the grievance process.*

ARTICLE 32 – ARBITRATION

Section a. *In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.*

Section b. *When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.*

1. *a list of arbitrators will be requested utilizing the FMCS Form R 43;*

2. *the parties shall list on the request any special requirements/qualifications, such as specialized experience or geographical restrictions;*

3. *the parties shall, within five (5) workdays after the receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel;*

4. *if they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from this list until one (1) name remains; and the arbitrator selected shall be instructed to offer five (5) dates for a hearing.*

Section c. *The grieving party will be able to unilaterally select an arbitrator if the other party refuses to participate, only if the grieving party:*

1. *gives written notification to the HRM of its intent to unilaterally select an arbitrator; And*

2. *allows a time period of two (2) workdays for the HRM to participate in the selection after the written notification.*

Section d. *The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.*

1. *the Employer will pay travel and per diem expenses for:*

   a. employee witnesses who have been transferred away from the location where the grievance arose;

   b. employee witnesses who were temporarily assigned to the location where the grievable action occurred; and

   c. employee witnesses where the parties mutually agree to hold the hearing at a site outside the commuting area;

   2. the Employer will determine the location of the arbitration hearing; however, in the event that the Union, in good faith, advises the Employer that the designated location is
   unacceptable, the hearing will then be held at a mutually agreed upon neutral site; and

   3. in Council-level grievances, the Employer will determine the location of the hearing. The Employer will pay the travel and per diem expenses for the Union witnesses and one (1)Council representative. The Employer will not be responsible for the travel and per diem expenses of more than five (5) Union witnesses unless mutually agreeable to the parties or ordered by the arbitrator.

Section e. *The arbitration hearing will be held during regular day shift hours, Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regular day shift hours. No days off adjustments will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses.*

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1. the Union is entitled to the same number of representatives as the Agency during the arbitration hearing. If any of these representatives are Bureau of Prisons employees, they will be on official time;

2. the Union is entitled to have one (1) observer in attendance at the hearing. If Management has an observer, the Union's observer will be on official time.

Section f. *The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.*

Section g. *The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.*

Section h. *The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:*

1. *this Agreement; or*

2. *published Federal Bureau of Prisons policies and regulations.*

Section i. *A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost shall be shared equally including the cost of the arbitrator's copy.*

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FINDINGS OF FACT

While many of the issues in this case are strongly contested, the material facts are essentially not in dispute. By way of background, the Agency operates 122 prisons. Of those, seven are federal medical centers—including FMC Devens. This facility has both

a medical mission and mental health commission for inmates who are transferred to FMC Devens from other facilities after becoming sick, amongst other reasons inmates may be assigned to the facility. The facility is considered an administrative facility, meaning that they can house inmates of all security levels. As of the time of the hearing, approximately 930 inmates were in custody at FMC Devens; pre-pandemic the number was about 1000 to 1,100. D2Tr. 153-54.

Approximately 440 employees work at FMC Devens. Id. Grievant was hired by the Agency as a Correctional Officer at FMC Devens, Massachusetts effective January 2, 2000. D3Tr. 73. FMC Devens staff features correctional officers such as Grievant, as well as employees in the education, medical, and food services departments. All staff, regardless of job function or title, are correctional workers first and are designated as law enforcement officers, which means that all employees, regardless of their specific position, receive the same training to respond to emergencies D2Tr. 154-55.

On Thursday June 15, 2017, Grievant was assigned as the Special Housing Unit 1 ("SHU1") Officer for the SHU for the 4:00 p.m. until 12:00 a.m. shift (evening watch). D3Tr. 173; A4E. Grievant, an Officer who at the time had over 17 years of experience, had received prior in person SHU training at various times. One of the few material factual disputes in this record is whether the Agency's training records are accurate showing that grievant had received web based training during the previous quarter. Grievant directly denied receiving such training, and Grievant's assignment records for the time period would suggest that the training record is inaccurate. The Arbitrator credits Grievant's corroborated testimony on this point. Grievant, did acknowledge, however, receiving quarterly in-person refresher training on SHU at least a couple of times. 4DTr. 164, 18. He further acknowledged that he was familiar with the relevant post orders related to SHU. Id. 173-75.

From 4:00 p.m. through 10:00 p.m., there is only the SHU1 and SHU 2 Officer that work within SHU. A4E; D3Tr. 83-84. At 10:00 p.m., SHU2 completed his shift and departed from SHU. D3Tr. 81; A4E. As the SHU1 officer, Grievant was responsible for monitoring the Special Housing Unit. U7C; U7D. As a part of the duties set forth in SHU

Special Post Orders, staff are required to conduct rounds of the unit for inmate accountability every 30 minutes but not to exceed 40 minutes from 4:00 p.m. through 12:00 a.m. and to personally track those rounds in annotating them on a SHU round checksheet. U7D at 27; D3Tr. 78. Included are official institutional counts, i.e., a reported count of all inmates in the institution. These counts are regularly scheduled throughout the 24-hour day. All inmates in SHU who are able to stand for the daily 4:00 p.m., 10:00 p.m. and 10:00 a.m. count on weekends and holidays are required to do so. Staff must ensure that they are positively observing human flesh before counting any inmate. U7D, p.7; D3Tr. 32.

From 4:00 p.m. through 10:00 p.m. SHU Special Orders prohibited Grievant from personally making the rounds; instead his role was to simply annotate the time of the rounds performed by other staff on the checksheet. U7D at 22-23; D3Tr 79, 82 and 84. A round requires that an Officer go down the range and look into every cell that is occupied. D3Tr. 75.

There are four separate and distinct ranges within SHU. A completed round in 2017 would involve the need to visit and observe all occupied cells on each of the four ranges. D3Tr. 81, 83. On June 15, 2017, there was only one singular checksheet that was used within SHU to document the time of a round for SHU. In order to qualify for a completed SHU round, a staff member had to travel down all four ranges and then annotate only one singular time for the entire SHU round encompassing all four ranges. D4Tr. 84; U2D. The checksheet had one spot for round time to be placed under every half hour block of time for all four ranges beginning from 4:00 p.m. and ending at 12:00 a.m. for the evening watch. U2D; D3Tr. 84.

The checksheets were kept in the SHU officer station, outside of the SHU ranges. D3Tr. 87. The Special Post Orders for the SHU reflect that staff will document all rounds as soon as possible after completion. U7D at 27. There is no indication on the checksheet itself advising staff to place either the start and/or end time for the round. U2D. D3Tr. 84. Grievant expressed his understanding that there was no specific deadline for documenting the completion of the round – “it’s as soon as you can.” D3Tr. 87.

As the SHU1, Grievant had a set of keys that controlled the entrance to each of the four ranges within the SHU. D3Tr. 3 80-81. He also had the outer door key to permit staff into the SHU from the rest of the institution. D3Tr. 3 80. The individual four range doors are opened with the keys commonly referred to as range grill keys. U7D. The keys for the individual cell doors are not part of the SHU1's set of keys within his possession. U7D; D3Tr. 81. The range grill keys, and therefore SHU1, are not permitted to go down the ranges while the individual cell door keys are within the SHU between the hours of 4:00 p.m. and 10:00 p.m. U7D; D3Tr. 82. Whenever there is only one staff present in the SHU, SHU1 will never have the keys to the individual cell doors. The individual keys for the cells within each of the four ranges were not allowed to be within SHU the remainder of Grievant's shift from 10:00 p.m. through 12:00 a.m., while there was only one staff present. U7C; D3 Tr.82.

At hearing, Grievant and the Union addressed what occurred within the time frame between 10:00 p.m. and midnight on June 15, 2017. Grievant testified that he "prefilled" that the checksheet after the 10:00 p.m. count to remind himself what time to conduct his last three rounds before finishing his shift. The count sheet contains the notations 2240 for the 22:30-23:00 block of time, 23:20 for the 23:00-23:30 block and 23:35 for the 23:30-00:00 block. D3Tr. 186-87; U2D.

Grievant testified that an inmate in a wheelchair was admitted into SHU from another unit within the institution just following the 10:00 p.m. count. D3Tr. 232, 239. While he was conducting rounds between 10:30 p.m. and 11:00 p.m., after finishing Range 2, he moved to Range 1. While conducting round on Range 1, the same inmate who he just admitted in a wheelchair stopped him with a medical issue. This required Grievant to notify the medical staff at FMC Devens to report to SHU to assist the inmate. Grievant met the medical staff at the main SHU door, escorting them into SHU and then escorted them down Range 1. Grievant stayed on Range 1 with the inmate and medical while they treated the inmate's medical issue. D3 Tr. 85.

Grievant explained that if while conducting a round an inmate expresses a medical issue requiring s ome kind of immediate assistance, he needs to get help for the inmate

even if the round must be paused or delayed. D3Tr. 86. Grievant followed Agency protocol and alerted the Operations Lieutenant for his shift that he had an inmate which was having a medical issue. Grievant testified that one of the reasons that he alerted his shift lieutenant was just in case the medical staff from FMC Devens were unable to handle the inmate's medical issue the lieutenant would then be on alert that the inmate may need to be sent out to the local hospital outside of FMC Devens for more intensive medical attention than was available at FMC Devens. D3Tr. 198. Grievant finished his round on range 1 and then remained with the inmate while waiting for medical staff to arrive. Grievant could not recall exactly how long this encounter with the inmate took, but he estimated he remained on range 1 for approximately 20-25 minutes. D3Tr. 85-86.

Grievant recounted that after finally completing the interrupted round, he performed paperwork related to the inmate in the wheelchair that he had received earlier. He explained that when the inmate first arrives to a unit his clothing must be issued and everything given to the inmate must be marked down. There has to be an inventory of his clothing that he comes in so that when he leaves, any personal items can be accounted for.

There is also a folder that is created for that inmate as well to know who is in the cell. The Officer makes door tags and board cards. There is a board in the office that has every inmate's name. Along with the other paperwork there could be the fire and security sheets. There are inventories of what Officers used that day. Another large form is called the 292. This form documents any medication that the inmate is on and what inmate is eating and when. This form is necessary to show what the inmate ate during whatever meal he are on so that the medical department can see who is eating and who is not. 3DTr. 232-33; U7D p.7.

Grievant was relieved at 11:40 p.m. Grievant explained, and Local Vice-President Guerriero confirmed, that it is customary for officers to relieve each other early in order to brief each other on what is going on in the unit and to exchange the equipment that is kept within the SHU unit 24 hours a day. This equipment includes the key ring, handheld radio/body alarm, handcuffs with case, OC (pepper spray) with holder, emergency rescue

knife with pouch, flashlight and fire-hose wrench. D3Tr. 113; D4Tr. 54-55; U7C p. 17. The outgoing SHU1 officer for evening watch is to pass all keys and equipment to his or her relief. Once properly relieved, his tour of duty ends and he is to proceed directly out of the institution. D4Tr. 4 56; U7C p. 23.

As related by Officer Guerriero, historically SHU officers relieve each other early otherwise the incoming/outgoing officer will be responsible for causing/incurring overtime issues as well as interfering with the officer's assigned job duties. For instance, one of the daily institutional counts begins at 4:00 p.m. But if the evening watch officer who is not scheduled to report until 4:00 p.m., arrives at 4:00 p.m. then the officers briefing and exchange of equipment would carry over after 4:00 p.m., interfere with the count being conducted at that time and possibly result in overtime due to the outgoing officer not being relieved until after 4:00 p.m. D4 Tr. 52-55. The same situation would occur with the 12:05 a.m. count and also when the morning watch officer arrives. According to Officer Guerriero, this process is voluntary, as no Officer will be required to perform official duties until the beginning of their designated shift without being paid. In addition staff must have prior approval to begin duties prior to or after their shift from their supervisor in order to receive overtime pay. D4Tr. 78-79; U7 E pp. 43-44.

There is no dispute that Grievant did not perform rounds at either 23:20 or 23:35 as recorded on the checksheet. U2F; D3Tr. 186-87. There is no evidence in this record that Grievant informed the relieving Officer, Michael Davidson, that he had not performed the round recorded as having been performed at 2035. Grievant testified that could not recall whether he informed Officer Davidson of this. Grievant did acknowledge that he never told OIG investigators or the Warden in his response to the subject adverse action that he had done so.

On June 16, 2017, a tragic incident prompted the investigation that ultimately led to the adverse action which is the subject of the instant grievance. As reflected in an investigative memorandum prepared by Captain M.A. Hollinger, on June 16, 2017, the SHU # 2 Officer called for assistance at 6:33am; specifically, the officer observed an inmate sitting on the floor of his cell with a noose around his neck, unresponsive. A4F.

The inmate was declared dead at 7:35 a.m. at an outside hospital. Following the discovery of the inmate on Range 2, and following the review of video of Range 2, Captain Bollinger indicated that no SHU rounds were completed between 10:51pm and 12:10am, and that Grievant, as the SHU #1 Officer (until midnight), was responsible for conducting those rounds. A4F. Based on this memorandum, On June 16, 2017, Lt. William Deeley prepared a referral to the OIA signed by Warden J. Grondolsky. U18, p.10.

On June 21, 2017, OIA forwarded the referral to the OIG for review on the preliminary charges of "Failure to Follow Policy/Inattention to Duty & Falsification. Id. The OIG retained the case for investigation, with Agents Mary Kiley and Daniel Benedict assigned to the case. Id; D1Tr. 208-09; 215. The OIG collected and reviewed various administrative documents over the course of its investigation reflecting what Officers were assigned to perform rounds on Range 2 where the inmate was housed on June 15 and 16, 2017 and whether according to the documentation when rounds were performed. U18.

