IN THE MATTER OF ARBITRATION BETWEEN

Council of Prison Locals (AFL-CIO) :
American Federation of Government
Employees Local No. 607

Union : **FMCS 06-58294**

v.

U.S. Department of Justice,
Federal Bureau of Prisons, FCI Elkton :

Agency :

BEFORE: Floyd D. Weatherspoon, Arbitrator, selected by the parties through procedures of the Federal Mediation and Conciliation Service

APPEARANCES:

For the Union: Phillip W. Hulett, Union Representative
AFGE, Local No. 607
14467 Seigler Road
Lisbon, Ohio 44432

For the Agency: Elizabeth Kay Blackmon, Labor Relations Specialist
Department of Justice
Federal Bureau of Prisons
HOLC Building, Room 818
320 First Street, N.W.
Washington, D.C. 20534

DATE OF HEARING: May 31, 2007 and June 1, 2007

BRIEFS RECEIVED: August 29, 2007

DATE OF AWARD: November 11, 2007

AWARD: The grievance is sustained in part.

I. STATEMENT OF FACTS

The facts indicate that Council of Prison Locals (AFL-CIO) American Federation of Government Employees, Local No. 607 hereinafter (Union) and U.S. Department of Justice, Federal Bureau of Prisons, FCI Elkton, hereinafter (Company) are parties to a collective bargaining agreement, hereinafter (CBA or Agreement).

About June 14, 2006, a grievance was filed challenging the Grievant's 20-day suspension on May 16, 2006 (Joint Exh. 6). The grievance went through the various stages of the grievance procedure. The grievance was denied. Arbitration was requested pursuant to Article 32 of the CBA. (Joint Exh 1). The parties stipulated that the grievance is properly before the Arbitrator.

The facts further indicate that the Grievant received a twenty day suspension for unprofessional conduct, involving a verbal altercation between the Grievant and another employee, Connie Dysert; the Grievant was also charged with failure to follow policy which involves the Grievant's acceptance of three Cleveland Cavalier tickets from a vendor. The facts indicate that the Grievant was given a proposal letter dated August 22, 2005. (Joint Exh. 4). The letter informed the Grievant that it was proposed that the Grievant be suspended twenty days for (1) unprofessional conduct and (2) failure to follow policy. The proposal letter states, in relevant part:

Charge 1 - Unprofessional Conduct

Specifically, on January 12, 2005, while assigned to the Special Housing Unit, you were assisting Mr. Schoolcraft and Ms. Dysert with the commissary delivery to the Special Housing Unit inmates. During the delivery, an inmate asked Ms. Dysert to pass crackers to an inmate in

another cell. When she solicited advice from you regarding the response given to the inmate, you engaged in a verbal altercation with Ms. Dysert in the presence of inmates. ***

Charge 2 - Failure to Follow Policy

Specifically, you stated in your affidavit of April 14, 2005, that you had established a personal relationship with Tim Nichols, a representative of the Keefee Coffee Company, who sells products to the FCI Elkton Commissary. *** Employees of the Bureau of Prisons are governed by the regulations published in 5 CFR 2638. *** Your conduct in accepting tickets to sporting events from a representative which you regularly purchase items from for the FCI Commissary is inappropriate behavior which does not conform with procurement integrity regulations and could be perceived by the public and other vendors as preferential treatment because of your personal friendship and the provision of gifts to you from the vendor.

The letter also informed the Grievant that the Warden would make the final decision on the proposal and that he could reply both orally and in writing. The Grievant responded to the Warden orally. He also submitted a written memorandum describing the incident.(Joint Exh 17).

II. ISSUE

Was the adverse action taken for just and sufficient cause, if not, what is the appropriate remedy?

III. RELEVANT CONTRACT AND STATUTORY PROVISIONS

ARTICLE 3O:DISCIPLINARY AND ADVERSE ACTIONS

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

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the

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

5 CFR 2635.202 GENERAL STANDARDS

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or
(2) Given because of the employee's official position.

5 CFR 2635.204 EXCEPTIONS

The prohibitions set forth in ξ2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section, and an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in ξ2635.101(b) ***

(b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

IV. POSITION OF THE PARTIES

A. Union's Position

The Union contends that the Agency did not have just cause to suspend the Grievant. The Union maintains that the Agency did not prove by a preponderance of the evidence that the Grievant was guilty of unprofessional conduct or failure to follow policy. The Union states, in the alternative, even if the Agency had proven the charges, the level of disciplinary action taken against the Grievant was excessive. It is the Union's assertion that the Grievant was the victim of disparate treatment.

