

IN THE MATTER OF THE ARBITRATION

Between

AFGE LOCAL 375 and FEDERAL BUREAU OF PRISONS

FEDERAL BUREAU OF PRISONS

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EMPLOYER,

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AND

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DONNELL WHITE

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EMPLOYEE

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FMCS CASE NO.: 11-04192-1
Disciplinary Suspension of
Donnell White

Edward J. Gutman, Arbitrator

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AND

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AFGE LOCAL 375

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UNION

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I. BACKGROUND

This is an Arbitration Award in the grievance filed by American Federation of Government Employees, Local 375 ("AFGE" or "Union") on behalf of its member, Donnell White, a Senior Correction Officer ("SCO") of the Federal Bureau of Prisons ("Agency" or "Bureau") employed at the Bureau's correctional institution located in Fairton, New Jersey. ("FCI")¹

The undersigned was selected by the parties to serve as Arbitrator from a list of arbitrators furnished to the parties by the Federal Mediation and Conciliation Service. A hearing was conducted at the Bureau's facility located in Fairton, New Jersey on June 5,

¹ FCI is a federal minimum security facility with a staff of in excess of three hundred and an inmate population of over one thousand five hundred.

2012.² Both parties were represented by able Counsel, witnesses were sequestered, testified under oath, were subject to cross examination and a stenographic record was made of the proceedings which together with closing memoranda filed electronically by the parties have been carefully studied and considered in the preparation of this Decision.

II. THE AUTHORITIES

A. The Master Agreement

Article 6: RIGHTS OF THE EMPLOYEES

2. To be treated fairly and equitably in all aspects of personnel management.

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 . . .

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.

Section e. 1. 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.

² By agreement of the parties, the record remained open for ten days beyond June 5 pending the introduction into the record of a proposal and disciplinary letters to Stephen Bateman. On June 14, (1) a letter dated January 29, 2010 to Stephen Bateman from his Captain advising him of a proposed five days suspension letter for off-duty misconduct, misuse of a government travel card and violations of standards of employee conduct and (2) a letter dated March 1, 2010 from the Deputy Regional Director confirming the five days suspension were received by the Arbitrator electronically and have been received in evidence.

ARTICLE 31: GRIEVANCE PROCEDURE

Section d. Grievances must be filed within forty (40) calendar days of the alleged grievable 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. . . .

B. The U.S. Code

Title 5 USC §7116(a)(4) : Unfair Labor Practices

Title 5, USC §2302(b), Prohibited Personnel Practices, An Abuse of Authority

III. THE ISSUE

Did the Agency violate the Master Agreement in giving the grievant a 7 day suspension for the charges of off-duty misconduct and unprofessional conduct. If so, what is the proper remedy?

IV. FACTS

A. The Events of June 4, 2009

SCO White has been employed by the Bureau at FCI since December 2000. His grievance is from a seven day suspension³ imposed on him on July 11, 2011, by Warden Shertle as discipline for conduct described in a Vineland, New Jersey Police Report that occurred on June 4, 2009. According to the Report, Vineland Police Sergeant Christopher Davis responded to a call on that date from the proprietor of a restaurant located in Vineland

³A suspension of 14 days or less is defined in the Master Agreement as a "disciplinary action." (Jt Exhibit 1 Article 30 Section b).

in regards to "a fight" on his premises. The Sgt.'s Report stated he encountered "an unknown black male" later identified as SCO White who "appeared to be intoxicated." The individual was "advised" not to drive but despite the warning entered his vehicle and proceeded on State Highway 55 where, after a high speed chase, he was taken into custody, handcuffed and transported to Vineland Police Headquarters where he was charged with driving while intoxicated. White was transported to the "report room" where he was seated on the bench and handcuffed to the wall. He was asked to take a breathalyzer test but refused: illegal to refuse under New Jersey law. While seated in the "report room, according to the Police Report, White became "aggressive." He called Sgt. Davis a "fat fuck" and a "hillbilly" and made the "further" statement: "Too bad you can't be killed like the Philly cops." (JT Ex.9:21-24) ⁴ This statement was made in the presence of Vineland Officers Mackafee, Platania and Dounoulis. ⁵

When White was released from custody, he was charged by the Vineland Police with driving while intoxicated and refusal to take a breathalyzer test. He was issued multiple motor vehicle summons.