On November 15, 2017, Agents Kiley and Benedict interviewed Grievant, who had Union representation present. Grievant signed a sworn Affidavit, with an attached copy of the SHU checksheet for his shift on June 15, 2017, which Grievant also initialed. U2D; U2F; see also U18. Grievant's affidavit stated the following:

> I am providing this statement voluntarily to Special Agent Mary Kiley and Special Agent Daniel Benedict of the Department of Justice, Office of the Inspector General. This statement is being prepared for me by Special Agent Mary Kiley at my request. On June 15, 2017, I was assigned as the Special Housing Unit number one officer for the evening shift. The hours of work for this assigned shift were 4 PM until 12 AM. My responsibilities as the number one officer for the Special Housing Unit is to conduct irregular 30 minutes security rounds on each inmate. These rounds should not exceed a 40 minutes time frame in between each round. The last round I completed for that shift on June 15, 2017, was approximately 10:50 PM. From approximately 11:00 PM to 11:40 PM my attention was diverted to processing an inmate placed in the Special Housing Unit for a medical procedure the following day. Additionally, my attention was further diverted in completing the necessary paperwork for my shift. This included

> the computer-generated log book within TRUSCOPE in which I completed log entries for rounds completed. I also completed a checksheet for 30 minute rounds manually. On this manual sheet, I indicated that I completed rounds at 23:40, 23:20, 23:35. These rounds I did not complete but filled out the sheet ahead of time with the intention of completing the rounds. It was not my intention to deliberately falsifying [sic] a document. I only completed this document to ensure all the paperwork was completed prior to the end of my shift. At no time did I ask any individual to alter or conceal this information.

U2F.

These agents took one other statement, from Officer Michael Davidson, who relieved Grievant on the night in question and on whose shift the inmate was found to have committed suicide. In his statement, Officer Davidson also admitted that he did not perform rounds after 5:00 a.m. but documented that he had performed such rounds at 7:37 a.m., 6:20 a.m., 7:18 a.m. and 7:48 a.m. He further explained in his affidavit that on the checksheet that these were rounds that he did not complete but filled out ahead of time. Officer Davidson wrote:

> Typically, between the hours of 4:30 am and 8:00 AM are quite busy on a daily basis in the Special Housing Unit excluding weekends, This particular day happened to be a Friday which in addition to feeding the inmate population in the unit, inmates also needed to be retrieved for transportation to other institutions. Additionally there are other staff members who frequently enter the unit between those times, Including medical staff, food service, and additional correctional officers for various reasons. Due to the fact there were other staff members who entered the unit between these hours 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 620 AM, 6:52 AM, 7:18 AM, 7:48 AM. These rounds I did not complete but filled out the sheet ahead of time. My assumption was the other staff members entering the unit and walking the ranges sufficed as a round completed. It was not my intention to deliberately falsifying [sic] a document l only completed this document to ensure all the paperwork was completed prior to the end of my shift At no time did I ask any individual to alter or conceal this information.

U18.

The OIG report does not include the inmate's time of death. There is no dispute in this record, however, that institutional non-standing counts were performed at 12:05 a.m.,

3:00 a.m. and 5:00 a.m. on June 16, 2017. 2DTr. 51, 220-21. Agent Benedict testified that the BOP performed an after action review of the inmate suicide and he thought he reviewed it. He further testified that this report was not included in the OIG report because they were not charged with investigating the suicide. D1Tr. 210-11.

Due to the retirement of Agent Kiley, Agent Benedict took the lead to finalize the investigation and a corresponding report, for review and approval by his OIG superiors. On March 7, 2019, Agent Benedict signed his report, which was also signed by the Special Agent in Charge on the same date. D1Tr. 216-19, The OIG report reached two conclusions. With regard to Failure to Conduct Rounds, Grievant and Officer Davidson violated BOP policy and procedures related to responsiveness by not conducting required rounds of the SHU in the appropriate time frame in accordance with BOP policy. In regard to Falsified Round Sheets, Grievant and Officer Davidson violated BOP policy related to falsification of record by falsifying the checksheets. Both officers admitted to the OIG that they had preemptively filled out the checksheets falsely indicating that they had conducted rounds of the SHU. U18. The OIG report also contains a March 21, 2018 memorandum documenting that on March 16, 2018 Special Agent Fred Wyshak was informed of the results of the OIG investigation and that he declined prosecution of Grievant and Officer Davidson. U18; D1 Tr. 234-35.

According to HRM Reed, the Agency received the OIG investigation report on March 8, 2019 and she personally received it on October 8, 2019. D2Tr. 35, 49. HRM Reed reviewed the materials included in the OIG investigation and then submitted a draft notice of proposed discipline for review and approval, first to the Agency's Northeast Regional Human Resource Department, and then to the Agency's Office of General Counsel for a legal review. D2Tr. 14,44. A letter of proposed discipline was not forwarded to the proposing official, Captain Justin Rhodes, until the summer of 2020. HRM Reed attributed the delay in her receiving administrative approval to move forward on the proposed discipline to staff shortages related to the unprecedented COVID-19 pandemic. She also suggested that the legal review was delayed because

> [t] his was the first inmate date that involved within the Northeast Region that I'm aware of that was within the Northeast region and then the other incident was a major case happened during the same time frame. So they was [sic] trying to establish some sort of comparative. So that could have affected the time frame as well.[2]

D2 Tr. 44.

By letter dated June 30, 2020, Captain Rhodes notified Grievant that he proposed Grievant be removed from his position as a Correctional Officer. It must be noted that from the time of the incident in question until Grievant's removal was proposed, over three years had elapsed. During this time, Grievant continued to work as a correctional officer and was rated "Excellent" on his annual performance appraisals received during this time. Additionally, although Grievant was restricted from bidding on SHU assignments during this time, he was chosen and assigned by the Agency to work fifteen times within SHU in various posts and shifts. U9B; U13; D3Tr. 128, 192 and 220-22. Grievant's removal was based on the following:

> **Charge I: Failure to Conduct SHU Rounds**
>
> Specifically, on June 15, 2017, while assigned as the Evening Watch Special Housing Unit ("SHU") #1 Officer from 4:00 p.m. to 12:00 a.m., you failed to conduct the required 30-minute SHU rounds between the times of 11:00 p.m. and 11:30 p.m. and 11:30 p.m. and 12:00 a.m. In your affidavit provided to the Office of Inspector General dated November 15, 2017, you admit, "My responsibilities as the number one officer for the Special Housing Unit is to conduct irregular 30 minutes security rounds on each inmate. . . The last round I completed for that shift on June 15, 2017, was approximately 10:50 P.M."
>
> Program Statement 5500.14, *Correctional Services Procedures Manual,* states in pertinent part:
>
> > A staff member must observe all inmates confined in continuous locked down status, such as administrative detention or disciplinary

[2] / While HRM Reed did not specifically identify the major case to which she referred, the Arbitrator has inferred from subsequent questions posed by the Agency to Officer Guerriero that the referenced case was the death of Jeffrey Epstein. D4Tr 178-79, 190.

> segregation, at least once in the first 30 minute period of the hour (example, 12:00 a.m. - 12:30 a.m.) followed by another round in the second 30 minute-period of the same hour (example, 12:30 a.m. - 1:00 a.m.), thus ensuring an inmate is observed at least twice per hour-These rounds are to be conducted on an irregular schedule and no more than 40 minutes apart. All observations must be documented.

This policy is reinforced by the SHU Special Post Orders at FMC Devens, for which you acknowledged receipt on May 16, 2017. .The SHU Special Post Orders state in pertinent part:

> A staff member must observe all inmates confined in a continuous lock-down status, such. as administrative detention (AD) or disciplinary segregation (DS), at least once in the first 30 minute period of the hour (example, 12;00 a.m. -12:30 a.m.) followed by another round in the second 30 minute period of the same hour (12;30 a.m.-1:00 a.m.), thus ensuring an inmate is observed at least twice per hour. These rounds are to be conducted on an irregular schedule and no more than 40 minutes apart. All observations made must be documented and maintained on file. Staff will document all rounds as soon as possible after completion.

As a federal law enforcement officer, you are held to a higher standard of conduct. Additionally, as a Correctional Officer, you are responsible for special accountability of inmates while on duty, to ensure safe and secure institutional operations, as well as the safety of the inmates, staff, and the public. SHU rounds are conducted at 30-minute intervals, to ensure that inmates are properly observed and accounted for. You received Special Housing Unit re-familiarization training prior to the start of the quarter, which included the importance of and the procedures for conducting the 30-minute SHU rounds.

SHU rounds are not idle assignments, but serve as vital means of ensuring the safety and security of inmates in continuous lockdown status. Your failure to properly conduct rounds of the SHU clearly contravened policy and caused serious risk to the safety, security, and orderly operation of the institution. Additionally, the required SHU rounds on the evening of June 15, 2017, may have assisted in preventing the suicide of inmate [name and identifier omitted]who was found unresponsive in his cell around 6:33 a.m. on June 16, 2017 and declared dead at 7:35 a.m. Your actions constitute Failure to Conduct SHU Rounds and form the basis of this charge.

Charge II: Providing Inaccurate Information on a Government Document

Specifically, on June 15, 2017, while assigned as the Evening Watch Special Housing Unit ("SHU") #1 Officer from 4:00 p.m. to 12:00 a.m., you documented on the SHU 30-minute rounds check sheet that you had completed 30-minute SHU rounds at 11:20 p.m. and 11:35 p.m. when you did not actually complete the rounds. In your affidavit provided to the Office of the Inspector General dated November 15, 2017, you admit, "I also completed a check sheet for 30-minute rounds manually. On this manual sheet, I indicated that I completed rounds at …23:20, 23:35. These rounds I did not complete but filled out the sheet ahead of time with the intention of completing the rounds."

The Standards of Employee Conduct, Attachment A, page 29, section 34, identifies, "Falsification, misstatement, exaggeration or concealment of material fact in connection with employment, promotion, travel voucher, any record, investigation, or other proper proceeding" as a violation of the Standards of Employee Conduct. The penalty scheduled for a first offense is a 30-day suspension up to removal. Additionally, the FMC Devens General Post Orders state in pertinent part, "Rounds will be conducted in each housing unit on an irregular basis. . .Staff will document the actual time rounds were conducted." Moreover, the SHU Special Post Orders at FMC Devens, for which you acknowledged receipt on March 2, 2017 and May 28, 2017, state in pertinent part, "Staff will document all rounds as soon as possible after completion."

During all Agency-related incidents and activities and on all Agency-related documents, it is essential that you provide truthful and accurate information in order to maintain credibility and in order to ensure the validity of Bureau records. Additionally, as a federal law enforcement officer, you are held to a higher standard of conduct. As such, you may be required to provide testimony during criminal, civil, administrative, and/or third-party proceedings as a witness to criminal or other matters involving inmates or staff. Staff candor and credibility are essential to the Agency's ability to effectively enforce and impose penalties for violations of laws, regulations and policies. This charge, if sustained by the deciding official, could subject your testimony to impeachment and seriously compromise the Agency's ability to enforce said violations, which is an integral component of its mission. Your action of documenting that you completed 30-minute SHU rounds when you did not actually complete the rounds constitutes Providing Inaccurate Information on a Government Document and forms the basis of this charge.

> Your actions in this matter have greatly diminished your credibility as a correctional worker and have demonstrated that you are not one to whom the care, custody, and correction of federal criminal offenders may be entrusted. If this proposal is sustained, your removal would be fully warranted and in the interest of the efficiency of the service.

J-1. The Union and Grievant subsequently requested and received the material relied upon to support the proposal, consisting of:

> Grievant's Receipt of the Agency's Standards of Conduct dated December 13,2013,
> DEV General Post Orders (excerpt, including page 36)
> DEV Special Post Orders SHU (excerpt, including page 23)
> SHU Post Order Signature Sheet for Quarter Starting June 11, 2017 acknowledged by Grievant May 14, 2017
> June 15, 2017 DEV Daily Assignment Roster
> Capt. Bollinger Memo dated June 16, 2017
> Grievant's OIG Affidavit dated November 15, 2017, with attached Warning form and initialed 30 minute rounds checksheet.

D2Tr. 97:U15B.

The Union provided a written response on behalf of Grievant to the decision-maker, Warden Boncher. U3B. Grievant also provided an in-person oral response to Warden Boncher on August 18, 2020. U3C. By letter dated October 14, 2020, the Warden notified Grievant of her decision to uphold both charges and suspend him for thirty days. U4. She wrote in pertinent part:

> On June 30, 2020, you were issued a notice which proposed you be removed from your position of Correctional Officer, GS-0007-08/ for Failure to Conduct SHU Rounds and Providing Inaccurate Information on a Government Document. In making my decision, I have given full consideration to the proposal, your oral response on August 18, 2020, your Union representative's written response dated June 30, 2020, and to the evidence contained in the adverse action file, which has been made available to you.
>
> During your oral response, you indicated that you did not complete your last rounds on the date of the incident, and you indicated that you prefilled the rounds checksheet. You also indicated that you have continued to work in the Special Housing Unit ("SHU") with no other incidents. In your Union representative' s written response, the Union addressed its concerns with your proposed removal, and the Union highlighted your years of service

and performance with the Agency. Nonetheless, as a Bureau of Prisons employee, you are responsible for the accountability of inmates while on duty in order to ensure safe and secure institutional operations, as well as the safety of inmates, staff, and the public. It is essential that you conduct rounds in accordance with policy, including SHU Post Orders, and your presence on the unit during rounds is imperative to the safe, secure, and orderly operation of the institution.