B. Agency's Position

The Agency maintains that it met its burden to prove that the Grievant was guilty of unprofessional conduct and failure to follow policy. Therefore, the Grievant was suspended with just cause. The Agency contends that because the Grievant is in law enforcement, he is held to a higher standard and thus, the penalty was not excessive. The Agency contends that the Union failed to prove the Grievant was the victim of disparate treatment.

V. DISCUSSION AND ANALYSIS

It is noted at the outset that the Agency raises an issue that the Union failed to comply with the Master Agreement when it failed to exchange the initial witness list at least seven days prior to the arbitration hearing.

Article 32, Section f, provides,

> 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.

The Agency maintains that the witness list was submitted in an untimely manner and therefore, the Union should not be allowed to present evidence by way of witness testimony. The Union acknowledges that the witness list was one day late. However, the Union asserts, the submission of the witness list one day late does not prejudice the Agency in any way. Further, the Union states that the Agreement does not provide any form of relief for the late submission of witness lists.

"A general presumption exists that favors arbitration over dismissal of grievances on technical grounds." Elkouri & Elkouri, How Arbitration Works, Sixth Edition, pg. 206. The

premise underlying the presumption is to reach the merits of the grievance, rather than to avoid reaching the merits based on non-prejudicial or harmless technical or procedural violations. This was a harmless non-prejudicial, technical violation. Thus, the Agency's objection is not persuasive.

In an adverse action case the Agency bears the burden of proof to establish the basis of the adverse action. The Agency must prove three elements by a preponderance of the evidence. First, the Agency must prove that there was a factual basis for the misconduct relied on in taking the adverse action. Second, the Agency must prove that there was a logical relationship between the misconduct and the efficiency of the Service. Third, the Agency must prove that the penalty was within the tolerable limits of reasonableness. *U.S. Dept. Of Veteran Affairs and American Federation of Government Employees, Local 1923*, 122 LA 402 (2005)(Trotter). The facts indicate that the Grievant was disciplined based on two incidents: unprofessional conduct and failure to follow policy. The two incidents will be discussed separately.

As a threshold matter, the Union maintains that the Agency violated the Grievant's right to due process by failing to charge the Grievant with specific charges as related to the Employee Standards of Conduct. The Union argues that the specific charges leveled against the Grievant do not appear in the Employee Standards of Conduct and therefore, the Agency has failed to prove that the Grievant was guilty of violating any provision of its policy.

The Arbitrator notes that the Union raised a similar argument at the arbitration hearing in reference to the table of penalties. Specifically, the Union objected to the Agency's use of the table of penalties in administering discipline to the Grievant because the conduct that the Agency charged the Grievant with does not appear in the table of penalties. The Agency's response was

that the table is meant to be a guide and not an all inclusive list of offenses. While the specific charge of unprofessional conduct or failure to follow policy may not be articulated in the Employee Standards of Conduct or the Table of Penalties, the nature of the offense is sufficiently articulated so that employees are aware of what conduct is prohibited. Moreover, while the Arbitrator agrees that the Union's argument is not without some merit, I find that the Grievant received sufficient notice of the specific charges and the conduct that was the basis for the charges in the proposal letter. (Joint Exh 4). Additionally, the Grievant was given sufficient opportunity to respond to the charges. Therefore, his due process rights were not violated.

Charge 1- Unprofessional Conduct

The Agency contends that the Grievant engaged in a verbal altercation with another employee in the presence of inmates, therefore, this provides the factual basis for the unprofessional conduct charge. Warden Thomas Sniezek was the deciding official regarding the charges; he stated that he relied on the Grievant's oral response, the Grievant's memo dated January 12, 2005, Sam Biafore's memo, and Connie Dysert's memo to sustain the charge of unprofessional conduct against the Grievant.

The parties present somewhat conflicting versions of the incident. However, after reviewing all the evidence in the record, it is determined that the following facts are not in dispute, On January 12, 2005, both the Grievant and Connie Dysert were working in SHU delivering commissary when an inmate asked Ms. Dysert to pass a box of crackers to another inmate in another cell. Ms. Dysert did not pass the crackers. She then asked the Grievant if the inmate could receive the crackers. Apparently, the Grievant passed the box of crackers.

