

In the Matter of the Arbitration
between
FCI Schuylkill
and
AFGE Local 3020

FMCS 06-50053

Grievant Kevin Blackwell

Arbitrator: Nancy Kauffman, Ph.D.

APPEARANCES:

For FCI: Daniel B. Ritchey

For AFGE: Dennis Biesik

PLACE OF HEARING: Minersville, PA

DATE OF HEARING: September 7, 2006

AWARD: The grievance is sustained in part and denied in part. Management did not have just and sufficient cause to terminate Grievant's employment for Charges 1, 3, or 4 or a combination thereof. The penalty for Charge 2 is reduced to a one-week suspension. The Grievant is to be reinstated within the FCI system within forty-five (45) days of the date of this decision. His reinstatement is effective as of September 29, 2005, and backpay is awarded from September 29, 2005 to his reinstatement date. This amount is to be paid to him no later than forty-five (45) days from the date of this award unless the parties mutually agree to a different date. The arbitrator retains jurisdiction in the event that the parties are unable to agree on the dates specified in this paragraph solely to resolve the date issues.

DATE OF AWARD: December 12, 2006


Nancy Kauffman, Arbitrator

WITNESSES:

FOR FCI:

Kevin Blackwell, Grievant
Patti Manbeck, Case Manager
Amy Leonard, Unit Manager
Ronnie R. Holt, Warden

FOR AFGE:

Danielle Boris, Unit Secretary
Joe Gudonis, Case Manager

EXHIBITS:

JOINT

J1: Joint Exhibit Book

Tab 1: Moving papers:

- a. October 4, 2005 letter, Intent to Pursue Arbitration regarding Adverse Action. Pages 1-3
- b. September 21, 2005, letter of Adverse Action; removal effective this date. Pages 4-6
- c. August 22, 2005, M. Coratello's memo on Grievant's oral response to proposed adverse action. Pages 7-9
- d. August 15, 2005, Grievant's written response to proposed adverse action. Pages 10-11
- e. July 20, 2005, letter to propose removal for 4 charges. Pages 12-16
- f. Disciplinary Action Log, 2005, for all Schuylkill employees (10 items). Pages 17-18
- g. November 4, 2005, cover letter for Disciplinary Action Log. Page 19
- h. July 19, 2006, memo to union, response to discovery request. Pages 20-22

Tab 2: Supporting documentation, 87 pages:

- a. Incident report, August 12, 2004. Page 1
- b. Interview report with inmate, October 14, 2004. Pages 2-3
- c. Photograph, poor quality, of contents of inmate's locker. Page 4

- d. Telephone dump for four FCI Schuylkill extensions, 6 pages including cover. Pages 5-10
- e. Approved telephone list for inmate dated July 31, 2001. Page 11
- f. Visiting List for inmate, prepared August 11, 2003. Page 12
- g. Account telephone list, run August 4, 2004; 5 approved numbers; 1 number not on the approved list. Page 13
- h. Interview report with inmate, February 8, 2005. Pages 14-15
- i. Warning and Assurance to Grievant, October 14, 2004; introduction of contraband, inappropriate relationship with an inmate, preferential treatment of an inmate, breach of security. Page 16
- j. Affidavit by Grievant, October 14, 2004. Pages 17-19
- k. Warning and Assurance to Grievant, May 24, 2005; Absent Without Leave. Page 20
- l. Affidavit by Grievant, May 24, 2005. Pages 21-23
- m. Warning and Assurance to Grievant, January 25, 2005; insubordination and unprofessional conduct. Page 24
- n. Affidavit by Grievant, January 25, 2005. Pages 25-28
- o. Affidavit by Unit Manager, Grievant's direct supervisor, May 19, 2005. Pages 29-32
- p. Memo to Grievant from his supervisor, dated May 18, 2005, reviewing attendance and requiring supporting documentation for medical causes of absence. Page 33
- q. Memo from Grievant's supervisor to SIS regarding Grievant's attendance; March 21, 2005. Page 34
- r. Memo from Unit Manager to Associate Warden regarding Grievant's AWOL status on February 14 and 16, when he did not call in; February 23 and "rest of the week" due to hospitalization; March 7, 2005. Pages 35-39
- s. Affidavit from Lieutenant regarding Grievant's lateness on January 17, 2005 (15 minutes), January 15, 2005 (5 minutes), January 13, 2005 (30 minutes) plus insubordination on January 17 when Lt. spoke with Grievant about his lateness; with two supporting memos from Lieutenant to Captain on the date of the occurrences. Pages 40-42
- t. Daily assignments for Grievant for March 2004 through February 2005; 5 dates show "AWOL" in January and February 2005. Page 43
- u. Payroll Record and Time Sheets for Grievant for January 9-22, 2005. Week 1 shows 1.25 hours AWOL; Week 2, .25 hours. Pages 44-45
- v. Payroll Record and Time Sheets for Grievant for January 23 - February 5, 2005. Week 2 shows 8 hours AWOL. Pages 46-48
- w. Payroll Record and Time Sheets for Grievant for February 6 - 19, 2005. Week 2 shows 20 hours AWOL. On 4/29/05, this was corrected to LWOP for Week 2. Pages 49-51

- x. Payroll Record and Time Sheets for Grievant for February 20- March 5, 2005. Week 1 shows 14.25 hours AWOL. Page 52
- y. Time and Attendance Report for March 20 - April 2, 2005. Week 1, 6 hours AWOL; Week 2, 4 hours AWOL. Page 53
- z. Unit Staff Schedules for April 3- July 2, 2005 and Daily Assignment Rosters dated January 9, 13, 14, 17 and February 2, 2005. Pages 54-84

Tab 3: Policies:

- a. Telephone Regulations for Inmates at Schuylkill; SCH 5264.07B; July 7, 2003. Pages 1-6
- b. Telephone Regulations for Inmates; National: 5264.07; January 31, 2002. Pages 7-28
- c. Standards of Employee Conduct, Change Notice; 3420.09; February 5, 1999. Pages 29-66. Includes Attachment A, Standard Schedule of Disciplinary Offenses and Penalties on pages 49-66.