Furthermore, your actions of providing inaccurate information on the SHU 30 minute rounds check sheet damaged your credibility as a correctional worker. Moreover, 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 for violations of laws, regulations, and policies. Accordingly, your actions could subject your witness testimony in any future criminal, civil, administrative, and/or, third party proceeding to impeachment and seriously compromise the Agency's ability to enforce said violations, which is an integral component of its mission.

After careful consideration, I find the charges fully supported by the evidence in the adverse action file. 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 20 years of service with the Agency, and you accepted responsibility 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 evening of June 15, 2017, may have assisted in preventing the suicide of inmate [name and prison identifier redacted from original], who was found unresponsive in his cell around 6:33am on June 16, .2017, and declared dead at 7:35am Therefore, it. is my decision that a thirty (30) calendar day suspension should have the desired corrective effect. You will be suspended effective October 19, 2020, through November 17, 2020. You are to report for duty at your regularly scheduled hour on November 18, 2020. This suspension is warranted and in the interest of the efficiency of 'the service.

….

J-4.

On or about October 28, 2020, the Union filed a grievance of the adverse action with Northeast Regional Director Nicole English. U5A. The grievance stated the Union had attempted an information resolution with Warden Boncher. Id. On November 25,

2020, Regional Director English responded to the grievance, and denied the grievance on both procedural grounds and the merits. She noted the grievance was procedurally defective as no informal resolution efforts were identified; and Block 6 of the grievance did not explain how each Directive, Executive Order or Statute listed in Block 5 was violated. U5B. As to the merits, Director English noted that the suspension was well within range of penalties, and that Warden Boncher appropriately considered all of the available evidence and the relevant *Douglas*[3] factors in rendering her decision. Id. On December 7, 2020, the Union invoked arbitration. AX 12.

At hearing, Warden Boncher testified about the *Douglas* factors including factors she did not expressly address in her decision. With regard to these additional considerations, she observed that Grievant was not a supervisor, with any required contact with the public, considering this to be a mitigating factor. With regard to the effect of Grievant's misconduct on his supervisors' confidence in his ability to perform his assigned duties, she testified that she has "to be able to have faith that my staff are going to tell the truth and do the right thing. And in this case, there is a sustained charge of not doing it." D2Tr. 181-84.

Warden Boncher did not discuss comparator employees other than to acknowledge that Union president Basil during the oral response argued that staff with similar charges at FMC Devens had received letters of reprimand not removal. When asked on cross examination if she had inquired of supervisors about any such cases, the Warden replied that she had not. D2Tr. 210.

The record reflects that the Agency does maintain records of past discipline, including offenses and penalties. U15K and U15S. Both prior to and subsequent to invoking arbitration, the Union filed multiple information requests. U15K through U15S. These requests and responses continued through 2021. In April 2021, the Union was provided a log identifying a proposed five-day suspension reduced to four days based on

[3] *Douglas v. Veterans Administration*, 5 MSPR 280, 306 (1981)

charges similar to those lodged against Grievant. The Union subsequently was provided a copy of a draft proposed suspension but not the decision. U15S and U17E.

At hearing, HRM Reed acknowledged drafting the proposed five-day suspension notice. She testified that while she looked to consider disciplinary actions comparable to Grievant's case, she did not consider this particular case comparable. She explained that while the alleged misconduct occurred at FMC Devens, the employee transferred before a disciplinary action could be effected, and the proposal and decision notices were issued at a different facility. U17E; D2Tr. 135-36. The Union also introduced another comparator five-day suspension based on similar charges decided in Spring of 2014 by Warden Grondolsky, The proposal notice was issued by Captain Bollinger, who was involved in the initial investigation of the June 15th incident involving Grievant. Local Vice President Guerriero testified that this case arose out of an inmate death from natural causes. U17A: D4Tr. 140-42.

In addition, the Union introduced several counseling letters for not properly making rounds. U17B. There is no indication in this record that such letters are considered a formal means of discipline.

The Agency countered that a 30-day suspension issued to Officer Davidson should be considered a comparator and also pointed to a 30-day suspension issued followed a proposed demotion to a non-bargaining unit supervisor for falsifying time and attendance documents. U17F and U17G; D2 Tr. 131-32

Significantly, Warden Boncher did not testify about the possible application of the Agency's Table of Penalties, which is an incorporated part of the Standards of Conduct provided to employees. J-3. The Table is intended to be used as a guide in determining penalties provided for an offense. HRM Reed testified that she took the Table of Penalties into account in drafting the proposed discipline. Id., p.22-29; D2Tr. 73, 145-46 The Table is specifically referenced with respect to Charge II, Providing Inaccurate Information on a Government Document. The Notice cites "Nature of the Offense" #34: Falsification, misstatement, exaggeration, or concealment of material fact in connection with employment, promotion, travel voucher, any record, investigation, or other proper

proceeding. The table's explanatory note following states: [i]ncludes, but is not limited to, the destruction of records to conceal facts, and a concealed conflict of interest in the performance of official duties. The recommended range of penalties for a first offense is a 30-day suspension to removal.

Although not reference in the notice of proposed removal or decision, at hearing HRM Reed referenced #7 Inattention to Duty. This charge is accompanied by the explanation: "Potential danger to safety of persons and/or damage to property is a primary consideration in determining the severity of the penalty." The recommended range of penalties for a first offense is Official Reprimand to Removal. The record also includes Grievant's signed acknowledgment dated December 11, 2013 indicating that his conduct is governed by the policy set out in the Standards of Conduct and that it was his responsibility to familiarize himself with the provision of the document. A4A. Additionally, Grievant testified that he had reviewed the Standards and acknowledged that these standards were also reviewed in annual refresher training. D3Tr. 172.

The Warden also testified about the clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question. In her view there was no question Grievant was aware what the expectations and rules were in working in SHU. Grievant was on notice of the agency's standards of conduct and was also aware of the post orders governing his conduct. D2Tr. 185-86.

Warden Boncher opined that she believed Grievant could be rehabilitated, noting that after the conduct had occurred in 2017, the Grievant had continued to work in custody posts supervising inmates, eventually returning to SHU after a period of reassignment, without any further known incidents. D2Tr. 184-85. The Warden also expressed her belief that a 30-day suspension was the minimum to deter to such conduct in the future and that a lesser suspension would have lost its impact. D2Tr. 187. Finally, near the conclusion of her testimony, she also acknowledged that the inmate whose suicide triggered the initial investigation had not demonstrated any suicidal tendencies and there was no substantive evidence that the inmate would not have killed himself even

if Grievant had completed all of his rounds. D2Tr. 220. The Warden also testified that she was unaware whether Grievant was the sole Officer on the shift during the evening in question, and that if she had been aware she would have taken this into consideration. D2Tr. Tr. 235.

THE AGENCY'S POSITION

As a preliminary issue, the Union's grievance is procedurally defective and should be denied on this ground alone, as the record does not support that the Union attempted any meaningful informal resolution efforts prior to filing its grievance. Under Article 31, Sec. g,1 the Union could have bypassed the negotiated grievance procedure altogether and the Union's Invocation would have been due within 30 days of the October 14, 2020 disciplinary decision—or by November 13, 2020. When bypassing the negotiated grievance procedure, the issues are limited to those specified under Art. 31, Sec. h. Instead, Grievant and the Union decided to file a grievance first, which was due within 40 days of the disciplinary decision. The Union filed its grievance on October 28, 2020, only 14 days after the October 14, 2020, suspension decision was issued. When filing a grievance, however, the parties are obligated to attempt informal resolution first—thus the reason for extending the 30-day filing deadline to 40 days. Article 31, section b of the CBA provides that informal resolution will always be attempted at the lowest appropriate level before filing a formal grievance. Under Section d of the same Article: both parties will devote up to 10 days within 40 days of the grievable occurrence to the informal resolution process.

To "devote up to ten days" to the informal resolution process, the Union was required to inform the Warden of its request to resolve the grievable occurrence informally by October 18, 2020, ten days before filing the grievance and only four days after the decision letter was issued. However, no information was offered in the grievance itself or at hearing to clarify the date(s) of the alleged informal efforts with Warden Boncher. Union Representative Basil testified only that he spoke with Warden Boncher during the course of some other scheduled meeting.

For her part, Warden had no recollection of any such informal efforts being attempted by the Union. There are also no documents or other evidence in the record, aside from the notation in the grievance itself that an informal resolution was attempted with Warden Boncher, to support the Union's position that any such informal attempts were undertaken. The Agency was effectively denied its corresponding right and obligation to "devote up to 10 days" to the informal resolution process. The grievance was, therefore, appropriately denied by Regional Director English on procedural grounds. The Arbitrator should follow suit and deny the grievance as procedurally defective.

Under Article 5, section 2 of the CBA, it is the Agency's right, inter alia, to suspend, remove or otherwise take disciplinary action against its employees subject to the provisions of Article 30, section a that such disciplinary or adverse actions be taken only for just and sufficient cause and to promote the efficiency of the service. The CBA does not define "just and sufficient case," A test used by many arbitrators for determining whether an employer's disciplinary or adverse action was taken for "just and sufficient cause" was established in 1966 by Arbitrator Carroll Daugherty in *Enterprise Wire Co.*, 46 Lab. Arb. (BNA) 359 (1966). Arbitrator Daugherty's seven tests of just cause are notice, reasonableness of rule or order, investigation, fair investigation, proof, equal treatment and penalty.

When an adverse disciplinary action is imposed (suspension of 15 days or more), an employee has various appeal options to include filing an appeal with the Merit Systems Protection Board ("MSPB") or filing a grievance. If an employee chooses to use the negotiated grievance process, as here, the arbitrator is bound by the standard of review that the MSPB applies. MSPB's case law is applicable to all federal employees, thus, is government-wide in its reach and impact. This principle is further reflected in Article 2 section b of the CBA providing that in the administration of all covered matters, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time the CBA goes into effect.

Under MSPB case law, to support an adverse disciplinary action such as a 30-day suspension, an agency must prove by preponderant evidence that: (1) the employee committed the conduct charged; (2) there is a nexus between the conduct proven and the efficiency of the service; and, (3) the penalty imposed is reasonable. Further, where all of the agency's charges are sustained, or the employee admits to the misconduct resulting in the adverse action being challenged, as here, the MSPB will review the agency-imposed penalty only to determine if the agency considered all the relevant factors under *Douglas* and exercised management discretion within tolerable limits of reasonableness. Consequently, a penalty will only be modified when it is found that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty.

The record supports the conclusion that (1) Grievant committed the misconduct as charged; (2) Warden Boncher, as the deciding official, considered all of the relevant *Douglas* factors and her decision to impose a thirty-day suspension was for the efficiency of the service and within the bounds of reasonableness; and (3) the suspension was otherwise imposed for "just and sufficient cause" in accordance with the parties' CBA.

The evidence reviewed by the Warden and presented at hearing, including Grievant's own admissions, demonstrated that he failed to complete the required SHU rounds during each 30-minute block between 11:00 pm and 12:00 am on June 15, 2017 , contrary to his Post Orders. Additionally, the evidence reviewed by the Warden and presented at hearing, and Grievant's own admissions, demonstrated that he provided inaccurate information on the SHU Rounds Checksheet, a government document, contrary to his obligations as a federal law enforcement officer. Though Grievant failed to do any rounds between 11:00 pm and 12:00 am on June 15, 2017, he documented that he completed rounds at 11:20pm and 11:35pm on the checksheet.

Under 5 U.S.C. § 7513, an agency can take adverse action against an employee only for such cause as will promote the efficiency of the service. To establish a nexus, an agency must show by a preponderance of the evidence that the employee's misconduct is

likely to have an adverse effect on the agency's functioning. There is sufficient nexus between an employee's conduct and the efficiency of the service where the conduct occurred at work. All employees who work in federal prison facilities are law enforcement officers and as such are held to a higher standard of conduct, thus making it easier to establish nexus. Pursuant to 18 U.S.C. § 4042(a), the Agency is charged with "the management and regulation of all Federal penal and correctional institutions" and to "provide for the protection, instruction and discipline of all persons charged with or convicted of offenses against the United States."

Here Grievant committed the misconduct while on duty in SHU 1. At hearing, the proposing official, Captain Rhodes, noted that Grievant's conduct contravened policy and caused serious risk to the safety, security and orderly operation of the institution and that the required SHU rounds on the evening of June 15, 2017, may have assisted in preventing the suicide of an inmate. Captain Rhodes warned that Grievant having the charge of providing inaccurate information sustained would lead to credibility issues if he was required to testify in any proceedings, including criminal matters, involving inmates or staff. Warden Boncher reiterated these concerns in her letter suspending Grievant for 30 days.

Grievant's admissions that (1) he did not conduct either of the two required SHU rounds after 10:50 pm, and (2) that he filled out times on the SHU rounds check sheet "ahead of time," places this case in same posture it would be had the case gone before the MSPB and all charges had been sustained and nexus established. Accordingly, due weight must be afforded to the deciding official's primary discretion in maintaining employee discipline and efficiency, recognizing under MSPB rules the fact-finder's function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised. Furthermore, the MSPB has long held that the Department of Justice, Federal Bureau of Prisons, because of its responsibilities relating to the care of and custody of inmates, is to be afforded wide discretion as it relates to work-related conduct.