The evidence presented by the parties conflict as to the remaining events. Both the Grievant and Ms. Dysert submitted memos explaining the incident. Ms. Dysert states in her memo that after the box of crackers was given to the inmate, the Grievant turned to her and called her an idiot in front of the inmates. She said he then proceeded to call her names and say that she was miserable and alone and 40 and that no one would ever want her because she was miserable. Ms. Dysert states that the Grievant told her that no one in her department liked her. She said they went to another range and he still proceeded to call her names, she said "unbelievable" and left. (Joint Exh 22). Ms. Dysert's testimony at the hearing was consistent with her memo. She also testified that the Grievant followed her down the range, calling her names and berating her in front of the inmates.

Warden Sniezek also testified that he relied on the affidavit of Sam Biafore, the Discipline Hearing Officer in sustaining the charge. Mr. Biafore's affidavit is substantially similar to his testimony at the arbitration hearing. Mr. Biafore testified that his office is in the Special Housing Unit. (Tr. 64). He was in his office and heard a bunch of commotion, inmates were banging on the doors and hollering. (Tr. 65). He said that as the Grievant and Ms. Dysert exited the range, the Grievant raised his voice at Ms. Dysert, he testified that she was red faced and he was loud, he further testified that the Grievant said "something about being spoiled and a baby. Then they came down the steps. And then she was just standing there and asking Blaine for the key to get out, and he said something pertaining to, you don't know what you're doing. If you knew what you were doing, you would know not to ask me for the key. And that's about the extent of it." (Tr. 66-67).

The Grievant also submitted a memo explaining the incident, wherein he states that after he said the inmate could have the crackers, Ms. Dysert began to speak to him in a demeaning manner while continuing to question his judgment. He said that during this time many of the inmates on the range began to try to look out the window to see what was going on. He said that the verbal confrontation continued between both of them while going to another range. (Joint Exh 17). Both the Grievant and Ms. Dysert state in their memos that they told the other party to go off the range and away from the inmates with this confrontation.

At the arbitration hearing, the Grievant indicated that the incident wasn't a confrontation when the employees were around the inmates, he stated that it didn't become a confrontation until they pretty much got off the range. (Tr. 42-43).

Warden Thomas Sniezek essentially testified that he considered Ms. Dysert's version of the incident to be more credible. The Warden considered Ms. Dysert's version of the incident, in combination with the affidavit of Sam Biafore, to determine that the charges against the Grievant were sustained. Mr. Sniezek testified that when he looked at the memos presented, he considered that the Grievant's description of the incident was general and vague, whereas, Ms. Dysert's description was very specific and very detailed. He pointed to the following statement in the Grievant's January 12, 2005 memo: "she began to speak to me in a demeaning manner." (Tr. 115-116). Warden Sniezek testified, "[s]he specifically said what he called her. He just says demeaning. That's like me saying you're bad. What does that mean? If this is so fresh in your mind and a person is demeaning you, wouldn't you give specific details rather than a generic global-type answer? So looking at this memo, it does not say – it doesn't give me any details, nor do I recall during his oral presentation, to answer his question, did Mr. Edison ever

bring up what demeaning things did she say to you." (Tr. 116). Mr. Sniezek testified that he also considered the following statements in Sam Biafore's affidavit to sustain the charge of unprofessional conduct: "him raising his voice; she's trying to leave the unit, telling her she was a spoiled baby." (Tr. 118-119).

While the Arbitrator notes that the evidence in the record is in dispute about who was the main aggressor during the confrontation, the Union's primary argument is that the penalty was excessive rather than the confrontation didn't occur. The Arbitrator will consider this argument during the penalty portion of the analysis.

The Arbitrator finds that there is sufficient evidence in the record to support the Agency's conclusion that the Grievant engaged in a verbal altercation with Connie Dysert around inmates. Indeed, the Grievant states in his January 12, memo, "I had a verbal confrontation with Connie Dysert." (Joint Exh 17). There is also sufficient evidence to conclude that the altercation occurred around inmates. The Grievant further states in his memo: "[d]uring this time many of the inmates on the range began to try to look out the windows to see what was going on. I stated to her that if she needed to say something to me we should go off the range away from the inmates." This statement was sufficient evidence for the Agency to conclude that the altercation occurred around inmates. Therefore, the Arbitrator finds that the Agency met its burden by a preponderance of the evidence to prove that there was a factual basis for sustaining the charge of unprofessional conduct against the Grievant.