Tab 4:

- a. Memo from Unit Manager on Telephone Procedures for Inmate Calls; June 9, 2005, with Institution Supplement SCH 5264.07C dated June 8, 2005, attached. Pages 1-10
- b. Inmate Phone Information; report date June 26, 2006. Page 11
- c. Phone Dump from Grievant's office phone for May - July 2004. Pages 12-16
- d. Grievant's Performance Appraisal for April 1, 2004 - March 31, 2005. Overall performance Exceeds Expectation. Pages 17-18
- e. Memo to Grievant advising him of his transfer to the Satellite Camp as a Correctional Counselor; August 2, 2005. Advised that he must speak directly to the Unit Manager if unable to get to work. Page 19
- f. Grievant's work assignment January 30 - February 5, 2005. Pages 20-21
- g. FCI Schuylkill Phone Directory, April 2005. Pages 22-28

Tab 5:

- a. Memo to Warden from Grievant, January 28, 2005; request for 16 hours advanced sick leave due to asthma attack. Page 1
- b. Memo to Warden from Grievant, March 8, 2005; request for 14.1 hours advanced sick leave due to medical illness. Page 2
- c. Memo to Warden from Grievant, March 8, 2005, for 20 hours LWOP due to medical illness. Page 3

- d. Memo to Warden from Grievant, March 24, 2005; request for 4 hours LWOP due to car accident. Page 4
- e. Memo to Warden from Grievant, May 31, 2005; request for Family Medical Leave Act hours (number unspecified) for "those dates and times." Page 5
- f. Memo from Warden to Grievant, June 13, 2005 in reference to e. above; specifics required in order to consider request. Page 6
- g. Memo to Warden from Grievant, July 19, 2005; request for 6 hours LWOP due to medical illness. Page 7
- h. Memo from Unit Manager to Grievant, April 1, 2005; re leave usage; information needed (8 items), based on the provided job description, from physician on physician's letterhead. Pages 8-10
- i. Physician's note, April 18, 2005, with diagnosis, needs to be on medication, and "is expected to get better." Page 11
- j. Memo to Grievant from Human Resources, May 20, 2005; requesting more specific information from the physician along with a copy of medical records; position description and a Medical Release Form included. Purpose is for a physician/specialist to assess Grievant's medical condition. Pages 12-20
- k. Delaware Dept. Of Labor, Division of Unemployment Insurance Appeals, Referee's Decision, December 2, 2005; Grievant was not disqualified from receiving unemployment benefits as the employer did not meet the just cause standard. Pages 21-25
- L. Series of photographs of the inmates' telephone advising that all conversations on this phone are subject to monitoring; unmonitored attorney calls must be requested from the Unit Team. Pages 26-28

J2: Master Agreement: Federal Bureau of Prisons and Council of Prison Locals. American Federation of Government Employees; March 9, 1998 - March 8, 2001

FCI

- M1: Letter to Grievant from Unit Manager, January 25, 2004; release from sick leave restrictions after three months
- M2: Letter to Grievant from Unit Manager, October 21, 2003; Grievant placed on sick leave restrictions
- M3: Memo from Human Resource Manager to Union, October 21, 2003; advising that a bargaining unit member was placed on sick leave monitoring on September 5, 2003.
- M4: Memo from Unit Manager to Grievant, April 8, 2003; Counseling Letter regarding sick leave usage.

M5: 10 pages:

- a. Time and Attendance Report, Pay Period 14, with Time Sheet; July 22, 2005. AWOL Week 1 - 1.5 hours; Week 2 - 11.50 hours. Leave Record, ending balances: Annual 0, Sick 4, TOFF 8, LWOP 51.75, AWOL 89.75
- b. Time and Attendance Report, Pay Period 13, with Time Sheet; July 8, 2005. AWOL Week 2 - 10 hours. Leave Record, ending balances: Annual 1.0, Sick 0, OTHR 10, TOFF 8, LWOP 51.75, AWOL 76.75
- c. Time and Attendance Report, Pay Period 12, with Time Sheet; June 28, 2005. AWOL Week 2 - 2.5 hours. Leave Record, ending balances: Annual 0, Sick 0, TOFF 8, LWOP 51.75, AWOL 66.75
- d. Time and Attendance Report. Pay Period 11; July 19, 2005; corrected. AWOL Week 1 - 8 hours; Week 2 - 11 hours. Leave Record, ending balances: Annual 0, Sick 0, TOFF, 8, LWOP 39.75, AWOL 66.25
- e. Time and Attendance Report, Pay Period 11, June 14, 2005. AWOL Week 1 - 8 hours; Week 2 - 19 hours. Leave Record, ending balances: Annual 0, Sick 0, TOFF 8, LWOP 31.75, AWOL 74.25

M6: 22 pages:

- a. Memo to SIS from Unit Manager, July 12, 2005; Grievant AWOL on July 11, 2005. Page 1
- b. Memo to SIS from Unit Manager, July 25, 2005; Grievant AWOL on July 18 (1.5 hours), July 17 (10 hours), July 24 (10 hours). Pages 2-3
- c. Memo from Acting Unit Manager to Associate Warden, July 18, 2005; confirming Grievant's AWOL on July 18. Page 4
- d. Routing slip from Unit Manager, July 25, 2005; Item "AWOL Memo" on Grievant. Page 5
- e. Memo to SIS from Unit Manager, July 6, 2005; Grievant AWOL Sunday July 3. Page 6
- f. Memo to SIS from Unit Manager, June 8, 2005; Grievant AWOL June 7, 2005. Page 7
- g. Memo to SIS from Unit Manager, June 17, 2005; summary for pay period 11; over 80 hours of unpaid leave status during this two week period. Page 8
- h. Memo to SIS from Unit Manager, June 27 2005; AWOL for one or more hours on June 21, 22, and 23. Page 9
- i. Memo from Acting Unit Manager to Associate Warden, June 21, 2005; confirming Grievant's late arrive this date. Page 10
- j. Memo from Associate Warden to Unit Manager, June 24, 2005, documenting conversation with Grievant in which he states he didn't believe he needed to call in because he wasn't going to use annual leave; Grievant admitted he did not call