Therefore, as established by MSPB case law, the question of whether the disciplinary/adverse action was taken for just and sufficient cause or, if not, what the appropriate remedy is, must be assessed under the MSPB's standard of review regarding whether Warden Boncher, as the deciding official, considered all the relevant *Douglas* factors and exercised management discretion "within tolerable limits of reasonableness."

After review and consideration of the proposal letter and the evidence, including Grievant's Affidavit, and oral and written responses, Warden Boncher testified that she considered each of the twelve *Douglas* factors in arriving at the decision to suspend the Grievant for thirty days, in lieu of removing the Grievant as the proposal letter recommended. She gave considerable weight first and foremost to the first and second factors, i.e., the nature and seriousness of the offense as a law enforcement officer where Grievant is held to a higher standard of conduct.

The Warden considered factors three and four as mitigating. Grievant had no prior discipline within the reckoning period, that Grievant had more than 20 years of service, and that his performance record was at an acceptable level. In point of fact, the Warden also searched for whether Grievant may have had a clean disciplinary record throughout his career as an additional mitigating factor.

With regard to the fifth factor, she took into account whether Grievant continued to have the ability to perform at a satisfactory level would retain his supervisors' confidence in the ability to perform his duties. In particular she noted that she has to be able to have faith that her staff are going to tell the truth and do the right thing.

She took into account the sixth and seventh *Douglas* factors, i.e. the consistency of the penalty with those imposed upon other employees for the same or similar offenses and the consistency of the penalty with any applicable agency table of penalties. Based upon Grievant's serious misconduct, the Agency proposed removing him from his position. HRM Reed explained that in drafting the notice of proposed removal, she focused on # 7 and # 34 within the Agency's Table of Penalties, as the closest charges aligned to the charged misconduct. The Union agreed in its written response that these were the closest charges within the Table of Penalties. Further, the fact that an inmate

death was involved, removal was viewed as the appropriate penalty and consistent with the Agency's Table of Penalties comments regarding the appropriate penalty range for # 7. And for Charge 2, which again the Union agreed that # 34 from the Table of Penalties was most applicable, the minimum penalty for a first offense is a 30-day suspension. Therefore, even concentrating solely on the Providing Inaccurate Information charge, the imposed penalty would be appropriate and consistent in this case.

At the hearing and prior to reaching a decision, Warden Boncher explained that Grievant was one of two employees on duty prior to or at the time the inmate was found nonresponsive. They both engaged in similar misconduct; both were proposed to be removed and, ultimately, the same 30-day suspension was imposed in each case. Otherwise, there were no exact comparators.

Although removal was within the range of penalties for Grievant's offenses, the Warden reduced the penalty from removal to a 30-day suspension based on consideration of all relevant factors. Warden Boncher's rationale for the penalty of a 30-day suspension is therefore consistent based on the importance she placed the specific charges of both missing SHU rounds and providing inaccurate information about those rounds. Further, while she did not suspend the Grievant based solely on the fact that there was an inmate death following Grievant's shift, this was an important factor taken into consideration.

As to the penalty, the bulk of Grievant's witness testimony did not deny the charges against Grievant, but instead focused on alleged Agency practices in which similar misconduct was addressed through the performance evaluation (counseling) process, or by less severe penalties than the one imposed upon Grievant. While the Union proffered comparator information, other than Officer Davidson, who also received a 30-day suspension, these employees are not true comparators. First, none of the disciplinary letters dealt with a similar situation to this, featuring both the failure to conduct SHU rounds and providing inaccurate information on security documents. Second, none of the counseling letters (allegedly in lieu of discipline) dealt with (1) more than one missed SHU round; (2) nor were there any counseling memos for making erroneous entries on a government document indicating that SHU rounds were conducted when they were not.

Finally, and perhaps most notably (3) none of the disciplinary or counseling letters involve the same extenuating factors such as the injury, death or suicide of an inmate during or soon following the employee's shift when the required rounds were not completed.

Here, the Union does not offer any comparators in which it contends are inconsistent with the Grievant's 30-day suspension and that are based on analogous fact patterns. As such the Union's testimony regarding comparators again should be given no weight.

With regard to Factor eight, there is no evidence in the record of any public notoriety about the misconduct or even the inmate's death, other than an external law enforcement agency (OIG) elected to investigate. The Warden's letter and testimony did not identify this as an aggravating factor.

The ninth *Douglas* factor is the clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question. This factor also played a role in the Warden's decision, as there was no question Grievant was aware of what the expectations and rules were in working in SHU. The record contains substantial evidence that the Grievant was on notice of the Standards of Employee Conduct, and his Post Orders that were violated in committing the offenses with which he was charged.

It is worth noting the Union belatedly implies that Grievant's training record is inaccurate, in that he never received "Web-based" training as indicated in the Training Profile. First, the contention that Grievant did not receive adequate training was never presented to the deciding official, Warden Boncher, for her consideration as a possible mitigating factor. Therefore, the Union's late-made contention should be rejected as waived. Second, it is noteworthy, that this argument fundamentally contradicts the Grievant's testimony at hearing, acknowledging he received SHU training before each quarter and had signed for the Post Orders that governed his responsibilities. Therefore, there is no question that the Grievant was clearly was aware and on notice of his specific responsibilities as the SHU #1 Officer on June 15, 2017, to ensure that rounds were

completed in each 30-minute block and to accurately log the rounds as soon as possible after completion.

The tenth *Douglas* factor is the potential for the employee's rehabilitation. During her hearing testimony, Warden Boncher explained she considered whether the Grievant could be rehabilitated and felt he could. She noted the fact that since the initial misconduct had occurred in 2017, the Grievant had continued to work in custody posts supervising inmates, eventually returning to SHU after a period of reassignment, without any further known incidents. Warden Boncher testified that she considered the time it took for the OIG investigation and disciplinary action and concluded that "[t]he proposal was termination and really just based on [the passage of time] – there's no way that it would have stayed at termination."

The eleventh *Douglas* Factor is the mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter. As noted above, Warden Boncher specifically considered that Grievant's years of service, lack of prior discipline during the reckoning period, and that his performance had been at an acceptable level. Warden Boncher further considered that during his oral and written response to the proposal letter, the Grievant had accepted responsibility for his actions.

The twelfth and final *Douglas* Factor is the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others. Based on her review of all of the available evidence, Warden Boncher believed that Grievant had demonstrated his potential for rehabilitation such that removal was no longer appropriate; but nevertheless, believed that a substantial period of suspension was warranted and corrective in nature. While she also considered suspensions of 60 and 45 days, she eventually decided upon 30 in balancing the various *Douglas* Factors. In the Warden's considered judgment, corrective action was warranted, concerned that a reduction lower than a 30 day suspension would have lost its impact

Even the Grievant testified that he was held to a higher standard of conduct as a law enforcement officer and that the charges against him were serious. And in terms of whether the discipline was corrective or punitive in nature, he further testified that, since receiving the discipline, he has changed how he performs his duties in that he no longer prefills the round sheets. And while Grievant has not had a similar situation where other duties have made him "too busy" to conduct rounds, he testified that he "would make sure that the rounds do get done now".

At the oral response meeting with the Warden, before she made her decision, the Union did not disagree that the Grievant committed the misconduct charged. Rather, the Union appealed to the Warden not to remove the Grievant. The Warden agreed that removal would be unduly harsh. Only thereafter, has the Union argued that Grievant should not be disciplined at all. Although the Union disagrees with the Warden's decision, there was no actual evidence presented that the Warden failed to consider any relevant factors warranting mitigation of the imposed penalty. As such, the concerns the Union has presented are far outweighed by the evidence in the record and clear testimony of those involved, especially Warden Boncher as the deciding official. The Union simply has not presented sufficient evidence to overcome the required deference given to law enforcement agencies on determining appropriate penalties in discipline matters, most especially where the imposed penalty is so far in the middle of those prescribed in written Agency policy as in this case. Here, Warden Boncher's decision to impose a 30-day suspension was well within the tolerable bounds of reasonableness, even lenient, and was reached after a full and thorough analysis of the *Douglas* factors. As such, the Agency's adverse action determination should not be disturbed.

The Union also presented evidence at hearing regarding the procedural aspects of the discipline process, including the timeliness of the investigation and disposition of discipline, which must also be addressed.

The Union seeks to impose a statute of limitations on an administrative proceeding that is neither explicit, nor implied in any policy. As demonstrated at the hearing, neither the parties' CBA nor Agency policy (including the Standards of Employee Conduct*)*,

contain a specific deadline or time frame within which investigations must be completed and employee discipline imposed; indeed, at the hearing the Union admitted this is the case. Such general "endorsements" do not establish hard and fast rules or specific deadlines.

It is well-established that arbitrators "draw their essence" from the collective bargaining agreement. Article 32, Section h provides that the Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of the CBA or published Agency policies and regulations: As numerous arbitrators have observed in prior awards, had the Union wanted to make an explicit, defined limitation period an enforceable contractual requirement, it could have negotiated the same into the CBA, but it chose not to do so.

The Union's main argument regarding this alleged "time limit" for disciplinary action is based the Agency's responses to recommendations made in an outdated report, Appendix III to the U.S. Department of Justice, Office of the Inspector General Report No. I-2004-008, (dated September 2004), regarding Agency investigations and a disciplinary system that is no longer in existence. Appendix III contains the Bureau's response to the Draft Report. Specifically, the Union relies on OIG recommendation #9: "Establish written time guidelines for the investigative and adjudicative phases of the disciplinary process."

On September 15, 2004, then Bureau Director Lappin responded to the recommendations in the draft report expressing his general agreement that the Agency's investigators need to adhere to "general time guidelines." However, regarding the establishment of any firm time guidelines, Director Lappin stated "it is impossible to anticipate in every case the unique factors which may impede the timely investigation of an allegation, and we will never compromise the integrity of an investigation in order to meet time guidelines."

Further, the Union relies on an October 31, 2006, memorandum from Kathleen M. Kenney, Assistant Director/General Counsel, to all Chief Executive Officers, re "Review of Local Staff Misconduct Investigations." It states in relevant part:

> For Classification 1 and 2 allegations, *local investigations* should be completed and the investigative packet forwarded to the OIA within 120 calendar days of the date a local investigation was authorized by the OIA.

First, at no point in this memorandum does it say or even imply that the Agency must complete an investigation in that timeframe nor does it prescribe any consequences, for instance, if such a timeframe is not met. While the Union seeks to change that definition into a rule or mandate, this is a simply unsupported assertion that cannot be written into the parties' collective bargaining agreement at the Union's election. Second, even if the 2006 Kenney or other memoranda could be construed as imposing a 120-day completion mandate for local investigations, the evidence is uncontroverted that the allegations of misconduct here were investigated by the Office of Inspector General, an entity outside the BOP and over which the Agency does not control. To the extent the Union also seeks to impose time limits during the adjudication phase for imposing discipline, again there is nothing in the memoranda cited by the Union, Agency policy or program statements, nor in the parties' collective bargaining agreement, that prescribes a time period in which a decision must be imposed. All of these arguments are consistent with the findings of previous arbitrators and the MSPB that there is no explicit timeframe for either the investigative or adjudicative phases of disciplinary process anywhere in BOP policy.

Grievant's timeliness argument should be rejected for the additional reason that he has failed to prove that any harm occurred as a result of the alleged untimely Agency discipline. Harmful procedural error is an affirmative defense and is defined as "error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion *different* from the one it would have reached in the absence or cure of the error." 5 C.F.R. § 1201.56(c)(1). The burden is on the grievant to demonstrate the error was harmful, i.e., the error caused substantial harm or prejudice to his or her rights. The agency's "procedures" include procedures required by statute, rule, or regulation. Harmful error cannot be presumed.

Although the total time period from the date of the incident until the decision to remove the Grievant spanned over three years, the facts surrounding this case explain that the OIG, independent of the BOP, retained this case for investigation based on various factors present, including the death of an inmate and possible criminal misconduct. After the United States Attorney's Office decided not to press criminal charges, and due to the retirement of the lead Agent, OIG Agent Daniel Benedict drafted the final report, which was then required to be reviewed and approved by various OIG superiors. The final report was completed in March 2019, just under two years after the misconduct occurred.

As for the adjudication phase, the record does not disclose when OIG transmitted its final investigation report and evidentiary materials to the Agency for administrative action. However, HRM Reed, who had responsibility for initiating the disciplinary proposal process, documented receiving the OIG report and evidentiary materials contained therein, on October 8, 2019. Thereafter, the completion of the disciplinary process took one year. HRM Reed reviewed the materials provided from the OIG investigation and then submitted a draft notice of proposed discipline for review and approval, first to the Agency's Northeast Regional Human Resource Department, and then to the Agency's Office of General Counsel for a legal review. However, in large part due the unprecedented COVID-19 pandemic that overtook Agency operations, and subsequent staff shortages, the review process was not completed until summer 2020. As explained by HRM Reed, COVID led to delays in many aspects of Human Resources Department work because personnel were in and out of the office..

While the process was lengthy, the record does not support a finding that the delay in imposing discipline caused the Grievant any actual prejudice in his ability to defend or answer the allegations. Instead, to the extent that the delay caused the Agency to reach a different decision, it was beneficial to the Grievant. As Warden Boncher explained, due to the time that had elapsed, Grievant had time to demonstrate his potential to be rehabilitated. She elected to retain the Grievant in lieu of removing him. Accordingly, if any alleged timeliness-based error in administering the adverse action in this matter exists (a point the Agency does not concede), it is harmless and should be disregarded.