Charge 2 - Failure to Follow Policy

The Grievant was also disciplined for failure to follow policy. The behavior underlying this charge involved the Grievant accepting three Cleveland Cavalier tickets from a vendor doing business with the Agency. The Grievant admits accepting the tickets.

The Agency contends that in accordance with 5 CFR 2635.201-205, employees are prohibited from accepting any gift from a vendor.

5 CFR 2635.202, provides in relevant part,

> (a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:
>
> (1) From a prohibited source; or
> (2) Given because of the employee's official position.

The Union maintains that 5 CFR 2635 clearly states that an employee may accept a gift from a vendor or prohibited source under given circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee.

5 CFR 2635.204 Exceptions, provides in relevant part,

> The prohibitions set forth in ξ2635.202(a) do not apply to a gift accepted under the circumstances described in paragraphs (a) through (l) of this section, and an employee's acceptance of a gift in accordance with one of those paragraphs will be deemed not to violate the principles set forth in ξ2635.101(b) ***
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> (b) *Gifts based on a personal relationship.* An employee may accept a gift given under circumstances which make it clear that the gift is motivated by a family relationship or personal friendship rather than the position of the employee. Relevant factors in making such a determination include the history of the relationship and whether the family member or friend personally pays for the gift.

Therefore, in accordance with the regulation, employees cannot accept gifts from prohibited sources or gifts based on the employee's official position; however, employees can accept a gift if that gift is motivated by a family relationship or a personal friendship.

The evidence demonstrates that Tim Nichols was a vendor with Keefe, with whom the Agency does business. The Union presented the following evidence that the Grievant and Tim Nichols had a personal relationship. The Grievant testified, "Tim Nichols and I had a personal relationship. We were friends; we talked on several occasions. From his home phone, he would call me. We would talk about how the weekend went, maybe a fishing trip that he had; how well he did. He called me a couple times in regard to his sister who was terminally ill with cancer." (Tr. 172). He added that he would talk on the telephone with Mr. Nichols sometimes thirty or forty-five minutes. (Tr. 174).

The Agency contends that the Union has not established that Grievant had a personal relationship as contemplated in the CFR because the Grievant developed this relationship after his employment at the prison and he met Mr. Nichols through his dealings with Mr. Nichols as a vendor. In support of its position, the Agency points to the testimony of Paul Whitesell. Mr. Whitesell testified that its his belief that if the Grievant began a personal relationship after his employment that would not be considered a personal relationship as identified in the CFR. (Tr. 252-253).

The evidence indicates that the Grievant developed a friendship with Mr. Nichols while the Grievant was employed by the Agency and Mr. Nichols was employed by Keefe and did business with the Agency. Other than Mr. Whitesell's belief, the Agency does not provide any explanation to support its premise that when an employee develops a relationship with a vendor,

it is not a "personal relationship" as contemplated by the regulation. The Agency has not pointed to anything in the regulation that prohibits employees from establishing personal relationships with vendors. While this may not be the typical personal relationship described by the regulation, it's nonetheless, a personal relationship.

The regulation prohibits gifts that are motivated by the employee's official position. In response to the failure to follow policy charge, the Grievant submitted an affidavit about April 14, 2005, wherein he stated, "I have never received any free tickets to sporting events from Mr. Nichols or any representative from the Keffee company while at work or in an official capacity. I had established a relationship with Mr. Nichols outside of work and about two years ago he called me at home and asked me if I wanted tickets to a Cleveland Cavalier game because he had to take his daughter to a girl scout event. I asked him if they were company tickets and he told me they were his own personal tickets." (Joint Exh 19). The evidence demonstrates that the proposal letter charging the Grievant with misconduct (Joint Exh. 4) acknowledged the Grievant's personal relationship argument in response to the failure to follow policy charge. However, the Agency sustained the charges without mention of the Grievant's contention that his acceptance of the tickets was not a violation of the policy because of his personal relationship with Mr. Nichols. (Joint Exh 5). The Agency sustained the charges against the Grievant, based on his admittance that he accepted the tickets.