In a memo to Fairton Warden P. Schultz captioned "DUI Arrest" dated June 5, 2009, the day immediately following his arrest, SCO White reported to the Warden that he had been taken into custody on June 4 and charged with DWI by the Vineland Police. The memo which according to a handwritten note on the document was reviewed by Warden Schulz on June 8, 2009, stated that while he was at the station the (sic) Sargent who arrested him made "several jokes and comments about correctional officers. One statement he made was 'don't you guys only do about a week of training. No wonder you guys get stabbed' and he laughed. I replied back to him that was wrong and would be like me saying no wonder PA cops get killed, they don't have enough training." (Jt Exhibit 9; p.38) ⁶

⁴In Philadelphia seven police officers have died in the line of duty in less than three years.

⁵In an email December 3, 2010 from Vineland Lt. Bowers to Vineland Officers Mackafee, Platania and Dounoulis, Lt. Bowers asked if they remembered the incident of White's arrest "last summer" and the statements made by White in their presence. Officer Platania responded by email that he remembered White's "negative comments regarding police officers' deaths but can not remember word for word as to what he was saying. The only thing that I can remember is him saying 'You guys should die just like them cops in Philly.'" Jt. Exhibit 9; p. 11

⁶The reference was apparently to reports of stabbing of correctional officers by inmates.

Also on June 5, 2009, in a memo to Warden Schultz, Special Investigative Agent J. Byrnes advised that, at 3:30 p.m. that day, he had taken a call from Sgt. Davis who reported that he had arrested White on June 4 and that "While at the police station, during the processing, numerous times Officer White made statements to Sergeant Davis and a few other officers, such as: Take the cuffs off and we will go a few rounds. He also told all officer's (sic) present, 'you guys should die like the Philadelphia Police.'" According to another memo dated June 5, 2009, this one from C. Robbins Operations Lieutenant to Captain Joseph Henger, Lt. Robbins reported that he spoke twice with Sgt. Davis. The first was a call from Sgt. Davis at 12:05 a.m. on June 5 informing him that he had arrested a correctional officer identified as Donell White on DUI charges alleging White was making "unwarranted remarks." Sgt. Davis asked Lt. Robbins what "we wanted to do." Lt. Robbins told the Sergeant that he would call him back after notifying his supervisor of the situation. After calling his supervisor, Lt. Robbins called Sgt. Davis back and informed him there was nothing he could do. Sgt. Davis then proceeded to tell the Lieutenant that Officer White had been making "inappropriate statements, one such statement being 'You should die like the Philadelphia Cops.'" Jt. Exhibit 9; p. 37.

On Wednesday, June 10, 2009, an article appeared in the Daily Journal, a local newspaper, led by the headline "Police: Prison guard wished death on officers." The article reported that "a federal corrections officer arrested on suspicion of drunken driving "allegedly told Vineland police 'too bad you can't be killed like the Philly cops' – a disparaging reference to several officers in that city recently slain in the line of duty." The article quoted White that "his comments were taken out of context, and were made after Vineland officers made remarks to him asserting federal corrections officers lack training" and that he replied "That's disrespectful. That would be the same thing as saying when Philly cops get killed, it's because of a lack of training." ⁷(Jt. Exhibit 9:55)

On July 2, 2009, White pled guilty to DUI and refusal to take the breathalyzer test and was fined \$256. (Jt. Exhibit 9, p. 13) ⁸

⁷ Despite quoting the verbatim account from the Police Report, the source of the newspaper's story was not disclosed.

⁸ A similar article had appeared in The News of Cumberland County on June 8, 2009.

B. Removal proceedings against SCO White

At the same time of the June 4, 2009 incident in Vineland a recommendation for SCO White's removal from service was pending against him based upon incidents of alleged misconduct that occurred in 2007.⁹ On June 11, 2009, White was removed from service by then-Warden, P. Schultz for the 2007 incidents described as "inflicting bodily injury on co-worker, unprofessional conduct, absence without leave, failure to follow leave procedures and failure to follow post orders." (Jt. Exhibit 9, p. 50) Officer White filed a grievance from his removal on July 13, 2009, and his grievance was arbitrated on April 21 and 22, 2010.¹⁰ The Arbitrator issued an Award on August 23, 2010, in which he found that the Agency did not establish just and sufficient cause by a preponderance of the evidence to sustain the charges of inflicting bodily injury on co-worker, absence without leave, failure to follow leave procedures and failure to follow post orders. The charge of unprofessional conduct was reduced to a written reprimand and the Bureau was ordered to immediately reinstate White with back pay. He was reinstated on October 5, 2010. (Jt Exhibit 15)¹¹

C. The Seven Day Suspension

No investigation of the June 4, 2009 incident was conducted following White's removal on June 11, 2009. However, a month following the Arbitrator's August 23, 2010 decision, the Bureau began an investigation of the June 4, 2009 Vineland incident. By letter dated September 28, 2010 to the Vineland Municipal Court, Fairton Special Investigative Agent J. Byrnes requested "available documentation regarding the disposition" of SCO White's arrest on June 4, 2009, for "Driving While Intoxicated and Refusal to submit to a Breathalyzer in conjunction with an internal investigation for employee misconduct and a

⁹ On October 20, 2007, SCO White had allegedly left his post without permission. While this incident was under investigation SCO White was accused of being embroiled in an altercation with fellow officers that occurred on December 16, 2007.