The Union has also argued that the Agency failed to provide Grievant with a copy of certain material relied on to support the reasons for the action given in the notice; the OIG's narrative report and video viewed by Captain Bollinger and cited in the initial investigative memorandum.

The OIG's narrative report details of the investigation or summary of the evidence, or conclusions, is not "evidence." HRM Reed culled the "evidence" relied upon from the OIG Report and provided this material to the Grievant and his Union. This was the same material relied upon to prepare the proposal notice, and it is the same evidence that the Warden reviewed in making her decision. As the OIG narrative report itself was not relied upon or considered by the deciding official, the Grievant was not entitled to receive it during the disciplinary process.

The Union has not explained how the narrative OIG report is exculpatory, or how it would have made any difference in the outcome of this case had the narrative report been disclosed to Grievant and/or had been reviewed and relied upon by the Warden;

Likewise, the video of Range 2, was not identified as an exhibit by the OIG in its investigation nor relied upon in OIG's sustaining the misconduct. It is correct that the OIG marked Capt. Bollinger's Memorandum as an exhibit, and that Memorandum references a review of video collected from SHU Range 2. The Bollinger Memorandum was relied upon in issuing Grievant's proposal notice, and both the Grievant and Warden had a copy of this Memorandum.

Most importantly, Grievant has failed to show that the video evidence, offered at hearing, would have made any fundamental difference in the outcome of his disciplinary case or penalty. The fact is, the video clearly shows that no rounds were conducted (at least not on Range 2) in the 11:00 pm-12:00 am time period, and Grievant does not argue otherwise. Rounds must be completed on each SHU range in order to be a "completed" round. The video in this case simply supports the Agency's charge that Grievant failed to conduct his required SHU rounds, and it was not error, let alone harmful error, for that video to not be included in the OIG report or disclosed to Grievant in the disciplinary process.

Another red herring presented at hearing related to the Union's argument that, well after these events, FMC Devens and the Union negotiated a revised SHU Rounds Checksheet procedure, so that one checksheet is located on each range and the sheet is formatted differently. However, Grievant's mistake was not a technical one that could have been cured by a more user-friendly checksheet, and Grievant does not argue that he wrote incorrect times based on some confusion about the time or how to properly fill in the checksheet in use at the time. Rather, Grievant wholly made up times—very specific times—that rounds were conducted, and pre-filled the checksheet "ahead of time", but did not conduct any of the rounds he admittedly and inaccurately documented took place between 11:00pm and 12:00am.

Based on the record and foregoing arguments, the Agency has met its burden by establishing that (1) the Grievant committed the conduct as charged; (2) Warden Boncher, as the deciding official, considered all of the relevant *Douglas* factors, and her decision to suspend Grievant for 30 days was for the efficiency of the service and within the bounds of reasonableness; and (3) the suspension was otherwise imposed for "just and sufficient cause" and in accordance with the parties' collective bargaining agreement. Accordingly, the Agency respectfully requests the Warden's decision be upheld and the Union's grievance be denied.

THE UNION'S POSITION.

Preliminarily, the Union grievance was not procedurally deficient. The Union met the requirements in Article 31, Section b of the CBA. The Union made a reasonable and concerted effort towards information resolution prior to filing a formal grievance and provided a properly executed Formal Grievance form. The evidence and testimony support that the Union did attempt to informally resolve the grievance at the lowest appropriate level with Warden Boncher. Secondly, the CBA simply requires that the Grievance form be signed by the Grievant or the Union, in which it was. Block 6 of the Formal Grievance form successfully put the Agency on notice of the violations claimed within Block 5 of the form.

The Union wrote within block 6 of the grievance in what way the Agency specifically violated each item referenced within block 5 of the grievance by the Union. The Union articulated that the Agency violated the CBA as they took an action which was not for just cause, the penalty was not reasonable, there was no progressive discipline used, it was not fair and equitable to what other employees received, that the evidence that was relied upon was not provided to the Grievant/Union, the Agency did not fully consider the *Douglas* Factors and the action was not issued in a timely manner. It is unrealistic and unreasonable to expect or require that every argument or bit of evidence that the Union intends to bring up during an arbitration hearing that filled an average of 200 pages of manuscript and up to 20 exhibits be included on the standard grievance form.

At the same time, Arbitrators generally recognize that a grievance written at the "shop level" should not be read as equivalent to a common law pleading in a court of law. In situations where a Union representative failed to cite the correct contract provision or all of the provisions the Union believed violated by the employer's actions, or even where the Union altered the theories underlying a claim prior to arbitration, Arbitrators seldom refuse jurisdiction over that failure or change if the employer has not been misled by the omission.

The Agency violated Article 30 of the CBA when it suspended Officer Grievant without just and sufficient cause. In fact, for the discipline to be found to have been taken for just and sufficient cause, the Agency must show that it complied with the CBA and its negotiated terms when it suspended Grievant. Just and Sufficient cause requires that the discipline be fair and equitable. The most widely accepted formulation of just cause is the checklist of seven tests devised in the 1960s by the late Arbitrator Carroll R. Daugherty.

The tests are presented in the form of seven questions. As originally formulated, a negative answer to any one question normally indicates the absence of just cause for the discipline. In the current case, the Agency has failed to prove that the Grievant engaged in the charges against him and that the Agency had just cause to issue the disciplinary action. Thus, the charge cannot stand, and the suspension must be overturned.

The rule of just cause includes the concepts of due process and timeliness. The Agency's suspension action was also not for just and sufficient cause because the Agency failed to discipline Grievant in a timely manner. Factors such as promptness in imposing discipline, are some of the factors inherent in cause that are just. The CBA unambiguously states in Article 30 section d that while recognizing that the circumstances and complexities of individual cases may vary, the parties endorse the concept of timely dispositions of investigations and disciplinary/adverse actions. Grievant's suspension for conduct which occurred over three years before the imposed discipline was not corrective and certainly not timely. Thus, the Agency's suspension was in violation of Article 30 of the CBA. Multiple arbitrators have held this provision to be an enforceable contractual requirement.

The Agency's argument that the investigation and adjudication of Grievant's disciplinary adverse action was not untimely must fail and their defense that they were not responsible should be seen as the smokescreen in which it is and not a shield from liability. Specifically, the OIG made recommendations regarding timelines that the Agency needed to adhere to when reporting, investigating, and issuing discipline. One of the recommendations was establishing written time guidelines for the investigative and adjudicative phase of the disciplinary process. The Agency responded by concurring with the OIG recommendation. In a memo drafted by Harley Lappin, then Director of the Bureau of Prisons, the Agency established a general guideline that local investigations of disciplinary matters should not exceed 120 days and OIA on-site investigations should not surpass 180 days. The Agency also established a separate general guideline under recommendation # 9 of no more than 120 days for completing the adjudication phase of the disciplinary process.

Warden Boncher acknowledged that she was familiar with the Lappin memorandum. She also testified that the timeliness of the disciplinary action should be considered when making her decision, i.e., in order to correct and improve employee behavior then discipline should be issued as soon as possible to the date in which the employee committed the misconduct. Moreover, these guidelines have been affirmatively

accepted by the Agency as illustrated by the denial by Regional Director's, N.C. English denial of a grievance filed by another local within her same jurisdiction as FMC Devens in 2021.

The Agency must impose discipline within a reasonable time after learning of the misconduct. When a matter involves complex issues or detailed investigation, delays in enforcing disciplining can be expected. However, given the simplistic facts of the instant case, the delay in imposing discipline was completely unwarranted and challenges the validity of the suspension.

The Agency agreed to mete out discipline in a timely manner when it agreed to the terms in the CBA in July of 2014, and this provision continues to be in effect to this day. If the Agency is unable to comply due to staffing, budgetary or pandemic-related issues, it is still contractually obligated to hold up its end of the bargain.

The Union understands that some complex cases may take a considerable amount of time to investigate. The failure of the Agency to take prompt action cannot be rewarded. The Federal Labor Relations Authority has repeatedly held that Arbitrators may order disciplinary actions rescinded for delays in imposing discipline and many arbitrators have done so in cases involving Agency and this Union. The investigation and discipline was untimely under the CBA, the Agency's own memorandum, and any fair definition of the term. The Agency's non-consideration as a mitigator the excessive delay in completing an investigation of a simple matter should result in a mitigating of his thirty-day suspension. It is obvious that Management failed to discipline Grievant in a timely manner. Consequently, the grievance must be sustained due to the clear contractual violation.

The Agency failed to meet its burden to prove the charges alleged by preponderant evidence as required by 5 U.S.C. §7701 (c). The charge that Grievant failed to personally conduct SHU rounds from 11:00 p.m. through 12:00 a.m. is completely and wholly unfounded for two reasons. The first and most important reason is because his attention was diverted dealing with an inmate's processing into the SHU and a medical issue that the inmate was having. Grievant was completing his round for the four SHU ranges on

Range 1. Significantly, Warden Boncher testified that while she was aware that Grievant's attention was diverted to processing an inmate in a wheelchair into SHU, she was unaware that Grievant was the only officer on shift at the time, and that she would have taken that into consideration.

The second reason that the charge of failure to conduct SHU rounds is flawed is because the Agency has been unrealistic in their understanding of how the timing of a round can result within Special Housing. There is no plausible way that one round sheet that covers four different ranges would ever be accurate as to what time the round was conducted individually on each of the four ranges because rounds on each range must be performed irregularly, i.e., varied on each round.

As to the second charge, the Agency used the term "providing inaccurate information on a government document" but it is essentially a misrepresentation/falsification charge. To sustain a falsification charge, the Agency must prove by preponderant evidence that the employee knowingly supplied incorrect information and that he did so with the intention of defrauding the Agency. The intent element, in turn, requires two distinct showings: (a) that the employee intended to deceive or mislead the Agency; and (b) that he intended to defraud the Agency for his own private material gain. The intent to defraud or mislead the Agency may be established by circumstantial evidence and also may be inferred when the misrepresentation is made with a reckless disregard for the truth or with conscious purpose to avoid learning the truth. Whether intent has been proven must be resolved by considering the totality of the circumstances, including the appellant's plausible explanation, if any. Through the evidence and testimony presented, the Agency is unable to demonstrate the requisite intent. Grievant has consistently maintained that he never attempted to falsify any documents and had every intention to perform the rounds at the times that were written.

The next issue with the charge of Providing Inaccurate Information on a Government Document is that the Agency's use of one singular time for four ranges is inaccurate in design. As Grievant was the only staff member assigned to SHU from

10:00 p.m. through 12:00 a.m. on June 15, 2017, he personally annotated the rounds that either he made or when another staff member went down range. There was only one singular time that was permitted and allotted on the 30-minute rounds checksheet per each half hour block for FMC Devens SHU that was in use as of June 15, 2017. This singular annotated time reflected the period for the 30-minute round for the entirety of SHU, which consisted of four individual ranges.

The Agency charged Grievant with providing inaccurate information on a government document for the annotation of rounds for 11:20 p.m. and 11:35 p.m. Grievant admitted that he filled out the sheet ahead of time for those times with the intention of the rounds having been conducted during those times and as a reminder for himself as to what time to perform the rounds. For instance, he admitted that he prefilled in the 10:50 p.m., 11:20 p.m., and 11:35 p.m. and subsequently conducted the 10:50 p.m. round. Grievant would have also conducted the 11:20 and 11:35 p.m. rounds if he had not been distracted by the medical issues of the inmate on range # 2. Officer Guerriero testified that there was nothing within policy that prohibited Grievant from prefilling the round times on the checksheet.

Additionally, without a review of the other 3 ranges, as the only video and evidence that the Agency used was from Range # 2, there cannot be a finding that Grievant's times that he placed were inaccurate as the time written does not simply reflect range # 2 in isolation.

There was nothing nefarious in Grievant's prefilling in the times, as Grievant testified that, "they were prefilled in with approximate times that I knew the rounds were going to have to be due." He placed the times on the form as a reminder to himself of when the rounds would be due and with the intention of correcting them if they were not accurately reflected. In the end, had Grievant been provided the video, he could have proven to the Agency that the annotated times were accurate either as a start or end time of the round and that the times were not inaccurate on the checksheet. Grievant cannot be charged with providing inaccurate information on a government document when the Agency cannot prove that the information provided on the checksheet was inaccurate.

Based on all of the above, Grievant did not have the requisite intent to deceive the Agency for his own material gain. Thus, the Arbitrator should find that the Agency did not have just and sufficient cause to suspend Grievant.

The decision imposing a 30-day suspension illustrates that the standard of workplace fairness and the seven tests of just cause failed to be met for seven out of the seven essential elements All tests must be satisfied without shortcomings to sustain the just cause discipline. A no answer to any one of the seven tests (of which in the instant case there were seven) indicates that just cause was not satisfied.

Grievant was not given advance notice that he would face disciplinary consequences for his prioritization of the processing of an inmate nor handling an inmate's medical issues over the conducting of a round. The rule of conducting a round without any legitimate exceptions within 40 minutes of the last round for all four ranges is not a reasonable rule as is illustrated in why FMC Devens changed the process of a round being conducted on each range instead of all four ranges collectively counting as a singular round. The Agency as shown in the evidence and testimony did not attempt to discover whether Grievant actually violated the rule.