The Union has presented sufficient evidence that the Grievant engaged in a personal relationship with Tim Nichols. Further, the Union presented evidence that sufficiently establishes that Mr. Nichols' motivation in giving the tickets was based on the personal friendship rather than the Grievant's position with the Agency. The Grievant's affidavit

establishes that Tim Nichols could not attend the Cavaliers game himself, therefore, he gave the tickets to the Grievant. The Arbitrator acknowledges that there are times when it is inappropriate for an employee to accept gifts even when that employee has a personal relationship with a vendor. However, while it may be inappropriate, the CFR doesn't prohibit the acceptance of gifts in this situation. Also strengthening the Union's position that the motivation was based on a personal relationship, rather than the Grievant's position, is Mr. Whitesell's testimony that the Grievant's position doesn't affect the status of the contract between the Agency and the Keefe Company. (Tr. 254). Therefore, there is no evidence that Keefe Company could have received any advantage by the Grievant's accepting the tickets.

The Agency further contends that receiving tickets from a representative that the Grievant regularly purchases items from is inappropriate behavior that could be perceived by the public and other vendors as preferential treatment.

The Union maintains that the Agency's claim that the Grievant's accepting the tickets gives the impression of impartiality is a double standard given the fact that Mr. Paukstat accepted gratuitous golf outings with the exact same vendor. The Union further points out that Mr. Paukstat did not have a personal relationship with Mr. Nichols. The Union also contends that another management official also provided testimony about receiving a gratuity in the form of a live lobster.

Alvin Paukstat, Trust Fund Supervisor at FCI Elkton, testified that he has been on golf outings with Mr. Nichols twice. He testified that he paid for one golf outing and that Mr. Nichols paid for one. (Tr. 261). He testified that the value of the golf outing was $9. (Tr. 262). He added that he did not have a personal relationship with Mr. Nichols. (Tr. 262). Mr. Paukstat

acknowledged that going on a golf outing could have possibly been perceived as preferential treatment toward that vendor. (Tr. 262-264).

Additionally, the Union states, "Mr. Whitesell another management official of the Agency and the person responsible for requesting the investigation which led to the disciplinary action against the Grievant provided testimony about receiving a gratuity in the form of a live lobster from a vendor." (Union's closing brief, pg. 7). However, the evidence demonstrates that a lobster was sent to the laundry department and that it was valued at under $20, which is acceptable according to the CFR. According to 5 CFR 2635.204, "an employee may accept unsolicited gifts having an aggregate market value of $20 or less per source per occasion."

The Arbitrator acknowledges that the golf outing appears to be acceptable according to the regulation, as was the acceptance of the tickets. It supports the Union's position, however, that the Grievant's acceptance of the tickets was no less acceptable than Mr. Paukstat's acceptance of the golf outing, as both could be perceived as preferential treatment. Therefore, the Agency did not sufficiently demonstrate that the Grievant engaged in misconduct when he accepted the Cleveland Cavalier tickets from Tim Nichols. Thus, the Agency failed to meet its burden by a preponderance of the evidence that there was a factual basis for sustaining the charge of failure to follow policy against the Grievant.

The Arbitrator has determined that the Agency has met its burden in proving that there was a factual basis for the adverse action in relation to the charge of unprofessional conduct. However, the Agency has not met that burden with the failure to follow policy charge. Now, the Agency must prove that there was a logical relationship between the misconduct and the efficiency of the Service. "In evaluating whether a penalty is merited, however, we examine first

and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or frequently repeated." *U.S. Dept. Of Veteran Affairs*, citing, *In Brown v. Department of the Army*, 96 MSPR 232 (2004), citing *Dogar v. Department of Defense*, 95 MSPR (2003). Obviously, when employees engage in a verbal altercation in front of inmates there is an impact on the efficient and safe operation of the prison. Thus, this is an offense that affects the efficiency of Service.