¹⁰ FMCS Case No. 09-04056

¹¹ Jt.. Exhibit 14

violation of or Employee Code of Conduct.” On September 30, 2010, the Bureau received a fax copy of the Vineland City “Court Disposition Display.” (Jt. Exhibit 9: p. 12-13)

In a sworn statement dated November 29, 2010, Byrnes described the call he had received from Vineland Police Sgt. Davis at 3:30 p.m. June 5, 2009. In that call, according to Byrnes statement, Sgt. Davis advised him of SCO White’s arrest on June 4 and that he “was informed, he also told all officers present, ‘you guys should die like the Philadelphia Police.’”¹² (Jt. Exhibit 9, p.39-41) Lt. Cynthia Robbins stated in an affidavit given to Lt. Robinson on November 26, 2010, she received a call from Sgt. Davis at 12:15 a.m. June 5, 2009 informing her that he had arrested White on DUI charges and he had been “making remarks.” Later she called Davis and he “proceeded to tell me that Officer White had been making inappropriate statements, one such statement being ‘You should die like the Philadelphia cops’” At 1:42 a.m. SCO White called her and said he was “out and that no charges had been filed.” (Jt Exhibit 9, p 47-49)

On December 1, 2010, White gave an affidavit to Lt. D. Robinson of the Bureau’s Special Investigation Section. He stated that when the police arrived on the scene on June 4th 2009, the police officer directed him and his friends to move - “Get the fuck over there.” The girl he was with told the police officer “He’s a Correctional Officer.” The Officer ordered White to move: “Didn’t I tell you to get the fuck away from here” and said to him “Your (sic) pretty fucking hard headed ... Get the fuck out of here before I arrest you for interfering with police business... After the police officer heard that we were Correctional Officer (sic) he started to get on us even more...”

White’s affidavit continued, that while he was in custody:

“... every time one of them (the Vineland police officers) would pass me, they would joke about me or make fun of my situation. I never said to any of the officers that they were ‘Fat Fuck’ or ‘Hillbillies’. It was the police officer that was making fun of me and said something like “Do you guys get a lot of exercise chasing guys with homemade alcohol’ and then start to laugh at me. I did reply to his statement by saying ‘it doesn’t look like he gets a lot of exercise.’ After making this comment to him about the exercise, Sergeant Davis said, ‘Don’t you guys do about a week of training,

¹² Byrnes stated “As previously noted, I had already requested copies of all documents when ready from the Vineland Police Department.” However, his statement had not referred to any such request.

no wonder you guy get stabbed', and then laughed. I replied back to him by saying that he was wrong and it would be like me saying to him "No wonder PA cops get killed, they don't have enough training' . . . At no time did I ever say 'Too bad you can't be killed like the Philly Cops'" (Jt. Exhibit 9, pa 14-18)

In an email dated December 03, 2010 "Subject: Donnell White," to Vineland Officers Mackafee, Platania and Dounoulis, the three officers referred to in the Police Report as having been present in the station house on June 4, 2009, Bureau Lt. Lene asked if they remembered statements SCO White made in their presence that day. Only Officer Platania responded. In his email on December 6, 2010 he stated he remembered "the subject very well and remember his negative comments regarding police officer deaths but cannot remember word for word as to what he was saying. The only thing that I can remember is him saying 'You guys should die just like them cops in Philly.'" JT Exhibit 9; p 11.

By letter dated March 7, 2011, SCO White, who theretofore had no prior discipline and whose work record at Fairton had consistently been evaluated as acceptable, was notified by Captain William A. Lee that he was proposing a seven day suspension for "Off Duty Misconduct" and "Unprofessional Conduct" and violations of the "Standards of Employee Conduct." Under the heading "Unprofessional Conduct" the proposed suspension letter stated that White had been arrested by the Vineland Police for driving while intoxicated, and that after his arrest he was transported to Vineland Police Headquarters and placed in the report room. "While there," according to the letter of proposed suspension, White stated to one of the officers "words to the effect of 'Fat fuck', 'Hillbilly,' and 'Too bad you can't be killed like the Philly cops'" (Jt. Exhibit 6) On April 14, 2011, SCO White accompanied by his Union Representative, David Gonzalez, met with Fairton's current Warden, J.T. Shartle, for the Warden "to hear the oral response of SCO White regarding the proposal letter he signed on March 30, 2011" (Jt. Exhibit 9:5-7) According to the "MEMORANDUM FOR THE RECORD" of the meeting, the following occurred:

"Warden

Mr. White, I know you are here to respond to a proposal letter you received in March. March, is that right?