- anyone at the institution to notify them he would be late to work. Page 11
- k. Memo to Associate Warden from Acting Unit Manager, June 22, 2005; confirming Grievant one hour late to work. Page 12
 - l. Memo to Unit Manager from case manager, June 23, 2005; confirming Grievant one hour late to work. Page 13
 - m. Four Memos relating to an incident July 6, 2005 when Grievant had not signed out a radio after 4 pm, as previously directed, and Grievant's lack of response for 45 minutes to Operations Lieutenant's messages. Page 14-22

STIPULATIONS

1. Grievant gave one inmate telephone calls from May through July 2004.
2. Grievant late on May 13, 2005.
3. Grievant's Unit Manager gave the Grievant a Counseling Letter on May 18, 2005.
4. Grievant received the proposal for termination letter on July 20, 2005. This letter put the Grievant on notice of the charges and specifications of the charges; gave Grievant the opportunity to respond to Warden orally and in writing.
5. Grievant responded in writing on August 15, 2005 and orally on August 20, 2005
6. The Grievant had no prior discipline; Grievant's performance was rated as "Exceeds" or better.
7. Occasionally the inmate clerk had reason to be in Grievant's office.
8. The policy on in Joint Exhibit 1, Tab 4, page 2, came into effect after the Grievant left: Institution Supplement SCH 5264.7C, Telephone Regulations for Inmates, dated June 8, 2005

ISSUE

Did the Agency take action for just and sufficient cause when it terminated Kevin Blackwell on September 21, 2005? If not, what should the remedy be?

CONTRACT REFERENCES

Article 19 - Annual Leave

Section e. Employee requests for unscheduled leave will be handled in accordance with applicable laws, rules, and regulations, including the Family and Medical Leave Act and the Family Friendly Leave Act.

Article 20 - Sick Leave

Section a. Employees will accrue and be granted sick leave in accordance with applicable regulations, including:

1. sick leave may be used when an employee receives medical ... examinations or treatment; is incapacitated for the performance of duties by sickness, ..
3. except in an emergency situation, any employee who will be or is absent due to illness or injury will notify the supervisor, prior to the start of the employee's shift or as soon as possible, of the inability to report for duty and expected length of absence...

Article 30 - Disciplinary and Adverse Actions

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

Section b. Disciplinary actions are defined as written reprimand 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.

Article 31 - Grievance Procedure

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 action taken for just and sufficient cause, of if not, what shall be the remedy?"

POLICY EXCERPTS

Telephone Regulations for Inmates
SCH 5264.07B - July 7, 2003
Local Policy

4. Procedures

A. Telephone List Preparation:

Paragraph 3: Inmates may not place calls to telephone numbers for which all the actual expenses for the call cannot be directly and immediately deducted from the inmate's account ... unless compelling circumstances exist and prior approval is granted by the Associate Warden (Programs).

9. Maximum Length of Calls

Each inmate is allowed five (5) telephone calls per day. The maximum length for a telephone call is 15 minutes.... An inmate must wait **one hour** between **successful** calls to place an additional call. (Bold print is in the policy.)

TIME LINE for Charges 1 and 2

February 5, 1999 - July 7, 2003: Telephone policies for inmates. Local policy cited above.

May - July 2004 - Grievant dialed numbers 67 times for one inmate according to telephone records

08/12/04 - Inmate made allegations about Grievant, including preferential treatment of an inmate

10/14/04 - Inmate making 8/12/04 allegation interviewed by Internal Affairs

10/14/04 - Grievant responded to allegations by affidavit. Admitted possible breach of security in reference to unmonitored

02/08/05 - Inmate allegedly receiving preferential treatment interviewed by Internal Affairs

03/31/05 - Grievant's annual performance review; exceeds expectations; does not include attendance but does include the factor of maintaining security of the institution

5/12/05 - Grievant's telephone records for May - July 2004 dumped and analyzed

TIME LINE for Charges 3 and 4

01/13, 15, 17/05 - Grievant late to work each day; 15, 5, and 30 minutes respectively; Lt. reports Grievant was insubordinate on 1/13/05 when questioned about why he was not on time

03/07/05 - Unit Manager advised Associate Warden of Grievant's AWOL hours on February 14, 16, 23, 24, 25

01/09 - 04/02/05 - Grievant has AWOL hours in four of the eight pay periods

- 05/18/05 - Immediate supervisor advised Grievant in writing of excessive use of leave; medical documentation requested.
- 05/24/05 - Grievant warned of investigation due to excessive use of AWOL.
- 06/14/05 - Pay period 11; AWOL 27 hours (8 + 19)
- 06/28/05 - Pay period 12; AWOL 2.5 hours
- 07/08/05 - Pay period 13; AWOL 10 hours
- 7/22/05 - Pay period 14; AWOL 13 hours (1.5 + 11.5)

TIME LINE for proposed removal

- 7/20/05 - Unit Manager proposed in letter to Grievant his discharge based on 4 charges: (1) Failure to follow procedures for granting unmonitored telephone calls to one inmate; (2) Preferential treatment of one inmate; (3) Absent Without Official Leave, excessive use; (4) Failure to follow leave procedures
- 08/15/05 - Grievant responded in writing to proposed adverse action
- 08/22/05 - Human Resources documented Grievant's oral response to proposed adverse action
- 09/21/05 - Warden's decision letter to terminate Grievant, effective this date at midnight

BACKGROUND

The Grievant has 27 years of federal service, including 17 years with the Federal Bureau of Prisons, since May 23, 1988. He was a GS-09 counselor at Schuylkill from April 1994 until his discharge on September 21, 2005. According to his letter of August 15, 2005, he developed asthma a few years ago. From July 2004 until September 2005, he had been hospitalized four times, including two trips to the hospital from FCI Schuylkill while he was on duty. In his written response to the proposed charges on August 15, 2005, he notes that only recently had he gained control of his asthma.

The Grievant had been advised and interviewed about several allegations: October 2004 - introduction of contraband, inappropriate relationship with an inmate, preferential treatment of an inmate, breach of security; January 25, 2005 - insubordination and unprofessional conduct; May 24, 2005 - Absent Without Leave.

Three different Unit Managers advised the Grievant in writing that his sick leave usage was of concern; one placed him on leave usage restriction requiring medical documentation.