The Agency must next demonstrate that the penalty was within the tolerable limits of reasonableness. *U.S. Dept. Of Veteran Affairs,* supra. In determining whether the selected penalty is reasonable, due deference is given to the agency's discretion in exercising it managerial function of maintaining employee discipline and efficiency, an Arbitrator's function is not to displace management's responsibility, but to assure that management's judgment has been properly exercised. *Cantu v. Dept. of Treasury* (2001), 88 MSPR 253, citing, *Fowler v. U.S. Postal Service,* 77 MSPR 8 at 12. It is not the Arbitrator's role to decide what penalty he would impose, but rather, whether the penalty selected by the Agency exceeds the maximum reasonable penalty. *Cameron v. Department of Justice*, 100 MSPR 477 (2005), citing *Adam v. Postal Service,* 96 MSPR 492

A penalty will be modified only when it is determined that the agency failed to weigh the relevant factors or that it clearly exceeded the bounds of reasonableness in determining the penalty. *Cameron, supra.* The issue in determining whether an arbitrator should exercise its mitigation authority is whether the agency considered the relevant *Douglas* factors and reasonably exercised management discretion in making its penalty determination.

The *Douglas* factors are:

(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 supervisor's 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 were 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 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.

The Agency points out that as a law enforcement officer, the Grievant is held to a higher standard. The Union argues that while law enforcement employees are held to a higher standard, that standard must be applied equitably among similarly situated employees. The Union contends that when all the Douglas factors are appropriately considered, the Grievant's discipline is excessive and mitigation is warranted. The Union states that the Grievant had no past disciplinary record in 13[1] years of service, he has a good work record, the Union states that the

[1]The Union states that the Grievant had 13 years of service, while the Agency says 15 years. The Arbitrator doesn't believe the parties are in dispute at to the years of service, the Arbitrator is just pointing out in inadvertent inconsistency in the parties facts.

progressive discipline policy was not followed because there were no prior warnings or reprimands.

The 20-day suspension was based on the warden's determination that the Grievant engaged in misconduct based on the unprofessional conduct charge and the failure to follow policy charge. However, the Arbitrator concluded that the Agency didn't meet its burden to sustain the failure to follow policy charge; therefore, the Grievant cannot be disciplined for that charge. Thus, the Arbitrator must decide whether the 20-day suspension is an excessive penalty for the Grievant's conduct in engaging in a verbal altercation.

In considering what discipline to impose, the nature and seriousness of the offense is a factor. The Union contends that the altercation between the Grievant and Ms. Dysert was simply a difference of opinion and nothing more. In support of its position, the Union points the testimony of William Meek. Mr. Meek testified that on the day of the incident in question, he and Sam Biafore were in the lobby area on the range. He said that it was evident that the two employees were having a disagreement. He stated that Ms. Dysert's face was red and that the Grievant was saying something to her, but he didn't know what the Grievant was saying. (Tr. 35-36). He testified that he didn't believe the disagreement was that serious because they work in a very stressful environment and disagreements take place on a daily basis between staff members. He said that he took notice of the disagreement, but he didn't think that it was really anything out of the ordinary. (Tr. 36). He further stated that disagreements between employees were very common. (Tr. 36).

The Union's evidence supports its position that the altercation was not out of the ordinary. However, the evidence establishes that Mr. Sniezek's decision not to mitigate the

penalty was based on factors such as: the altercation occurring in front of inmates and the Grievant's comments to Ms. Dysert as she was trying to remove herself from the situation, rather than the severity of the altercation.

The deciding official, Warden Sniezek, testified that he considered the Douglas factors when deciding what discipline to impose against the Grievant. Mr. Sniezek testified that one factor he considered in his decision not to mitigate the penalty was that the Grievant was in the military. He explained that in the military you're taught a code on how to conduct yourself, and how to deal with people appropriately. (Tr. 95). He also considered the Grievant's employment, work record, Ms. Dysert's affidavit, and Mr. Biafore's affidavit. Mr. Sniezek testified that he considered the following facts, surrounding the incident, sufficient to warrant a 20-day suspension: an employee was trying to remove herself from the situation, the Grievant belittled her about her weight, the Grievant made comments that she's a baby in front of inmates. Mr. Sniezek also testified that he considered the Grievant's 15 year work history as a double-edged sword; he explained that even though the Grievant's been there for 15 years with no prior discipline, because he has been there 15 years, he should have known better. (Tr. 98-101). Mr. Sniezek also considered that having an altercation in front of inmates is a security concern. (Tr. 103).