The employer's investigation was not conducted fairly and objectively and there was no investigation or evidence presented linking what happened to the inmate to these events 7.5 hours before he died on June 6, 2017. Based on the Agency's evidence, there were three institutional counts that were performed by the Officer who relieved Grievant which verified the inmate was alive and breathing. Without proof of such a link or nexus to use then the death of the inmate as an aggravating factor for Grievant fails. There must be substantial evidence of the employee's guilt in order for the Agency to make the inmate's death an aggravating factor in Grievant's discipline. There must be some proof that the events had some causal connection to the inmate's suicide yet no proof was ever offered nor does it exist to aggravate the discipline.

The Agency's investigation into this matter consisted of one half-page affidavit taken by OIG Benedict on November 15, 2017 from Grievant. There were no other affidavits or interviews conducted in the case of the charges against Grievant. OIG

Benedict testified that the case was a pretty straightforward case. Yet it took from June 15, 2017 until March 7, 2019 to issue his investigation report to the Agency. The investigation report that OIG Benedict constructed on March 7, 2019 consisted of 43 pages with only 6 exhibits. On that list of exhibits there is no after-action report from FMC Devens for the death of the inmate on June 16, 2017 yet OIG Benedict claims that he "thinks" that there was one constructed and that he "thinks" that he reviewed it. Within that list of exhibits there is no record that OIG Benedict received the video of range # 2 from FMC Devens for June 15, 2017. OIG Benedict testified that the memorandum from Captain Bollinger did not reflect who from FMC Devens specifically reviewed the cameras from 10:51 p.m. through 12:10 a.m.

OIG Benedict did not discover that the assertion in the written statement from FMC Devens Captain Bollinger that no rounds were made on range between 10:51 p.m. and 12:10 a.m. was incorrect. The round on Range 2 was completed at 10:53 p.m. and not 10:51 p.m. as the Agency alleged. The investigator testified that he did not even know the basic and needed facts of how many ranges there were within the SHU on June 15, 2017. The investigator also testified that he did not realize that in order to be counted as a complete round then Grievant would have to visit all four ranges.

OIG Benedict admitted that there was inaccurate information reflected within the final OIG report which had going through the review process and that the report was a government document in which he should have picked up on those inaccuracies. There was nowhere within his report any explanation as to why it took so long to conduct the investigation prior to sending the investigation report to the BOP.

Warden Boncher testified that she is aware that she could reopen the investigation and conduct additional interviews before issuing the decision notice however she did not reopen it. Although Grievant informed the Agency and OIG that the inmate's medical issues superseded the completion of the round Warden Boncher did not reopen the investigation and interview the medical staff that responded and handled the inmate's medical issues.

HRM Reed testified that the evidence packet is also referred to as the adverse action file for a discipline letter and alleged that it was the materials used to support the discipline. However, HRM Reed testified that she did not present the OIG report within the adverse action file nor did she present it to the Union prior to the decision being issued as she excluded materials that she believed were not reliable or relevant.

HRM Reed did not provide the entire OIG investigation file to Captain Rhodes as the proposing official, Warden Boncher as the deciding official or to the Union/Grievant who had requested it multiple times prior to the issuance of the decision in this case. HRM Reed was not provided nor requested the video from OIG of June 15, 2017 from Range 2 of SHU. The video of Range 2 was referenced and used within the adverse action file that was presented to the Union and to the Grievant such as in Captain Bollinger's memorandum referring the case to the Warden. Not only did this memorandum reference the video but it also was predetermination by the Agency that Grievant falsified the rounds sheets.

The video of Range 2 was also referenced and used within the OIG report multiple times. HRM Reed cherry-picked evidence that supported an adverse action and then used that evidence to draft the proposal letter that she then issued to Captain Rhodes as the proposing official.

Such cherry-picking is problematic. The problem is that no member of management who held the official role in proposing or deciding the action against Grievant saw the complete investigative report. OIA sent the complete investigative report to Warden Spaulding, who was the previous Warden prior to Warden Boncher. Therefore, it was unnecessary for HRM Reed to "cherry-pick" the evidence that would ultimately be provided to Warden Boncher as the prior Warden had received the complete unedited OIG investigation report.

The OIG investigation report in the instant case was relevant as Warden Boncher and/or Grievant would have discovered in this adverse action that OIG Benedict did not interview anyone else besides Grievant and that the OIG investigative report has many inaccuracies that had not been corrected and most perplexing that there was no

reasonable justification from OIG Benedict as to why it took him almost a year to draft a report after having the results from his investigation.

The Agency had the responsibility to conduct a full and fair investigation and had they provided the video and OIG report to the Grievant, he would have been equipped with the tools necessary to properly respond to the allegations. Neither Grievant nor the Union were provided the video or the OIG report until February 2022. Over three years had passed before Grievant was given his proposal notice and provided a response to the Deciding Official. Grievant could not be expected to recall from memory exactly what medical issues that the inmate was having nor how exactly how long he was down range with the inmate.

But on a related note, it is dramatic irony that Warden Boncher considered that a round may have assisted in preventing the inmate suicide that occurred on the next day in imposing her disciplinary decision yet did not consider that Grievant may have assisted in preventing the detriment of an inmate health and/or life in attending to the inmate's medical issue as Warden Boncher testified that it was not a "sufficient excuse for not conducting rounds".

If the inmate that was having medical issues was not dealt with at the moment that he was and instead made to wait until Grievant finished the round there was no substantive evidence from the Agency showing that Grievant would not now be facing a different set of administrative or criminal allegations at the beset of the Agency regarding that specific inmate. The Agency did not present any video, testimony, or affidavits to contradict that Grievant was handling other equally important job-related duties as the round in which he had notified the Operations shift Lieutenant during the time that it was occurring. There was no evidence that the Operations shift Lieutenant was interviewed by the Agency about his interaction with Grievant on June 15, 2017. Secondly, the Agency never asked Grievant or his relief what time he was properly relieved on June 15, 2017. The Agency possesses the burden to prove whether the Grievant is culpable for committing the charged conduct. The Agency's failure to conduct a full and fair investigation serves as a mitigating factor.

The Agency must provide an employee fundamental and procedural due process when administering an adverse action. Due process requires, at a minimum, that an employee being deprived of his property interest in continued employment be given the opportunity to be heard at a meaningful time and in a meaningful manner. The Supreme Court directs that due process considers, among other things, "the risk of an erroneous deprivation of a protected interest through the procedures used. Under 5 C.F.R. § 752.404, mirrored in Article 30, section e of the CBA, an employee is entitled to notice of the proposed action which includes the specific reasons for the proposed action and the Agency is required to inform the employee of his or her right to review the material which is relied on to support the reasons for the action given in the notice. The Notice requirement is satisfied when the proposal and any attachments to it, taken together provide the employee with specific notice of the charges against him so that he made an informed and meaningful reply.

The opportunity to respond to a proposed adverse action is important for two reasons. First, an adverse action will often involve factual disputes and consideration of the employee's response may clarify such disputes. Second, even where the facts are clear, the appropriateness or necessity of the penalty may not be, and in such cases the employee must receive a meaningful opportunity to invoke the discretion of the decision maker. A due process violation is not subject to the harmless error test. Instead, the employee is automatically entitled to a new, constitutionally correct adverse action proceeding.

The Agency committed a due process error insofar as HRM Reed cherry picked the evidence, failed to provide this material to the proposing official and failed to provide the OIG investigative report and the video of Range 2 until February 22, 2022 to the Union. Without the OIG investigation report and the video there would have been no allegations formed in the first place by the Agency. HRM Reed testified that she wrote up the proposal letter after reviewing the case file and the table of penalties and then there is no mention of her, within her direct testimony, ever specifically providing it to Captain Rhodes for issuance to the employee as can be illustrated in her testimony:

Captain Rhodes cannot have made a fully informed decision about whether to propose an adverse action, let alone what action to propose, without all the evidence. Additionally, HRM Reed cannot have given Rhodes the information that was necessary to draft the proposal as she had already determined the charge and penalty within her drafted proposal letter. Instead, Captain Rhodes was simply forwarded the proposal letter to rubberstamp the already pre-decided disciplinary proposal with his signature.

Secondly, it is entirely possible that managers Rhodes or Boncher would not have made the same conclusion if they had seen other information. If the Captain/Warden had been provided the video themselves then they would have seen for themselves that Grievant was handling the medical situation with the inmate as well as what time he had completed the round on Range 1. The statement from Grievant was taken on November 15, 2017 which was five months after the incident from June 16, 2017.

The Agency further violated Grievant's due process rights insofar as HRM Reed acted as a de facto proposing official and unduly influenced the deciding official. HRM Reed was at the meeting in which Grievant gave his response to the deciding official, Warden Boncher. HRM Reed took the minutes during Grievant's oral response to the Warden. HRM Reed drafted the decision letter, on behalf of the warden. It is only logical that the HRM Reed and the Deciding Official would have had to discuss the instant case in order to properly memorialize what occurred within the response meeting. There was no testimony from the Agency presenting that HRM Reed and the Deciding Official did not discuss the instant case in response to this meeting between Grievant and the Warden in which the HRM was also present. As the HRM, Reed is the individual who drafted and came up with the recommended penalty, any conversations between Warden Boncher and HRM Reed would be the equivalent of the conversations between the proposing and deciding officials. As such, Grievant was not given an opportunity to respond to any comments made by HRM Reed to Warden Boncher about his case. HRM Reed was also the gatekeeper who determined whether or not to grant the information and/or documents to the Union's requests pertaining to the disciplinary matter of Grievant. Based on the constitutional and procedural due process violations, the Arbitrator must set aside the

suspension action. While constitutional due process violations do not require clear evidence of harmful error, the final decision to suspend shows the harms suffered by Grievant.

The untimely discipline in this case was not fair or equitable to Grievant. The Agency's actions are in direct opposition with the doctrine of timely and progressive discipline. An unreasonable delay subjects an employee to uncertainty and financial harm. The long delay suffered by Grievant is destructive to the disciplinary process. During the course of almost three and a half years, Grievant had to work without any resolution for the June 15, 2017 incident. In addition to the 30-day suspension, Grievant would have had a sense of uncertainty as to whether or not he would lose his job with the Bureau of Prisons and also for the interim he was unable to bid on certain posts which presented difficulty in him obtaining the days off that he needed due to the restriction from him bidding for SHU for a period of that three and a half years.

Even if the Agency's charges are sustained, in whole or in part, the penalty is overly harsh, excessive, an abuse of discretion, arbitrary and capricious. The discipline was punitive in nature and the Agency failed to apply progressive discipline. Article 30, Section c states that "the parties endorse the concept of progressive discipline designed primarily to correct and improve behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal." The exception to the application of progressive discipline for "offenses so egregious…" was not met. Similar principles are incorporated in the Agency's Table of Penalties.

The Agency had no concern about his ability to continue to work in a very sensitive position and, in fact, after the incident of June 15, 2017 but prior to receipt of the suspension on October 14, 2020 he was given the same responsibilities as he had before June 15, 2017. If his conduct was "so egregious", would the Agency have been that irresponsible, at best, and create potential liability at worst, by assigning him to SHU for 15 times after June 15, 2017. The answer is no. As evidenced by the Agency's certainty, confidence, and trust in returning the Grievant to SHU prior to issuance of the

suspension, his conduct was clearly not "so egregious." Progressive discipline was required under the circumstances yet the Agency suspended Grievant as a punishment for his actions rather than to improve his behavior. The Agency's failure to apply progressive discipline in this case warrants overturning, or at the very least mitigation of Grievant's suspension.

In *Douglas,* the Board enumerated the twelve factors mentioned above that are relevant in considering the appropriateness of an Agency's penalty. Failure to consider a significant mitigating factor is cause to overturn an Agency's decision. In *Douglas,* the Board enumerated the twelve factors mentioned above that are relevant in considering the appropriateness of an Agency's penalty. Failure to consider a significant mitigating factor is cause to overturn an Agency's decision.

There is an issue as to the nature and seriousness of Grievant's conduct not rising to the level of a 30 day suspension. The Warden testified that she considered an inmate committed suicide later on June 16, 2017 as an aggravating factor in deciding the adverse action for Grievant. Grievant was not on duty on June 16, 2017 and based on her testimony the Warden was aware of this fact. There were no findings by the Agency presented that the suicide could have been prevented even if the rounds had been done every 30-40 minutes. Regrettably, an inmate that is housed by himself that wants to kill himself may do so within minutes of the staff member walking by his cell. There was no indication within the evidence of how long he was dead when he was found. Any failure of Grievant to make rounds was not relevant and simply inadvertent, was not malicious, did not involve any personal gain to the employee, and was not repeated.

The second *Douglas* Factor is the employee's job level and type of employment. The Warden testified that this was a mitigating factor as Grievant was not in a supervisory position. Yet within those written mitigators she did not reference that she considered his job level and responsibility as a mitigating factor within her decision letter. Although the Union would not expect for this factor to be notated within the decision letter if it was deemed to be irrelevant, it is expected that any factors in which would be deemed as a mitigator, as should any relevant aggravators, should be expressly

listed within the decision letter. As this factor was not properly considered within the decision letter, the Union requests that this factor be considered mitigating.

Performance records and years of service can be significant mitigating factors. The Agency's failure to investigate and consider mitigating factors such as his excellent performance, awards, and ability to get along with fellow co-workers not to mention his dependability in the lieutenants selecting him to be placed repeatedly into a SHU position despite his inability to bid for a post within SHU warrants overturning, or at the very least, mitigation of Grievant's suspension.

Grievant had and continues to have a good work record as evidenced by "Excellent" performance appraisal throughout the relevant time period. In addition, Grievant has received numerous time-off and cash awards. Yet there was no reference that the Warden considered the awards within her written decision letter as a mitigator to the penalty An Agency's promotion of an employee or allowing him to perform his duties for an extended period of time after learning of his misconduct can indicate that his overall work record outweighs the seriousness of the offense.