White:

Yes.

The Warden:

This is your time to tell me anything you and your rep. want me to consider." With that, I will turn it over to you.

White:

The statement (Kill Cops) that was made in there, I didn't say. He was saying a lot of stuff about Correctional Officers and that he was going to call my job and get me fired. I was drinking. The officer told us to leave. He let me leave and pulled me over approximately five miles down the road.

Warden:

So are you saying he shouldn't have pulled you over?

White:

He shouldn't have made me leave. He said I had to leave the premises.

Warden:

You could have walked away.

White:

I guess I could have."

According to the minutes of the meeting, the meeting began at 10:05 a.m. and concluded at 10:16 a.m. At 2 p.m. that same day, in an email to the Warden, SCO White stated:

"I didn't have the opportunity to address my regret for the situation. There was a lot of dialogue going on during the meeting today and I didn't complete my feeling on the events of that night. (sic) this was a (sic) ugly time in my life and a (sic) embarrassment to me and my family that I do regret." (Jt Exhibit 7) ¹³

¹³As noted below, White testified he "tried to explain the situation and the things – I don't think I've been given an exact opportunity to get into that detail of stuff with the warden... Because sometimes when I was giving an answer, he cut me off. He never even looked at me. He stood up against a desk like this. The whole time, his arms were crossed. He stared at Gonzalez like this while I was sitting over there talking." Tx.224:20-225:5.

Warden Shartle notified SCO White on July 11, 2011 that "After careful consideration, I find the charges fully supported by the evidence in the disciplinary action file." He cited from White's affidavit his admission that he "had a few drinks" prior to getting in his car adding that "you indicated the statement you were accused of making to the arresting officers was not true, but that the officer made statements against correctional officers". He concluded that the Officer's "actions, whether on or off duty, reflect on the integrity of the Agency and negatively impacted the public's perception of the Bureau of Prisons, especially when reported in the news media. Additionally, your actions could have resulted in serious injury to yourself or someone else." The Warden concluded that in determining the "most appropriate penalty" he considered SCO White's ten years of service and his satisfactory performance. However, according to the Warden, in addition to the seriousness of the offenses and the public notoriety of the Officer's actions, he also considered the Officer's "unwillingness to take responsibility for your actions". He concluded that his decision was to suspend SCO White "for seven (7) calendar days . . . effective July 15, 2011, through July 21, 2011, inclusive. (Jt. Exhibit 8; Jt Exhibit 9:8-10)

D. The Grievance

On August 11, 2011, the Union filed a Grievance on behalf of SCO White with the Northeast Regional Office of the Bureau alleging violations of Article 6, 31, 36 and the Preamble to the Master Agreement, 5 USC §7116(a)(4), Title 5, USC §2302(b), Prohibited Personnel Practices, An Abuse of Authority and the Twelve Step Douglas factors. As "ways" that each of these sections was violated, the grievance stated that the suspension "does not promote the efficiency of the services of the Agency and is not for just and sufficient cause . . . is punitive . . . and not corrective . . . in accordance with the disciplinary process." In addition, the grievance stated "The discipline for DUI's in the Federal Bureau of Prisons is inconsistent throughout the Agency from a letter of reprimand to days of suspension . . . The seven (7) days suspension . . .is arbitrary, capricious and inconsistent throughout the Agency

and FCI Fairton.” The grievance also alleged “this disciplinary action may be retaliation based on Officer Donnell’s previous Union activity concerning his termination case which was overturned on or about July 2010.” (Jt. Ex. 3)

The grievance was denied by J.L. Norwood, Regional Director of the Northeast Region on September 9, 2011. (Jt. Exhibit 4) On September 14, 2011, the Union invoked its right to arbitrate the unresolved grievance pursuant to Article 32 of the Master Agreement.

E. Witness Testimony

1. Sgt. Davis

Sergeant White, the arresting officer who filed the Police Report, testified as a Bureau witness. Counsel for the grievant objected to Sgt. Davis’ testimony on the grounds that the deciding official, Warden Shartle, did not speak to Sergeant Davis prior to issuing the suspension decision; nor had any contact with the Warden until a “meet and greet” the day before the hearing. The only evidence the Warden relied upon in making his decision was the Police Report (Tr. 34-35). The Warden had not consulted with him in any way on whether or not White was guilty of making the “kill cops” slur. Sgt David was permitted to testify over the Union’s objection. After reviewing the record I find merit in the Union’s objection and Sgt. Davis’ testimony will not be considered.