The Arbitrator finds that the deciding official went beyond the bounds of reasonableness when he considered the Grievant's military background and his 13 years of service as aggravating factors. The Grievant is already held to a higher standard because of his status in law enforcement. It is not reasonable to impose a higher level of discipline on the Grievant because he was in the military. The Arbitrator also finds that the warden was not reasonable in

his treatment of the Grievant's years of service. The Warden testified that he considered the Grievant's prior years of service as a double edged sword. Basically, the warden said because the Grievant had 13 years of service with no prior discipline he should have known better. It's not appropriate for employees with one month of service to engage in misconduct anymore that it is for someone that has 30 years of service; however, longtime employment without prior discipline is a mitigating factor, not an aggravating one. The warden exceeded the bounds of reasonableness when he considered these factors to justify a higher level of discipline upon the Grievant.

The Union also contends that the penalty in this case is not consistent with penalties for similar infractions. Essentially, the Union argues that the Grievant was the victim of disparate treatment. To further support its position, the Union presented evidence that the Office of Inspector General conducted a review of the Federal Bureau of Prisons' disciplinary system in 2004. (Joint Exh 30). The report provides, in part, "we identified deficiencies in the BOP's disciplinary system that prevent it from ensuring that disciplinary decisions are reasonable, consistent, and timely." The Union further argues that Joint Exhibit 31, which is a discipline log dated from 2006 through May 29, 2007, establishes that employees do not receive similar penalties for similar infractions.

To show the Grievant was treated discriminatorily based on disparate treatment, the Union must demonstrate that the incidents were similarly situated. While Joint Exhibit 31 appears to support the Union's position that the Grievant was penalized more heavily for unprofessional conduct and failure to follow policy than other penalties for the same charge, the Arbitrator notes that Joint 31 only lists the offense and the penalty, it doesn't specify the

underlying conduct that makes up the basis for the charge. Thus, while this evidence appears to support the Union's claim that the penalties are not consistent, it is not sufficient to show disparate impact without facts about the conduct that resulted in the discipline.

However, the Union provided evidence that Odel Eargle was disciplined in the form of a reprimand for unprofessional conduct when he and another employee engaged in a verbal confrontation. Mr. Eargle testified that he told another employee that if he ever talked to him like that again, he would "snatch his damn throat out". (Tr. 200). Mr. Eargle testified this disagreement occurred in front of inmates, which is a factor that the warden considered when giving the Grievant a higher penalty.

The Union also presented testimony regarding another confrontation that involved an employee, Leo Hudson, and another employee. Mr. Hudson's supervisor, Jackie Johnson, testified that she witnessed the confrontation. She testified that the other employee, whom she also supervises was involved in two separate incidents and was disciplined for each offense. The evidence indicates that he received a letter of reprimand and a 20-hour suspension.

This evidence supports the Union's contention that the Grievant was not disciplined fairly and consistently. The evidence indicates that other employees received lesser penalties for engaging in verbal altercations. The evidence further indicates that the incident involving Mr Eargle was in front of inmates. Thus, the Union has provided sufficient evidence that the Grievant's level of discipline was not consistent.

The Arbitrator also notes that the parties' CBA provides for progressive discipline. The Arbitrator finds that after reviewing all the relevant evidence and considering the Douglas factors that mitigation of the penalty is necessary in this case to bring the level of discipline within the

tolerable limits of reasonableness. The factors the warden considered against mitigation were that the Grievant belittled Ms. Dysert as she attempted to remove herself from the situation and that the altercation occurred in front of inmates. The Arbitrator finds this is a relevant consideration on behalf of the Agency. However, these factors must be weighed and balanced against any mitigating factors. The Union has presented sufficient evidence that other altercations occurring in front of inmates were not disciplined so severely. The Arbitrator finds that because the Grievant has received no prior discipline, to be fair and consistent with other similar infractions, the 20- day suspension is mitigated to a letter of reprimand.

VI. CONCLUSION

Although the Agency met its burden to demonstrate that the Grievant engaged in unprofessional conduct, the Agency did not meet its burden to prove that the penalty was within the bounds of reasonableness. The Union has sufficiently demonstrated that the Grievant was disciplined excessively and that his level of discipline was not consistent with similar penalties of the same nature.

VII. AWARD

The Grievance is sustained, in part. The penalty is mitigated from a 20-day suspension to a letter of reprimand. The Grievant is entitled to back pay and all benefits forfeited as a result of the suspension. The suspension shall be removed from the personnel file.

Floyd Weatherspoon

11/14/2007

Date