On July 20, 2005, the Grievant received a proposal letter with four charges: (1) Failure to Follow Procedures - Telephone Use by Inmates from May - July 2004; (2) Preferential Treatment of Inmates - allowed one inmate an excessive number of calls from May to July 2004; (3) Absent

Without Official Leave - January 2005 through March 2005; (4) Failure to Follow Leave Procedures. It is noted that the Grievant's performance was not at issue in the determination to terminate him. He is consistently rated as exceeding expectations.

On August 2, 2005, the Grievant was reassigned to work as a camp counselor. He responded to the charges in the July 2005 proposal letter in writing on August 15; he met with the Warden on August 22, 2005 to review the charges in detail. The Grievant was issued a decision letter on September 21, 2005 which terminated his employment that day. On October 4, 2005, the union's notice of intent to pursue arbitration was prepared.

No arbitrability issues were raised at arbitration. Therefore, the issue was properly before the arbitrator.

MANAGEMENT POSITION

The Agency established that it had just and sufficient cause to discharge Kevin Blackwell on September 21, 2005 by a preponderance of the evidence. This action was due to four charges of misconduct: failure to follow procedures, preferential treatment of inmates, absence without official leave, and failure to follow leave procedures. Mr. Blackwell had adequate opportunity to respond to these charges, which he did both in writing on August 15, 2005 and orally on August 22, 2005.

Charge One - Failure to follow procedures, Preferential Treatment of Prisoners -Unmonitored Calls: Program Statement 5264.07, Telephone Regulations for Inmates, states, "Staff are not to place telephone calls for inmates over the institution telephone system other than in situations as indicated in Section 10(e) and 14 (c) of this Program Statement." Section 10(e) states, "E. Exception. The Warden may allow the placement of collect calls for good cause." The section then explains "good cause" such as "inmates who are new arrivals at the facility, pretrial inmates, inmates in holdover status, inmates who are without funds, and in cases of family emergencies. None of these exceptions applied to the inmate who received the preferential treatment; he was in none of the statuses described, he had telephone credits, and there was no validated family emergency. All exceptions must be approved by the Warden. None of the calls made on Mr. Blackwell's telephone by the inmate were approved by the Warden.

In addition, the regulations require that ALL inmate phone calls are to be monitored. When inmates make calls from phones set aside for inmates, those calls are recorded, and there is a notice posted for the telephone user stating the calls are recorded and monitored. In cases where the inmate is allowed to use other telephones, the calls are monitored by staff. The only exception to monitoring is when the inmate's call is placed to his attorney. The calls in question were not to the inmate's attorney, and Mr. Blackwell has admitted that he could not hear or understand the complete conversation, some of which was conducted in Spanish, which Mr.

Blackwell states he does not understand.

Mr. Blackwell is not disputing that he gave the inmate too many phone calls or that this may have been a breach of security (Joint Exhibit 1, tab 2 page 17). While he does acknowledge that 12-14 of the calls connected, the records indicate that 67 telephone calls were made, and, according to the Warden's testimony (Transcript page 245), the phone monitoring system only records a phone number when an actual connection is made.

On Charge one, then, Mr. Blackwell does not dispute that he allowed one inmate to make an excessive number of phone calls over a three-month period, that these calls were not fully monitored, that he did not have the Warden's approval to make these calls, and that by allowing the calls, Mr. Blackwell may have caused a breach of security. Charge one is established through Mr. Blackwell's testimony.

Charge Two - Failure to Follow Procedures, Free Calls (Preferential Treatment of Inmates): Program Statement 5264.07, Section 14 (c) states "The Warden may direct the government to bear the expense of inmate telephone use or allow a call to be made collect under compelling circumstances such as when an inmate has lost contact with his family or has a family emergency."

From May 20, 2004 to July 19, 2004, Mr. Blackwell gave 67 phone calls to one inmate with no compelling circumstances as defined by the regulations. Mr. Blackwell stated that this inmate checked on a sibling who was hurt on a couple of occasions and that this inmate had relationship problems with a girlfriend (Blackwell affidavit, Joint Exhibit 1, Tab 2, pages 17-18). Neither of these reasons meet the compelling circumstance standard. In addition, these calls were (1) unmonitored and (2) not paid for by the inmate but by the taxpayers. This is preferential treatment of an inmate due to the number of calls and the fact that they were free as well as being a security risk because the calls were unmonitored. In his affidavit, Mr. Blackwell admits that he allowed too many calls and that they were not properly monitored.

The fact that the inmate was his clerk who was responsible in his duties does not justify the failure to follow procedures. Other inmates with similar life issues were not afforded the same access to free, unmonitored phone calls. In fact, another inmate complained that Mr. Blackwell's providing of free unmonitored calls on a staff office phone was part of an untoward relationship between Mr. Blackwell and his inmate clerk. The seriousness of this perception is the reason for regulations which specifically prohibit this type of conduct: Program Statement 3420.09, Standards of Employee Conduct, Section 9(c) (1) (6) and (7) (Joint Exhibit 1, Tab 3, third document, pages 8-9). The Standards of Employee Conduct admonish staff to "avoid situations which give rise to a conflict of interest or the appearance of a conflict of interest." The Standards also prohibit employees from participating in "conduct which would lead a reasonable person to question the employee's impartiality."

During the hearing, a tour of the facility revealed that inmates were clearly alerted to the subject of telephone monitoring, that staff actively monitored telephone calls, and that the facility had deployed sophisticated computer-based telephone monitoring systems. The security reasons for these systems and policies was explained.

Yet Mr. Blackwell claimed that he was following past practice but he could not explain why only this one inmate received such preferential treatment. Nor did he demonstrate that he had allowed similar preferential treatment to other inmates over the years. Mr. Blackwell seems to present the argument that an unnamed staff member once authorized him to give an inmate a free phone call. It is ludicrous to assume that one authorized free phone call provided a past practice which led to 67 calls from a staff phone that were unmonitored. If Mr. Blackwell one had authorization to give a phone call, that suggests that he should have known that he needed authorization to give additional phone calls.

Mr. Blackwell's own testimony substantiates this second charge. He admits that he allowed excessive phone calls from his phone, thus making the taxpayers responsible for the bill, and that he was not able to adequately monitor the calls since he does not speak Spanish.