2. Warden Shartle

The Warden testified that he “encourages every employee who is in the disciplinary process to take advantage of” meeting with him because that’s my opportunity to hear their side of the story and to make a judgment with their interests in mind . . .” He “typically says to the employee almost verbatim, you know, we all know why we are here. You received a proposal. This is your opportunity to tell me anything that I should consider relative to this case so I can make a fair decision relative to your case. Take as much time as need. Tell me anything you want. And with that, I turn it over to the employee, and I strongly encourage the employee to take as much time.” (Tr 68) After the conference, the Warden consults the human resources administrator, reads a transcript of the proceedings from the meeting and based on the history that the prison has had with similar cases and based on the employee’s standards of conduct, he makes a determination as to what is a fair penalty;

that when he considers the penalty phase of a decision, he considers that the person has a family, a career, and knows whatever decision he makes is going to have a direct impact on them.

The Warden explained that in reaching his decision in this case, he considered White's behavior described in the Police Report which showed there had been "some kind of an altercation involving one of our other staff here who had been, for lack of a better term, sucker punched, and the police showed up for this, and Mr. White was involved and sticking around the scene." He was told several times to leave by police officers, to get out of the area but not to drive. Nonetheless, he got in his vehicle, drove away, and a few miles later was pulled over by the same police officer who told him to leave the area and not to drive. He was given a field sobriety test which he failed. He was brought to the Vineland police station where he refused to take a Breathalyzer. Then in the midst of "a lot of vulgarity" White began to make "various extremely reprehensible and outrageous statements to the police officers that had taken him in" the gist of which the Warden paraphrased as "something to the effect of, you should die like the Philly cops, or it would be nice if you died like the Philly cops," which he "found horrible and egregious." There were some other personal statements "on record of him having said" about the officer there, that he was fat, and kept calling him a fat fuck and a hillbilly.

The Warden described SCO White's demeanor during their meeting as "disengaged;" and that White made no attempt to accept responsibility. Rather, "he went so far as to try to blame the police officer for allowing him to drive away when he was told to leave the premises of Bennigans. He said that the police officer should not have let him drive, and that it was the police officer's fault that he was driving drunk. He considered the DUI an extremely serious offense, itself an egregious offense, putting others and himself in harms way. You know, we are a very large presence in a very small area. It is of, I think, of importance to, not just the institution, but to the taxpayers that we present the most positive image that we can. We are Federal law enforcement officers. To have a situation where a Federal law enforcement officer is in the hands of local police, doing their job, treating them in such a reprehensible manner, I consider that extremely egregious. Somebody who behaves in this way in the presence of -- in any circumstance, let alone in the presence of local police officers, is not exhibiting very good judgment. In a correctional environment, our chief

correctional supervisor, as well as all of us, relies on correctional officers to exhibit extremely good judgment on any given day given the volatile and uncertain nature of a correctional institution. He stated that he tried to find something that's similar in nature. . . . But this was a stand-alone case. There was nothing that really -- there was nothing in the history of the disciplinary process here at Fairton that matched this case.¹⁴

When the Warden was questioned about credibility, he stated that "the Police Reports are self evident." And coming from sworn law enforcement officers, he had no reason to doubt their veracity. He explained that he never verified what the police officer stated in the Police Report was true because: "I had the Police Report. There was no need for me to do that."

The Warden explained when he makes a disciplinary decision it is not to exact vengeance on anybody. "My consideration is to take the action, which I think is -- frankly, the least punitive sanction which is going to have the effect of getting the employee back on track, getting their attention and getting them back on track." He did not find anything that he thought "rose to the level of a mitigating factor." Nor did he consider lesser sanction because of the "severity" of the offenses and "complexity of the case." (Tr 88) He sought guidance from the HR department locally, at the Region and the Central offense to insure "consistency" of the penalty.

When asked if he considered the fact that Mr. White pled guilty to driving drunk or DUI as well as refusal to take the breathalyzer but all the other charges were thrown out, the Warden stated that he wasn't charged with terrorist threats doesn't have anything to do with the administrative fact that he conducted himself in an unprofessional manner.