With regard to the next *Douglas* factor, There was no indication within either his performance appraisals or the decision letter that there was any effect upon the employee's ability to perform at a satisfactory level nor that his supervisors lost confidence in his ability to perform assigned tasks within the almost three and a half years that it took to issue disciplinary action,

Grievant was restricted from working in SHU in any form from June 16, 2017 through July 19, 2018. Although Grievant was not allowed to bid for SHU per Captain Bollinger from June 16, 2017 through June 30, 2020, he was chosen and assigned by the Agency to work fifteen times within SHU in various posts and shift. It is thus obvious that the Agency did not lose confidence in Grievant

Warden Boncher testified that this factor was mitigating as he continued to work in SHU with no issues. Yet again there was no reference by the Warden within her decision letter that she considered this as a mitigating factor.

Grievant was also restricted from obtaining any overtime or compensatory time during the same time frame as his restriction from working within SHU. But the Agency did not present any evidence that Grievant was ever removed from his duties with federal criminal offenders, i.e., home duty paid status and it was not alleged that the Agency had lost confidence in his abilities. Warden Boncher did not arrive as the Warden at FMC Devens until July of 2020. The Warden even referenced that her first encounter with Grievant was when he gave his oral response to her on August 18, 2020. As this factor was not properly considered within the decision letter, the Union requests that this factor be considered mitigating.

A penalty for misconduct should be consistent with the penalty imposed upon other employees for the same or similar offenses. In assessing an Agency's penalty determination, the relevant inquiry is whether the Agency knowingly and unjustifiably treated employees differently. A comparator need not always have to be in the same work unit or under the same supervisor. There must be a close connection between the misconduct or some other factor for an employee from another work unit or supervisory chain to be a proper comparator for disparate penalty purposes. The universe of potential comparators will vary from case to case, but it should be limited to those employees whose misconduct and/or other circumstances closely resemble those of the appellant.

Warden Boncher did not testify nor annotate within her decision letter that she considered the penalty to be in line with those imposed upon other employees for the same or similar offenses. The Union requested, multiple times, copies of all disciplinary actions received by all employees at FMC Devens in the last five years, prior to October 14, 2020, who have committed similar offenses to include both bargaining and non-bargaining. The Agency simply responded that this *Douglas* factor was not relied upon to support the instant action. The appropriate question is not simply whether they were relied on or not but instead whether Grievant was treated differently than similar situated staff in comparative disciplinary actions. HRM Reed testified that she contacted the Northeast Regional Office for similar cases to Grievant since she did not have any experience with cases like Grievant and that the region was trying to “establish some

comparative". Yet, the Agency did not reference any results from this consult within the decision letter and would not provide the Union the requested information on similar disciplinary actions for other institutions within the Northeast region.

The Agency, on April 9, 2021, then suddenly provided a log of similar cases from FMC Devens but did not include cases from the Northeast Region. The log of cases included three similar cases: Grievant's case, the Davidson companion case which was mentioned earlier and was decided on the same day, and one other case. Although the case for Grievant and the companion case, Davidson, each possessed a different set of facts and circumstances the proposal/decision letters for Davidson and Grievant were virtually identical to one another word for word using the same boilerplate language that only further illustrates the lack of complexity of Grievant's case.

The third similar case that was submitted from the Agency was for the charges of failing to follow post orders (for not making rounds while working morning watch) and providing inaccurate information in an official record (for notating that he made the rounds on the log).

In this case that occurred at FMC Devens, the correctional officer was proposed a five-day suspension which resulted in an imposed 4-day suspension. The facts of this case are that the staff did not make any rounds the whole shift with the exception of the three institutional counts. So, this equates to out of 16 required rounds for an 8-hour shift, with two rounds per hour, there were only three that were conducted. The incident in this case occurred on March 10, 2017 which was only a little over three months prior to the Grievant incident. Secondly, the facts and resulting charges in the instant case as well as the similar case are almost identical in the rounds not being conducted and the annotation that they were completed. And finally, Grievant was not charged with any intent to cause an inmate death nor was there any indication that the lack of a round was the causal factor in the inmate committing suicide. The Agency disciplined Grievant not on the basis of missing rounds but instead because an inmate decided to commit suicide on a day and shift in which Grievant did not work within SHU.

HRM Reed then provided another case which was deemed as another similar disciplinary case to Grievant on February 22, 2022. This case was for a management official with a proposal for demotion which resulted in a decided action of a 30-day suspension for providing inaccurate information on a government time and attendance record and providing inaccurate information on a government record. This basis of this comparative case was that a manager was claiming that he worked hours in which he did not and getting paid for those hours from FMC Devens.

The Warden did not testify that she reviewed the cases that HRM presented to the Union as comparative discipline. Further, Union Vice-President Guerriero testified that in his role as a Union representative at FMC Devens, the Union represented an employee in a case where he was charged with failure to follow post orders (for not making rounds from 1:00 a.m. through 3:00 a.m. during the morning watch shift which lasted from 12:00 a.m. through 8:00 a.m.) and for providing inaccurate information on a government document in a decision that was issued in June of 2014. In this case the employee was proposed a suspension for five days yet ultimately received a decision for a three-day suspension.

Lieutenant Bernier testified that he was the Acting Captain at FMC Devens as of the date of his testimony and had been since February 27, 2022. Prior to his being Acting Captain, Bernier was assigned as a lieutenant from 2019 through February of 2022. Lieutenant Bernier testified that he issued counseling letters for staff not properly making their assigned rounds, at the behest of Captain Rhodes, and may have issued counseling letters to staff for both failures to make SHU rounds and not accurately reflecting on the round checksheets on when the rounds were conducted.

HRM Reed testified that the Agency did not compare Grievant's case to any other disciplinary actions in issuing either the proposal or decision letter. Assuming arguendo that there were no similar cases for the Agency to review to Grievant's case, although there obviously were, then the lack of cases should have weighed heavily as a mitigating factor.

An Agency should not apply its table of penalties so rigidly as to ignore other *Douglas* factors. An Agency's table of penalties is only one factor to be considered in assessing the reasonableness of a penalty. This is especially true where the Agency has described the table of penalties as a guide that does not replace supervisory judgment or require specific penalties, but instead provides a general framework within which supervisors may exercise sound judgment in dealing with particular circumstances. Punishment for an offense greater than the offense charged is contrary to proper determination of a penalty. The penalty chosen by the Agency as a result of the mischaracterization of the charges is then subject to mitigation by the board.

The Agency proposed and decided the charges against Grievant of failure to conduct SHU rounds and providing inaccurate information on a government document and not for falsification or inattention to duties, which are on the table of penalties.

Neither of Grievant's charges are within the table of penalties. However, an Agency can craft an appropriate reasonable penalty to fit misconduct that is not addressed by a specific provision of its table of penalties. But that did not happen in the instant case. Instead, the Agency exaggerated and mischaracterized the charges as falsification and inattention to duty as can be seen on the two separate and distinct Agency logs that the Agency presented to the Union in response to two different information requests. HRM Reed testified that the two most relevant parts of the table of penalties for this case were inattention to duty and falsification, misstatement, etc. Yet, these are not the charges that Grievant received in his proposal letter. As this factor was not properly considered, the Union requests that this factor be considered as mitigating.

The MSPB has downplayed the effect of publicity where the board found no evidence suggesting that an employee's misconduct resulted in any adverse publicity outside the Agency or that the offense had any impact on the reputation of the Agency or the Agency's mission There was no testimony from Warden Boncher nor HRM Reed that there was any media coverage of the event. There was no testimony nor was it referenced in the decision notice from Warden Boncher of notoriety as an aggravating or mitigating factor. As this factor was not publicized, widely known or otherwise significant to the

effect on the Agency's reputation the Union asserts that this was not an aggravating factor and instead should have been considered as a mitigating one.

Another *Douglas* factor is the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question Warden Boncher testified that Grievant, "was aware of what the expectations were and the rules were. So that is factored into the decision as well. If somebody did not have that awareness or claimed to not have that awareness, that could be mitigating. But in this case, it was clear that he knew." Yet, the Warden testified that she did not review his training record to determine whether or not he was aware of the expectations.

According to his training records Grievant attended a web based quarterly SHU training as the most recent training before the June 15, 2017 incident and not the mandatory in person SHU quarterly training. Grievant testified that he has never taken a web-based training for SHU quarterly training and that he never was provided the training on December 14, 2016. Agency records submitted at hearing indicate that he his work assignments at the time were inconsistent with his assignment location if he had taken this training. The Agency has failed to demonstrate that Grievant received proper SHU training before this incident. Because the Agency failed to properly consider this factor, the Arbitrator should find that this is a mitigating factor and overturn the discipline, or at the least, mitigate it.

The Warden testified that she considered Grievant's potential for rehabilitation as a mitigating factor as he had accepted responsibility during his oral and written responses and that he had continued to work within SHU after the incident. Yet, she did not reflect that she considered this as a mitigator within her written decision letter. The Union asserts that this factor should be considered a mitigating factor to Grievant's discipline.

Exemplary punishment, where the motivation for choosing the penalty is to make an example of the appellant to other employees, is generally contrary to the *Douglas* factors. Although one of the *Douglas* factors to be considered is the adequacy and effectiveness of alternative sanctions to deter similar conduct in the future by the

employee or others, an Agency cannot decide to make an example of an appellant irrespective of the other *Douglas* factors. Vice President Guerriero testified that a disciplinary action that occurred over three years later is only punitive.

The Agency wrongly attempted to attach the responsibility of the inmate suicide to Grievant's case when it did not occur on the same day and shift that worked. Yet, the checksheet for SHU was not changed by FMC Devens until after the infamous Epstein suicide that occurred at another Federal correctional institution.

In her testimony, Warden Boncher said that she considered giving Grievant either a 60-day or 45-day suspension instead of the 30-day suspension in which she issued to him. But she did not consider anything less than a 30-day suspension for an incident that occurred three and a half years prior to its adjudication. Based on Warden Boncher's testimony, it is clear that the Agency did not consider any alternative sanctions lower than the 30-day suspension on Grievant.

The Board has held that it can abandon deference to an Agency's penalty determination when the deciding official considers factors to be aggravating when they should have been considered mitigating. Since the Agency has failed to demonstrate that it properly considered the *Douglas* factors in this case, the suspension must be overturned. Finally, no *Douglas* factors sheet was produced at hearing by the Agency.

The parties' Agreement at Article 30, Section a communicates that "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."

According to the Preamble of the CBA and which Warden Boncher testified that, "The Agency recognizes the employee is the most valuable resource of the Agency". Upon a review of the facts and testimony in this case, it is evident that the Agency violated that recognition and just as importantly violated Article 6 and Article 30 of the Agreement by suspending Grievant. The suspension does not promote the efficiency of the service. The Agency presented no evidence that Grievant was incapable of performing the duties of his job or that his performance was adversely affected in any way and in fact continued to assign these duties.

The Agency's failure to demonstrate that the suspension is for the efficiency of the service and corrective further evidences that the charges were pretext. The lack of respect shown to the Grievant, an honest, hard-working, long-term, career employee, with an unblemished disciplinary record within the reckoning period, exemplary performance record, and stellar reputation, exemplifies how not to treat an employee. Thus, the Arbitrator should find that Grievant's suspension was not taken for the efficiency of the service and should be overturned.

Based on the foregoing facts and argument, Grievant' s suspension was not taken for just and sufficient cause. Therefore, the Union asks, consistent with the provisions of the Back Pay Act, that the Arbitrator overturn the suspension and make Grievant whole, including the restoration of his back pay and all other lost compensation, to include benefits with interest for the period he was affected by the Agency's action, any back pay due to his restriction from receiving and working overtime assignments in SHU from June 16, 2017 through July 19, 2018 as well as any other relief the Arbitrator deems appropriate. Should the Union prevail, we ask that the Arbitrator retain jurisdiction for the purposes of implementation and for the determination of appropriate and warranted attorney fees.

ANALYSIS AND DISCUSSION

The parties have each offered documentary evidence and testimony to support their respective cases. The parties also extensively briefed the issues, citing numerous administrative and court decisions and many arbitral awards. The Arbitrator has considered the evidence and arguments, including the cited cases and awards (most of which will not be specifically referenced in this opinion), and offers the following.

The grievance is not procedurally defective.

There is a threshold procedural issue that must first be addressed. i.e., the Union’s alleged failure to attempt informal resolution of the grievance and provide specificity in the grievance. Any failure to attempt informal resolution prior to the end of the contractually imposed 40-day deadline to file a formal grievance is ostensibly a contract

violation The Arbitrator recognizes that the record is unclear as to when the Union made the requisite attempt at informal resolution prior filing the formal grievance. Local Union President Basil credibly testified that he brought up the subject grievance in passing seeking to reduce the penalty imposed on Grievant during one of many frequent meetings he conducted with the Warden. However, he could not remember the date of the meeting. D1Tr. 52. The grievance form used by the parties includes a space to name the official with whom informal resolution was attempted but does not include space for a date when informal solution occurred. The Warden has no good recollection of such an attempt being made. D2Tr. 162-63. The Arbitrator cannot find that the Union's failure to establish the specific date when informal resolution occurred is either necessary or fatal. By including Warden Boncher's name on the grievance form, they put the agency on notice at the time it filed the grievance that it believed informal resolution had been attempted. The evidence is preponderant that an effort at informal resolution was made.