Charge Three - Excessive Absence Without Leave: Mr. Blackwell was charged with reporting to work late or not at all on nine different dates from January 9 - March 31, 2005. At the hearing, Mr. Blackwell either admitted the charge or did not deny the charge. His pay records indicate that his pay was reduced on each of the nine occasions when he was scheduled to work.

Therefore, from Mr. Blackwell's testimony as well as the pay records, this charged is supported.

Charge Four - Failure to Follow Leave Procedures: Annual Leave and Sick Leave requests are governed by, among other things, the Master Agreement (Articles 19 and 20, Section a.3). Unless there is an emergency, leave is to be requested "prior to the start of the employee's shift."

During the arbitration, Mr. Blackwell stated, "In every case when I was going to be late, they received a call from me.... I called before the shift began." (transcript page 98) However, on page 106 of the transcript, Mr. Blackwell states, in response to questions about January 13, 14, and 17, 2005, "As I do not carry a cell phone, I was unable to contact the Lieutenant's office." This contradicts his testimony on page 105 of the transcript, in which he states that he called Acting Lt. Hinkle "while I was on the road."

The records show that when Mr. Blackwell did call, he (1) did not speak with a supervisor as required or (2) called in or verbally reported being late upon his arrival, which was after the shift had begun. This is substantiated by Unit Manager Amy Leonard's March 31, 2005 memorandum: "Thursday, March 24, 2005, Mr. Blackwell called the Unit Secretary's office and

left a voice message ... On March 25, 2005, Mr. Blackwell was scheduled to begin work at 8:00 am but did not report until 10:00 am. I asked where he was, and he replied, "I was running late." Finally, on March 31, 2005, Mr. Blackwell was scheduled to begin work at 8:00 am. Ms. Boris, Unit Secretary, informed me he called at approximately 9:00 am and said he had a problem with his tire and didn't know if he'd be in." (Joint Exhibit 1, Tab 2, page 34)

Finally, when Mr. Blackwell made requests in writing, the requests were dated after the actual date on which he had already taken leave. (Joint Exhibit 1, Tab 5, pages 1 - 5, 7)

Clearly, the record supports the charge of not following leave procedures.

Penalty Determination: It is beyond question that Mr. Blackwell's judgement as a correctional worker and credibility as a law enforcement official have been destroyed by his actions, and there is no length of suspension that would repair either his judgement or his credibility. His actions created a possible security breach. Since we don't know what the inmate said on the unmonitored calls when he was speaking Spanish, we don't know if there was a breach.

Any correctional worker who would bestow so much good faith and trust in an inmate that the security of the inmate telephone system was allowed to be breached cannot remain as an effective correctional workers. The continued safety of the staff and inmates at the facility require that sound judgement be exercised by all staff. There is no evidence that Mr. Blackwell had any personal gain from this violation of the rules, so it is clear that he lack the judgement required to be a correctional worker and a law enforcement office with this Agency.

The inmates in the housing unit that observed or heard of Mr. Blackwell's preferential treatment of one inmate may continue to believe that staff had been subverted. This perception cannot be repaired by simply suspending Mr. Blackwell

Mr. Blackwell's representative indicated that the removal of Mr. Blackwell was not consistent with the concept of progressive discipline. However, the Standards of Employee Conduct states, "While the principles of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal." (Joint Exhibit 1, Tab 3, third document)

Mr. Blackwell held the position of a law enforcement official who is held to a higher standard of conduct than non-law enforcement civil service members (Todd v Dept. Of Justice, 71 MSPR 326, 330; 1996). The safety of the inmates and staff at this facility demands that this standard be maintained.

The seriousness of Mr. Blackwell's action in allowing unmonitored phone calls is demonstrated by an article in the Chicago Tribune, November 22, 2005, in which an inmate who was allowed

an unmonitored phone call mounted a blood escape at the county courthouse three weeks later; a fellow prison guard was killed during the escape.

In this case, Mr. Blackwell was not transferred to other duties following the proposal letter. This does not imply that his behavior was not bad enough to be removed. There are other ways to monitor a staff member's activities. In addition, there may be continuing investigative efforts by other agencies, such as the FBI, which would mandate the employee's continuation in his assignment.

It is regrettable when it becomes necessary to remove any staff member, especially one who has as much time in service as Mr. Blackwell has. But there was just and sufficient cause to remove Mr. Blackwell based on the proposed charges, and the table of penalties, which has been negotiated with the union, supports this decision. In fact, charges one and two alone provide sufficient justification, and are similar to a discharge upheld in Local 501 and Bureau of Prisons, FMCS No. 2005-51098, although the Agency has provided by a preponderance of the evidence that all four charges are supported. In accordance with Title 5, USC, Section 7701 (c) (1) (B), the Agency has carried its burden and proved that all four charges should be sustained.

It is requested that the arbitrator find for the Agency and leave the removal of Mr. Blackwell undisturbed.

UNION POSITION

The Agency has violated Article 30, section (a) of the Negotiated Agreement by failing to apply the Douglas Factors appropriately and failing to have just and sufficient cause for discharging Mr. Blackwell. The Union's arguments center on the following points:

A. Management virtually ignored the Douglas Factors in determining the appropriate disciplinary action against Mr. Blackwell.

(1) Seriousness of offense: Allowing inmates calls on staff phones, arriving a few minutes late, and calling staff to request leave are all accepted past practices at this institution as testified to by Mr. Blackwell, the unit secretary, and other case managers. Since other inmates were allowed the same opportunities to make calls from a staff telephone, there was no preferential treatment of one inmate.

(2) Employee's job level, type of employment, contacts with the public, and prominence of the position: Mr. Blackwell's supervisor testified that Mr. Blackwell maintained an "exceeds" evaluation both before and after the alleged misconduct. Therefore, it is clear that even if the allegations are sustained, they did not affect his job performance.

(3) Employee's past disciplinary record: Mr. Blackwell had no previous discipline during his 17 years of Bureau of Prisons service.

(4) Employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability: Mr. Blackwell had a combined total of 27 years of government service with no previous misconduct, and he received several awards. He maintained an "exceeds" level of performance for the entire period of time.

While there is some question of dependability since he is charged with being AWOL, the first proposed discipline for this allegation is discharge. Even if this charge should be sustained, it carries a minimal sanction for the first offense (see Joint Exhibit 1, Tab 3, Program Statement 3420-09, Standards of Employee Conduct, Table of Penalties, Attachment A, Page 3).