The Warden acknowledged that White had no disciplinary record and that this was mitigating to the employee's advantage. He also noted that SCO White's past work record was rated "satisfactory to exceeds" (TR. 115) When questioned about the almost three year interval between the alleged offense and his decision to impose the suspension, the Warden explained "the action taken by this employee was so outrageous and egregious so that time is not a consideration with regard to the imposition of discipline. This is a case that required

¹⁴He compared White's case to cases involving Officers Brown and Wilson both of whom took full responsibility for their actions.

action, regardless of whether it was a month ago or two years ago, because it was so egregious.” (Tr. 101)

3. CAPTAIN LEE

Captain William Lee, the proposal official on White’s suspension, was called as a witness by the Bureau. He testified that he had seen the newspaper article and said it was part of the investigative package but he did not rely on it in issuing the proposed seven day suspension nor consider the newspaper article as an aggravating factor. “It was part of the investigative package. It was part of the “documentation” but he didn’t rely on it as the actual proposal. (Tr. 160-162) ¹⁵ He described the purpose of discipline is to correct behavior, to bring employees “back to a realm where they are good employees.” With respect to White, he stated that he had no issue with him; that White is a good employee; “does the work that needs to be done.”

4. The GRIEVANT

White testified that when he disclosed that he was a Federal corrections officer, Sergeant Davis started cracking jokes, and just being real “facetious,” and saying things, and he asked me, “did I ever think I was going to be in a pair of cuffs, and he made a comment about the training and the quality of officers, and he said, ‘no wonder Correctional Officers get hurt if you are a representation of the training and quality of officers.’ The statement I made was, ‘is that why Philly cops get killed, because of the training and the quality of the officers?’ That was the statement. I never said I hope Philly cops would die or anything like that.” ¹⁶

With regards to his meeting with the Warden prior to the issuance of the decision on suspension, White explained, “Yes, I tried to explain the situation and the things – I don’t think I’ve been given an exact opportunity to get into that detail of stuff with the warden...

¹⁵ Captain Lee did not explain what “documentation” he considered in making his proposal of suspension.

¹⁶The parties stipulated that CO Neil, Neil Kelleher, CO Daniel. Lukomski, and CO Natalie Cole-Waters have known and worked with Donnell White for periods of time ranging between 11 and 12 years. They would testify they get along with him. They one hundred percent trust him on and off the job, trust him with their life. They believe that he is a good person and a hard worker.

Because sometimes when I was giving an answer, he cut me off. He never even looked at me. He stood up against a desk like this. The whole time, his arms were crossed. He stared at Gonzalez like this while I was sitting over there talking.” Tx.224:20-225:5.

V. Position of the Parties

The Bureau

“There can be no doubt the grievant committed the charged misconduct outlined in the proposal letter of March 7, 2011.” White’s denial of making the “kill cops” statement “at best was influenced by his intoxicated state, or perhaps is merely convenient for these proceedings” Sgt. Davis’s testimony and the Police Report are “accurate” and “unchallenged” and bolstered by e-mails from Vineland police officers. “The only contrary evidence provided by the union are the self-serving and alcohol clouded memories of the grievant.”

The legal standard of review in arbitration is not the criminal “beyond a reasonable doubt” standard but rather a simple “preponderance of the evidence.” The case before the arbitrator is clear under either standard; the grievant committed the charged acts and based upon the higher standard of conduct demanded of a law enforcement officer must be held accountable for his actions.

The Grievant

The Agency did not have just cause to suspend Grievant Donnell White. White offered a reasonable explanation for why he may have been “misperceived” as having made abusive comments to the Vineland officer on the night he was arrested in June 2009. White showed “contrition” for his behavior on the night of June 4, 2009.

The Union objected to Sgt. Davis’ testimony because the Warden did not speak to Davis prior to issuing the suspension. Nor was there an affidavit from Davis on which the Warden could have relied. Therefore, his testimony should be given no weight.

The suspension was a form of double jeopardy because when White won the arbitration over his removal and was restored to his former job, management was upset and retaliated against him by resurrecting the 2009 charges. The evidence is clear that the Agency

suspended him in retaliation for White's successfully pursuing the removal grievance in arbitration.

The discipline was not timely. The Agency was aware of the June 4 charges prior to his removal from federal service and had a "duty" to act on the June 4 incident prior to finalizing his removal.

Warden Shartle never gave White a fair opportunity to contest the offenses. Finally, the Agency did not show a nexus between the discipline and the efficiency of the service.

The Warden made the decision a personal one, perhaps best illustrated by his decision to issue a 7 day suspension, which was well in excess of what had been issued to other employees found guilty of similar offenses.

VI. DISCUSSION

In federal labor relations dispute litigation where, as in the present case, an Agency's right to discipline an employee is limited by a contractual requirement of "cause," the Agency must satisfy a multiple pronged burden of proof. First, sufficient evidence must be produced to persuade an arbitrator that the grievant in fact engaged in the conduct described as grounds for discipline - in this case that he made the "kill cops" smear on June 4, 2009.