In any event, the Agency has made no showing that any failure to attempt informal resolution at an appropriate level before filing a formal grievance renders the grievance not arbitrable. As reflected in Article 31section e of the CBA, the parties agreed that grievances filed beyond the basic 40-day deadline may be raised as a threshold issue requiring resolution before the arbitrator may address the merits. If the parties envisioned, however, that the lack of informal resolution would similarly serve as such a bar, the contract could easily have included such a provision. The Agency has also made no showing that it has been prejudiced by the alleged violation. The Agency has pointed to no resolutions it has or might have proposed to resolve this grievance informally.

As to the Agency's contention that the grievance lacked the requisite specificity, again the Arbitrator finds no basis to conclude that such a defect renders the grievance not arbitrable. Block 6 of the grievance form includes an entire single spaced written page remarkable for its specificity. The Arbitrator thus concludes that the Agency's argument on this point must fail.

Just Cause and the Standard and Burden of Proof

The Arbitrator is generally of the view that where under a collective bargaining agreement (CBA), the employer may only discharge an employee for just cause, the burden of proof and persuasion is on the employer unless otherwise provided in the CBA.

In analyzing "just cause," the parties are in agreement that perhaps the most widely recognized distillation of just cause principle, i.e., the "seven tests" set out by Arbitrator Carroll Daugherty, should apply: (1) Did the Employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? (2) Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business (3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? (4) Was the employer's investigation conducted fairly and objectively? (5) At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged? (6) Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? (7) Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the employer? *See* Brand and Burren, Ch 2, I. A at pp. 33-34 (*citing Grief Bros. Cooperage Corp.* 42 LA 555, 558 (Daugherty, 1964).

Further, as aptly stated by Arbitrator Daugherty, albeit analogizing to a calculating tool from an earlier time, "[t]he answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with slide-rule precision." Id. (*quoting Grief* at 557).

Both parties also recognize that where an Agency takes an adverse action, i.e., a suspension of more than 15 days, the arbitrator is bound by the standard of review applied by the Merit Systems Protection Board (MSPB), *See Cornelius v. Nutt,*472 U.S.

648, 660 (1985) (Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision). This includes alleged violations of the CBA, which are subject to the harmful error standard. *Id*. at 472. Harmful procedural error is an affirmative defense and is defined as "error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error." 5 C.F.R. § 1201.56(c)(1); 5 U.S.C. § 7701(c)(2)(A).

It is well established that to support an adverse disciplinary action such as a 30-day suspension, an agency must prove by preponderant evidence that: (1) the employee committed the conduct charged; (2) there is a nexus between the conduct proven and the efficiency of the service; and, (3) the penalty imposed is reasonable. *See generally Adams v. Dep't of Labor,* 112 MSPR 288 (2009). In determining whether the disciplinary penalty imposed is unreasonable and should be mitigated. MSPB identified twelve non-exclusive factors to be considered:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> (3) the employee's past disciplinary record;
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
> (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> (7) consistency of the penalty with any applicable agency table of penalties;
> (8) the notoriety of the offense or its impact upon the reputation of the agency;
> (9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the

conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas v. Veterans Administration, 5 MSPR at 305-06.

The Agency proved its charges by preponderant evidence and established a clear nexus.

The Agency charged Grievant with Failure to Conduct SHU Rounds (Charge I) and Providing inaccurate information on a Government Document (Charge II).

On its face, the Agency elected to rely essentially on Grievant's admissions in the statement provided during the investigation-- quoted directly in the notice of proposed removal. In support of charge I, the Agency cited the following excerpt:

> My responsibilities as the number one officer for the Special Housing Unit is to conduct irregular 30 minutes security rounds on each inmate … The last round I completed for that shift on June 15, 2017, was approximately 10:50 p.m.

J-2. And in support of charge II:

> I also completed a check sheet for 30 minute rounds manually. On this manual sheet, I indicated that I completed rounds at …2320. 2335. These rounds I did not complete but filled out the sheet ahead of time with the intention of completing the rounds."

Id.

As to the first charge, while Grievant has offered mitigating testimony to explain why he did not perform rounds at 2320 and 2035, it remains undisputed that he did not perform these rounds. Without informing his supervisor, Grievant chose to prioritize paperwork over completing his rounds.

Similarly as to the second charge, while Grievant has attempted to explain that his error was not intentional, it is undisputed that the reported information that he had completed rounds at 23:20 and 20:35 remained on the checksheet after Grievant was relieved on his shift and that this information was inaccurate.

And while the revised checksheet certainly now provides the Agency with a more accurate picture of when rounds have been completed on each range, the Union has made no showing that the method used by the Agency in June 2017 was inherently unreasonable or contributed in any way to the Grievant's misjudgment. Accordingly, the Arbitrator must sustain both charges.

The Agency was not required to present direct evidence to address nexus. The proven misconduct occurred while Grievant was on duty and directly impacted the Agency's mission. The Arbitrator thus further concludes that discipline is warranted to promote the efficiency of the service. .

The Union did not establish a due process violation.

The Arbitrator recognizes that with regard to the allegation of due process violation is not subject to a harmful procedural error analysis and automatically entitles an affected employees to a new, constitutionally correct adverse action proceeding. *Ward v. U.S. Postal Service,* 634 F.3d 1274 (Fed. Cir. 2011). However in this instance, the Agency did not commit a due process violation by not including either the video or the complete OIG report in its adverse action file as part of the material relied on.

This is not to say, as discussed in more detail below, that the Agency did not abuse its discretion in its selection of penalty. But the Arbitrator cannot conclude that by choosing to rely essentially on Grievant's admissions that the Agency committed a due process violation. Neither the video nor the complete OIG report examining the actions of both Grievant and Officer Davidson on the evening of June 15 into the morning of the 16th contained any new information which on its face might be considered exculpatory.

The Arbitrator concludes that Grievant was afforded an informed and meaningful opportunity to reply to this admission and to clarify his statement through his written and oral replies. At this stage of the proceeding that is all that was required.

The Union established a violation of Article 30 section d but did not prove harmful error under the standards established by MSPB.

As to the Union's claimed Article 30(d) violation, this issue was raised only in the context of the issue before the Arbitrator, i.e. whether the 30-day suspension was for just and sufficient cause, and not as an independent violation. The CBA does not include hard and fast deadlines for the processing disciplinary or adverse actions. The parties have, however, endorsed the concept of timely disposition of both investigations and disciplinary/adverse actions while "recognizing the circumstances and complexities of individual cases will vary."

The Agency's own guidance recognizes as "upper parameters" 120 days for internal investigations and 180 days for investigations conducted by the OIA. U11A-F. 120 days is also the "upper parameter" for adjudicating disciplinary or adverse actions after a completed investigation. The guidance, which was first promulgated as an appendix to an OIG report issued in 2004, offers no timeline for investigations conducted by "outside law enforcement agencies in terms of deferring matters back to the OIA and conducting their own investigations." The record supports a conclusion that in the instant case, OIG was conducting a law enforcement investigation, resulting in an ASUA declining to prosecute either Grievant or Officer Davidson. The Arbitrator can find nothing in this record which mandates or even suggests that OIG complete such an investigation in a particular length of time.

There does remain, however, the suggested 120-day "upper parameter" for adjudicating disciplinary actions. Here, the Agency has fallen well short. In this regard, the Arbitrator finds the basic interpretation of Article 30 section d set out in several of the arbitral awards provided by the Union to be persuasive, i.e., it is reasonable to interpret the CBA as requiring the Agency to move as expeditiously as the circumstances and complexities of the case permit, with a goal of acting within the time frames set out in the 2004 report.

In the instant case, it took over 15 months to propose discipline after the OIG report was received at the Agency. The Agency's proffered reason for the delay is the

amount of time that it took for the proposed discipline to receive administrative approval to move forward based on staff shortages related to the pandemic as well as additional review prompted by concerns stemming from the investigation related to the death of Jeffrey Epstein. While there is no faulting the Agency for proceeding with extreme caution in the atmosphere surrounding the Jeffrey Epstein case, the Agency has offered no explanation for how or why the instant OIG report took 7 months to make its way to HRM Reed after arriving at the Agency, a time frame well beyond the recommended 120 day upper parameters for disciplinary adjudication following completion of an investigation. Absent any justification at all for this delay, there is ample evidence to conclude that the Agency violated Article 30, section d. Nonetheless, the Union has made no showing that the delay itself was likely to have caused the Agency to reach a conclusion different form the one it would have reached in the absence or cure of the error.

The thirty-day suspension penalty must be mitigated as the Warden failed to adequately consider the relevant Douglas factors .

In most instances, rounds, which occur irregularly and in intervals of as long as 50 minutes or possibly an hour, depending on which range comes first, in and of themselves will not prevent a suicide. As well expressed by Warden Boncher, rounds, beyond maintaining overall security, serve primarily as a deterrent not only to suicide but to creating weapons, hoarding pills and all manner of other prohibited activities. As such, a failure to perform this critical duty is an inherently serious matter. Whether an inmate successfully commits suicide in close proximity to a round or set of rounds does not in itself make the matter more serious, nor does the fact that no suicide may have occurred make it less so.

And there are clearly many sound management reasons for the detailed post orders included in this record -- general, special and specific -- setting out critical duties to be performed at particular hours, including the documentation of rounds. Such orders ensure that assigned personnel perform this essential duty, and provide a mechanism to aid

enforcement of prison policies and procedures, as well as to aid in investigations such as the one required in this instance following an inmate suicide.

And while the mechanism for documenting rounds at FMC Devens at the time of the incident appear to have been somewhat flawed, and possibly problematic, particularly during times when only one staff member is assigned to SHU, the record is clear that Grievant was aware that he was responsible for ensuring that rounds were completed and accurately reported. Grievant fell short, and his error in judgment made an inmate death investigation more complicated.

At the same time, the Arbitrator can find no basis for the Agency's conclusion that if Grievant had performed the missed rounds between 10:53 and the 12:05 a.m. count that the inmate's suicide might have been prevented. This conclusion can best be characterized as speculative. There is simply no supporting evidence in this record.

At hearing, the Agency placed a strong emphasis on its Table of Penalties. The table, however, is a guide and its application is left to the sound discretion of those management officials responsible for implementing the guidance. HRM Reed offered testimony about the applicability of this Table, and the Table is referenced in the Notice of Proposed Removal with respect to the charge of Providing Inaccurate Information on a Government Document. The Warden made no mention of the table during her testimony.

Neither charge as written falls squarely within the Table of Penalties thus limiting its usefulness in determining an appropriate penalty. The charge of Failure to Conduct Rounds does align with Inattention to Duty to the extent that the failure to conduct rounds inherently involves potential danger to safety of persons and/or damage of property. The Table provides little practical guidance, however, on how to address this particular offense as the suggested penalty ranges from Official Reprimand to Removal for a first offense.

The Charge of Providing Inaccurate Information on a Government Document does not fully align with the #34 in the Table but the Notice of Proposed Removal offers a rationale -- suggesting the charge, if sustained, could impair Grievant's ability as a law enforcement officer, to provide credible testimony during criminal, administrative, and/or

third party proceedings. The Notice also informed Grievant that his actions have "greatly diminished" his credibility as a correctional officer and that he had demonstrated that he is "not one to whom the care, custody, and correction of federal criminal offenders may be entrusted," warning that if the proposal is sustained that his removal would be fully warranted and in the interest of the efficiency of the service.

As noted in the Decision letter, the charge was sustained but the Warden expressly noted that she had considered that Grievant had accepted responsibility for his action, The Arbitrator can only conclude that in doing so, the Warden found that by accepting responsibility for his actions, Grievant in essence vitiated the element of intent associated with this charge, thus allowing him to continue to effectively work as a correctional officer. Additionally, the Arbitrator finds it significant that following the conclusion of the OIG investigation, at no point did the Agency directly challenge Grievant's explanation that he "prefilled" the checksheet with the intention of conducting the rounds as reported.

The record is clear that Grievant has learned from this experience and during the lengthy delay between the incident and his discipline has begun to regain the Agency's trust. It also clear that the Warden did not adequately consider all of the mitigating factors, including the extraordinary length of the delay in adjudicating this matter, and the conflicting demands on Grievant's time as the only Officer on duty. Of greater significance, the Warden was not made aware of either a comparator employee who was treated much more favorably for a similar offense occurring a mere three months prior to the incident in question or another employee disciplined for like offenses in 2014 under a previous Warden.

Under these circumstances, the Arbitrator is compelled to conclude that the imposed 30-day suspension is arbitrary and beyond the tolerable limits of reasonableness, requiring that the penalty be mitigated to the fair and equitable penalty of a four-day suspension. The Arbitrator finds no basis to compensate Grievant for any loss resulting from his restriction on working in SHU from June 16, 2017 through July 18, 2018.

REMEDY

The Agency must reduce the suspension to four days, correcting the appropriate record, and make Grievant whole, including back pay and all other lost compensation, to include any missed overtime, and benefits with interest for the period he was affected by the Agency's action consistent with applicable law, rule and regulations.

AWARD

The grievance is SUSTAINED IN PART. The Agency is ordered to provide the remedy set forth above. The Arbitrator will retain jurisdiction for at least 90 days after the date the award becomes final to resolve any questions that may arise over application and interpretation of this remedy and to afford Union counsel an opportunity to petition for attorney fees.

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Date: **December 19, 2022**

John F. Markuns

John F. Markuns
Arbitrator