(5) Effect of the offense on 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: Despite the Warden's testimony that he lacked confidence in Mr. Blackwell, the record proves otherwise since Mr. Blackwell was rated as above the "satisfactory" level even after the alleged incidents. Management continued to have enough confidence in Mr. Blackwell to allow him to remain in his counselor position for a year after the telephone incidents, and he continued to be rated as "exceeds" on his performance evaluations. The Agency's actions outweigh the Warden's statement.

(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses: The sanitized copy of the institution's discipline log shows a great disparity in that other similarly situated employees received no discipline whereas Mr. Blackwell was discharged.

(7) Consistency of the penalty with any applicable agency table of penalties: Since the Table of Penalties has a wide variance for most alleged offenses, consistency with the table can be easily proved. The problem here is that the Warden appears to have determined that he would have discharged Mr. Blackwell for his first AWOL offense in spite of the limitations of the Table of Penalties. This determination to go first to the most extreme penalty without considering the rest of the Douglas Factors is a Harmful Procedural Error that negates the Warden's decision.

(8) The notoriety of the offense or its impact upon the reputation of the Agency: The alleged offenses were not notorious and there was no evidence that they had any impact on 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 that the employee had been warned about the conduct in question: Neither Mr. Blackwell nor the other unit team members who testified were aware of any rule that they could not give inmates telephone calls; no other unit team members were called by management to testify otherwise. There was no evidence of awareness of a rule that limited the number of phone calls. There was evidence of a past practice of allowing staff to use their discretion in giving inmates telephone calls on staff phones, and supervisors participated in this practice. A staff member cannot be held accountable for a practice that they are not aware of or that has been called back into compliance without notice to the affected employees (see *Air Force Accounting and Finance Center, Lowry AFB, CO and AFGE, Local 2040, LAIRS 13944; 82-1 ARB 8158; January 20, 1982*)

There was no evidence that Mr. Blackwell had been warned that if his attendance did not improve that there would be possible disciplinary consequences.

Clearly, this factor was also ignored.

- B. Management failed to established that staff, including Mr. Blackwell, were aware of and followed the Program Statement on Inmate Telephone Use. See arguments above in A (1).

Mr. Blackwell testified that he believe he was acting within the scope of his duties when he allowed the inmate a number of phone calls on a staff phone between May and July 2004. This was the same opportunity that other inmates were allowed. The Agency did not prove that other inmates were not allowed this same opportunity. Therefore, there was no preferential treatment of one inmate.

Other team members also allowed inmates to make calls on staff phones; giving telephone calls to inmates has become a common practice with no restriction on the number of calls allowed according to other witnesses. This was confirmed by testimony from another case manager.

Further, Mr. Blackwell was not told he could not allow inmate calls on staff phones until long after July 2004. This was confirmed by the testimony of the unit secretary.

When the inmate was allowed calls on the staff phone, Mr. Blackwell monitored the calls by sitting beside the inmate.

Other inmates are allowed unmonitored conversations when they are in the visiting room five days a week. Therefore, the telephone calls in question did not threaten the institution's security any more than these other conversations did.

- C. Management failed to warn Mr. Blackwell that disciplinary action could result if his

attendance did not improve. By taking no action for several months, management demonstrated that his behaviors were acceptable. When an investigation was finally instituted, he was not asked about dates that are now in question.

In addition, management was well aware of Mr. Blackwell's health condition since he had been hospitalized twice during this time from duty at the institution. Management was also aware that he was driving from Delaware to work; while the length of his commute is not the Agency's problem, it is reasonable that weather, traffic, or car problems would occasionally affect his ability to get to work on time or at all.

- D. Management failed to establish that Mr. Blackwell did not follow leave procedures. The Master Agreement, Article 20, Section 3 states that "... any employee who will be or is absent due to illness or injury, will notify the supervisor prior to the start of the employee's shift or as soon as possible of the inability to report for duty and the expected length of absence." This is precisely what Mr. Blackwell did on each occasion.

Mr. Blackwell testified that it was an acceptable past practice, when requesting leave, to speak to someone other than your supervisor when that person was not available. That was confirmed by testimony from the unit secretary and another case manager who was called as a management witness.

Other staff were not disciplined for leaving voice mail requests for leave when they could not reach their supervisors.

Although there were a few occasions when Mr. Blackwell was late for work, the AWOL charges for which he was terminated occurred within a few days of each other and were mostly for a few minute. At no time in the past have staff members been terminated or formally disciplined for being absent without leave in situations similar to those for which Mr. Blackwell was charged.

- E. Management failed to conduct an adequate investigation. Although management asserts that 67 telephone calls were made for one inmate to numbers on his approved list, Mr. Blackwell states that there was no answer on the calls shown as one-minute calls. The Agency did not establish that a connection had to be made in order for the phone number to show up on the phone dump.

In another instance of inadequate investigation, management's investigator failed to ask Mr. Blackwell about any of the dates on which he allegedly failed to follow leave procedures.

- F. AWOL allegations after May 18, 2005 were not part of the adverse action packet, so that Mr. Blackwell had no opportunity to refute these allegations.

- G. As a 27-year government employee with no previous discipline, there is reason to believe that Mr. Blackwell could continue his career without any further incident because of the clear direction that has now been given to him.
- H. Management failed to have just and sufficient cause for discharging Mr. Blackwell.

Termination for the allegations made was excessive discipline for an employee with no prior disciplinary record who has consistently been rated as "exceeds" level of performance especially when there was no forewarning of possible disciplinary consequences. The union requests that the grievance be sustained, that the adverse action be removed from any and all personnel files, that he be reinstated as a Correctional Counselor, that he be assigned to an institution of his choice, that he be made whole for any lost pay and lost benefits including interest.

DISCUSSION

Charge 1: Failure to Follow Procedures on Inmate Telephone Calls

Management argued that the rules required that calls from staff telephones have to be pre-approved by the Warden, as stated in the Telephone Regulations. The witnesses provided varying views of how procedures were implemented. Management quoted the rules; non-management testified that unmonitored inmate telephone calls did not require the Unit Manager's approval; only verification that there was a legitimate need. The policy requiring Unit Manager approval was made known in June 2005; the excessive phone calls for one inmate occurred between May and July 2004.