In the labor arbitration context the sufficiency or weight of evidence that will support discipline imposed on an employee is typically - and both parties agree - based on a preponderance of the evidence. A preponderance of evidence has been described as just enough evidence to make it more likely than not that the fact sought to be proved is true. Thus, preponderance is established on the more convincing evidence and its probable truth or accuracy. While preponderance cannot be reduced to a simple formula except to say the preponderance is the degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it or evidence which as a whole shows the fact to be proved to be more probable than not.

That was the Agency's challenge here.

If sufficient evidence of a grievant's wrongdoing was produced, the Agency must be able show that the aggregate of the evidence warranted the discipline imposed; i.e show a

nexus between the conduct and the efficiency of the service. Finally, the Agency must demonstrate that the discipline was within the bounds of reasonableness. In the federal service the decision on this aspect of the proof scheme is usually determined by application of the twelve Douglas Factors.¹⁷ In light of the findings below, these elements of proof need not be addressed.

Did the Bureau Prove "Cause" for the Suspension?

The first hurdle the Bureau must cross therefore is to show by a preponderance of the evidence that SCO White engaged in the conduct the Warden relied upon to impose the seven day suspension. As the Warden explained, the suspension was not for the DUI on June 4, 2009, but rather "it was his post-arrest conduct which condemned him" together with his "unwillingness to take responsibility" for his actions. He described the "kill cops" statement as "horrible and egregious," "extremely reprehensible and outrageous." - so "egregious" it was the "kill cops" statement, not the DUI claims against White on which he justified the suspension "regardless of whether it was a month ago or two years ago, because it was so egregious." (Tr. 101) Thus, the Warden was explicit that he made his decision to suspend White because of the "kill cops" remark attributed to him in Vineland Police Sgt. Davis' Police Report.

Indeed, the Bureau claims "no doubt" White committed the misconduct on which the suspension is based; that the Police Report and Davis' testimony were "accurate" and "unchallenged," that White's denial was "influenced by his intoxicated state."

Had White spoken the words attributed to him by Sgt. Davis in the Police Report and printed in the local media, the Warden may have had ample grounds to describe his behavior egregious and reprehensible justifying the suspension. But, the predicate to sustain the Warden's suspension decision is whether by a preponderance of the evidence the Agency had

¹⁷*Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-07 (1981) For example: the nature and seriousness of the offense; the employee's past disciplinary record; the employee's work record, length of service, quality of performance and dependably, the supervisor's confidence in the employee after the misconduct; the consistence of the penalty with those imposed upon other employees for the same or similar misconduct; the notoriety of the offense and the impact on the reputation of the agency;

proved White made those statements. White testified and in his memo to the then Warden immediately after his arrest and his affidavit denied making the “kill cops” statement. He explained that his comment pertaining to the tragedy of the Philadelphia Police killed in their line of duty was made in the entirely different context which he described in the memo to then Warden P. Shultz hours after his arrest. He explained, he reacted to the arresting sergeant’s sarcastic and provocative remarks about the fitness of correctional officers – “don’t you guys only do about a week of training. No wonder you guys get stabbed.” He responded to Davis: “that was wrong and would be like me saying no wonder PA cops get killed, they don’t have enough training.”

In fact, the newspaper article that appeared a few days after the incident in June 2009 that reported White had made the statement “too bad you can’t be killed like the Philly cops” also quoted White’s account of the exchange he had with the Vineland Police Officer at the Vineland Police Station. According to White’s account of that exchange reported in the press, after the Vineland officers made uncomplimentary remarks about federal corrections officers lacking training, he replied, “That’s disrespectful. That would be the same thing as saying when Philly cops get killed, it’s because of a lack of training.” He denied ever saying “I hope Philly cops would die or anything like that.”

Despite the Bureau’s “no doubt” certainty that the Police Report was accurate and “unchallenged” the record reveals an unmistakable credibility issue between the Police Report and White’s testimony. Surprisingly, despite the Warden’s acceptance of the sureness of Sgt. Davis’ Police Report, the Warden acknowledged in his suspension letter of July 11, 2011, that White “indicated the statement you were accused of making to the arresting officer was not true, but that the officer made statements against correctional officers.” A fair question would be why the Warden would refer to White’s account of the events on June 4 only to completely disregard it without comment.

Thus, while the Warden’s suspension letter acknowledged White’s denial of the “kill cops” statement and his statement that he was responding to provocation by the Vineland officer against correctional officers the Warden made no attempt to reconcile the two versions of what was said on June 4 in the Vineland station. Rather, in the Warden’s view the Police Report was “self evident,” and that coming from a sworn law enforcement officer, he had no

reason to doubt that White had made the "kill cops" remarks. He simply accepted the Vineland police officer's accusation which he read in the Police Report. Solely on the basis of the Police Report he found that White's "actions, whether on or off duty, reflect on the integrity of the Agency and negatively impacted the public's perception of the Bureau of Prisons, especially when reported in the news media . . ."