While it is appropriate for management to institute policies which have an effect of removing the temptation of inmate preferential treatment, such policies must be published prior to any disciplinary action for the violation of the policy. Unit Manager Leonard credibly believed that the telephone policy she had written while she was at the Camp were in place when she arrived in Unit 2; the secretary showed her a copy of the policy. But, since the secretary did not follow the policy, according to her testimony, it appears that the Unit Manager did not review the policy with her employees or ask why she was not approving all unmonitored phone calls.

It is noted that the excessive telephone calls were made a year or more before they were included in a proposal letter and six months after the conclusion of the investigation on this issue. The Grievant acknowledges that he used poor judgement in allowing an excessive number of telephone calls, whether that was 23 or 67, but waiting six months to a year to notify the Grievant that he was subject to discipline is not timely and not effective use of discipline to correct behavior.

The Grievant violated regulations limiting the number and length of telephone calls, but discipline was not timely. The Grievant violated regulations that all non-attorney telephone calls must be monitored. Because this is a serious security issue, discipline is warranted; due to the delay in imposing discipline and no further evidence of violation after July 2004, the penalty is reduced to a written warning.

Charge 2: Preferential Treatment of Inmates

The Grievant admitted that, using his staff telephone, he dialed numbers on the inmate's approved list for one inmate an excessive number of times over a three month period in 2004. While the Grievant states that other inmates had the same opportunity to request an excessive number of calls, the fact remains that this was an excessive number, and this is a clear violation of policy.

In addition, there does not appear to have been a legitimate reason for allowing these calls to be unmonitored. The Grievant testified that he believed that the inmate did not have telephone credits, but he did not offer any testimony on what steps he took to verify that information. This violates established policy.

The local telephone policy clearly states that each inmate is allowed five telephone calls per day with a maximum length of 15 minutes for any one call and a total of 300 minutes for the month. The policy also states that inmates must wait one hour between successful calls. This violates policy.

The national policy states "to ensure the Trust Fund's continued financial integrity and for institution security purposes, inmates must place all personal telephone calls over the inmate telephone system. Staff are not to place telephone calls for inmates over the institution telephone system, other than in situations as indicated in Sections 10[e] and 14[c]." Section 10[e] lists the exceptions to this policy, one of which is for inmates without funds; another is for a family emergency. Section 14[c] allows an exception for compelling circumstances such as losing contact with his family or a family emergency. The Grievant violated this policy.

Grievant did give preferential treatment to an inmate from May to July 2004, thus violating facility policies, but management's allegations that this action affected his credibility with inmates and/or the security of the institution were not established and, therefore, this does not constitute just and sufficient cause to accelerate the penalty to a termination. Management waited over six months after the completion of the investigation to impose its penalty. This delay in imposing discipline is excessive and negates the impact of any proposed progressive discipline. Therefore, this discipline is reduced to a one-week suspension.

Charge 3: Excessive Absence Without Official Leave

The record indicates that the Grievant appears to have a lax attitude toward his attendance, and the Time Line for Attendance shows that this record was on a worsening trajectory in 2005. He had been placed on sick leave restriction in October 2003 for abuse of leave. While his statement that he did not follow the restrictions given in 2003 was unrefuted, the record still reflects a problem in 2003. When his supervisor warned him in writing on May 18, 2005 of his extremely low balances in both sick and annual leave and requested documentation for any contributing medical condition, the Grievant refused to sign the warning. His reasons for not being at work included "running late" and car problems.

The Grievant's attendance record and lack of compliance with the supervisor's directions certainly merited discipline. However, Article 30 Section c states that the parties endorse the concept of progressive discipline to correct or improve employee behavior with exceptions for egregious behavior. The Progressive Discipline concept suggests that employees receive warranted discipline that will encourage them to correct their problem behavior. The implication, therefore, is for a lesser penalty than discharge with a clear statement of the expected standards (how many AWOLs will be allowed within a specified period) and the consequences of not correcting the problem behavior. It does not appear that the Grievant received this consideration in terms of his attendance record.

Since the Agency did not provide a clear standard of expectations along with the possible consequences of not correcting his attendance, discipline is not warranted on this charge.

Charge 4: Failure to Follow Leave Procedures

When an employee is not able to report on time, Article 20 Section a.3 of the Master Agreement requires the employee to notify his supervisor prior to the start of shift. Testimony from various witnesses established that employees do attempt to reach their supervisors first before resorting to other means of relaying this information. The Grievant's testimony and the record do not indicate that the Grievant regularly attempted to contact his supervisor first. His only explanation was that he believed it was standard practice to simply leave a message with the unit.

In spite of Article 20's requirement to place the call prior to the start of the shift, the record indicates that the Grievant did not always do this. In March 2005, he reported late (5 minutes, 15 minutes, 30 minutes, 2 hours, 4 hours, or not report at all) without notifying his supervisor or the unit prior to the start of the shift.

In June, 2005, in spite of having received a memo from the Unit Manager that any leave other than that already approved would have to be approved by the Associate Warden while the Unit Manager was away for training, the Grievant determined that he did not need to ask the Associate Warden

for leave when he was going to be late because he was not going to use annual leave.

While the Grievant emphasizes his asthma as the major cause of his poor attendance, it appears that he did not call timely, he made no effort to reach his supervisor when he did call in, and he did not feel an obligation to consistently get to work on time. While it is understandable that he would be unable to report to work on the day following a trip to the hospital from work due to his asthma, it is not understandable that he felt no obligation to report consistently by the start of his shift – not five minutes later – or, when he was unable to do so, to call before the start of his shift. Since he lives over two hours from the facility, he should have been aware well before the start of his shift when he was going to be late.

While the Grievant believes that other employees also call in to the Unit Secretary or just leave messages when they will be late, he had had conversations with his Unit Manager about her concerns about his sick leave usage, and in May 2005, he was advised in writing by this Unit Manager that he was to report to work on time.