The Warden concluded that in determining the "most appropriate penalty" he considered SCO White's ten years of service and his satisfactory performance. However, according to the Warden, in addition to the seriousness of the offenses and the public notoriety of the Officer's actions, he also considered the Officer's "unwillingness to take responsibility for your actions". He made no mention of the follow-up email White sent him just hours after the meeting expressing regret for June 4, 2009.

In the Warden's estimation: "To have a situation where a Federal law enforcement officer is in the hands of local police, doing their job, treating them in such a reprehensible manner, I consider that extremely egregious. Somebody who behaves in this way in the presence of -- in any circumstance, let alone in the presence of local police officers, is not exhibiting very good judgment."

If White made the "kill cops" statement, the Warden's decision to impose the seven days suspension may have been defensible and the grievance might be denied, but did he make the statement? White consistently denied that he made the ill-tempered statement dating back to just hours after November 4 in the report he filed with the Bureau. Are his denials any less credible than the Police Report? But, despite the Warden's testimony that a statement such as attributed to White was reprehensible he made no attempt to resolve the unmistakable credibility issue or even to consider that there was an issue of believability. With no factual or empirical basis to reject White's testimony and accept the written statement of an individual who he had never spoken to nor even contacted the Warden simply accepted the Vineland Sgt.'s accusation.

While there is no precise formula for evaluating the truthfulness and accuracy of a person's statements or testimony there are factors that should be considered in assessing testimony of a witness. The factor considered by the Warden - "the Police Reports are self evident" is not one of them. When the Warden was questioned about credibility, he stated

that coming from a sworn law enforcement officer he had no reason to doubt the veracity of the Police Report. Without doubt a sworn police officer's word carries a strong indication of credibility. Nonetheless, a police officer's testimony should not be believed solely and simply because of his sworn status. Rather, a police officer's trustworthiness and integrity must be evaluated with the same critical assessment as the credibility of any other witness. But here, the Warden made no attempt to determine whether White was being truthful or even considered that possibility. In fact, the Warden's decision was based entirely on what he read in the Vineland Police Report. He spoke to no eyewitnesses.¹⁸

This Decision neither finds nor suggests that White did not make the "kill cops" statement. Neither can be made in the absence of any factual, forensic or other basis in this record. Nor does this Decision second-guess the Warden because, with all due respect to the Warden, he did not have a convincing foundation on which to accept the Police Report that White made the ugly remark attributed to him by the Vineland Officer in the face of White's denial. Moreover, in the context of the confrontation in the police station described by White and in the Police Report, the Warden never considered the possibility that Davis misheard White. The way humans perceive language is according to schema which can lead to misconceptions as much as perception. Mishearing words or phrases is a common occurrence. There is even a word for it – a mondegreen. While a mondegreen is most commonly applied to a line in a poem or a lyric in a song, humans perceive in part based on past experiences. In this case, the Vineland Officers past experience was the recent tragedy of the slain police officers that occurred in nearby Philadelphia. Nonetheless, White's explanation for even referring to the deaths of the Philadelphia police officers was plausible.

Accordingly, I find it unnecessary to determine credibility. Rather I find the Bureau's claim "There can be no doubt the grievant committed the charged misconduct outlined in the proposal letter of March 7, 2011" cannot be justified on the basis of the record. The Warden's failure to even consider the evident issue of credibility was a fatal deficiency in his conclusion that SCO White had uttered the words he described as so extreme and egregious. While the need for the Bureau to maintain the highest standard of conduct for Bureau employees to

¹⁸ The Agency argues that Sgt. Davis' testimony and Police Report are "bolstered" by emails from Vineland Police Officers. However, there was no evidence the Warden, the deciding official; saw them before he made the decision to suspend White.

insure maintaining the most positive community relations, the reasons cited by the Warden, is entirely unassailable; as is his concern for the integrity of the Agency and any actions by staff that negatively impacts the public's perception of the Bureau of Prisons, an equally unassailable need for the Warden and the Bureau is to treat its employees justly. That cannot be done if the word of a productive, reliable and above average Bureau employee is summarily rejected as was done here. In sum, no more reason for the Warden to believe that SCO White made the objectionable slur was presented to the Warden than that White may have made the innocuous innocent comment he claims he made.

The grievance is granted.¹⁹

Dated: August 7, 2012

Edward J. Gutman
Edward J. Gutman, Arbitrator

¹⁹ The Union's double jeopardy, timeliness, retaliation and other Douglas claims were not factors in reaching this Decision.