Having noted the Grievant's lax attitude toward attendance and timeliness, it is also appropriate to note what actions the institution should have taken since the Agency bears the burden of providing support for just and sufficient cause to terminate. The Unit Manager reported regularly on the Grievant's use of leave time, paid and unpaid. While there is a clear policy in the Master Agreement, management must implement that policy. When an employee does not follow the rules, he is to receive a clear written warning that re-states the rule, tells how/when he violated the rule, tell what is expected if there is something other than zero tolerance, and tell what the consequences will be if the rule is not followed, and give adequate time to correct the behavior (such as six months). With the Progressive Discipline concept (Article 30, Section c), some disciplinary step below discharge is anticipated in order to allow the employee the opportunity to show that he has corrected his behavior.

While the Grievant had been on sick leave restrictions for the last quarter of 2003, there is no evidence that he was clearly warned in 2005 that continued violation of Article 20 Section 3 could lead to discipline. Therefore, in spite of the Unit Manager's expressed "concern," the Grievant was lulled into believing that he did not really need to improve his attendance. Without clear notification, as stated above, discipline on this charge is not warranted.

Summary

Charge 1: Grievant violated regulations limiting the number and length of telephone calls, but discipline was not timely. Grievant violated regulations that all non-attorney telephone calls must be monitored. Because this is a serious security issue, discipline is warranted; due to the delay in imposing discipline and no further evidence of violation after July 2004, the

penalty is reduced to a written warning.

Charge 2: Grievant did give preferential treatment to an inmate from May to July 2004, thus violating facility policies, but management's allegations that this action affected his credibility with inmates and/or the security of the institution were not established and, therefore, this does not constitute just and sufficient cause to accelerate the penalty to a termination. Management waited over six months after the completion of the investigation to impose its penalty. This delay in imposing discipline is excessive and negates the impact of any proposed progressive discipline. Therefore, this discipline is reduced to a one-week suspension.

Charge 3: Since the Agency did not provide a clear standard of expectations along with the possible consequences of not correcting his attendance, discipline is not warranted on this charge.

Charge 4: While the Grievant had been on sick leave restrictions for the last quarter of 2003, there is no evidence that he was clearly warned in 2005 that continued violation of Article 20 Section 3 could lead to discipline. Therefore, in spite of the Unit Manager's expressed "concern," the Grievant was lulled into believing that he did not really need to improve his attendance. Without clear notification, as stated above, discipline on this charge is not warranted.

While the Douglas Factors allow the institution a range of penalties in dealing with the four charges of the proposal letter and various charges may be combined to determine the appropriate level of discipline, those Factors do not discourage the use of progressive discipline unless there have been egregious violations. The Grievant appears to have a very lax attitude toward attendance and carrying his fair share of the burden of his duties. He does not appear to be willing to communicate with his supervisor when he is going to be late or absent. However, progressive discipline means that clear expectations and possible consequences are laid out in writing and disciplinary steps, such as requiring medical documentation, when required are followed up. Each time the Grievant is late for work without talking directly to his supervisor should result in a documented meeting with clear instructions and clear consequences.

The preferential treatment of an inmate is clearly a security issue. If the institution believed that the Grievant violated institution policy by allowing excessive telephone calls in May through July 2004, then that information should have been reflected in the March 31, 2005 performance evaluation which followed the completion of the investigation. By rating the Grievant as "exceeds expectations" on this element, he had every reason to believe that the excessive telephone call issue had been put to rest. Annual evaluations should reflect what has occurred throughout the past year; there should be no surprises; there should be no omissions.

DECISION AND AWARD

The grievance is sustained in part and denied in part. Management did not have just and sufficient cause to terminate Grievant's employment for Charges 1, 3, or 4 or a combination thereof. The penalty for Charge 2 is reduced to a one-week suspension. The Grievant is to be reinstated within the FCI system within forty-five (45) days of the date of this decision. His reinstatement is effective as of September 29, 2005, and backpay is awarded from September 29, 2005 to his reinstatement date. This amount is to be paid to him no later than forty-five (45) days from the date of this award unless the parties mutually agree to a different date. The arbitrator retains

In order for progressive discipline to be effective, penalties must be issued in a timely manner. Interviews were completed in February 2005 of the excessive telephone use, and there was no prior warning that policies were being violated. Instead of taking disciplinary action in February or March 2005, the Grievant learned that he exceeded expectations for helping to maintain the security of the institution. Article 30 of the Master Agreement, Section d.2 indicates that employees who are subject to an investigation where no disciplinary or adverse action will be proposed, must be notified within seven working days; where disciplinary action is proposed, the Master Agreement does not provide a time limit. The Grievant could have assumed that a disciplinary action was being considered since he did not receive notice within seven working days, but a four-month delay seems excessive.

The attendance was an ongoing issue that was never dealt with effectively. While management continued to document excessive use of leave, paid and unpaid, the consequences were never clearly communicated to the Grievant until the proposal letter. This is not progressive discipline. The Grievant stated that he had had difficulty in establishing a regimen that worked for his asthma, but he now has an effective regimen. If that is true, then his attendance should have improved, but it does not appear to have improved. This conflict in the Grievant's perceptions of his health problems should have been pointed out to him with facts – dates and times – with a clear statement of expectations and possible consequences if his attendance did not improve.

The Grievant is charged with violating leave-requesting procedures, as specified in the Master Agreement, Article 20 Section a. 3. However, management must follow through on the consistent implementation of the Agreement. In combination with the Progressive Discipline concept (Article 30 Section c), the Grievant must be clearly notified of the policy, the agency's expectations, and the possible consequence of continued violation so that the employee has a fair chance of correcting his behavior. If he is placed on an attendance restriction requiring him to follow more stringent rules for a set period of time (like six months), management must be certain that those restrictions are being adhered to. When the employee is lulled into thinking that the rules don't really apply to him, discipline for those past actions is not warranted.

It is entirely possible that the Grievant's attendance record will now be reviewed and that some disciplinary record that falls within the realm of progressive discipline will occur with due consideration of the lack of any prior disciplinary action other than the attendance restriction in the last quarter of 2003. But, as of July 2005, the institution had not given the Grievant sufficient opportunity to understand what rules he must follow to request leave, how much leave will be tolerated before he faces some sort of suspension, and that continued disregard for his obligation to get to work, get to work at his duty station on time, and to communicate directly with his supervisor can lead to termination.