In the Matter of Arbitration

Between

American Federation of Government Employees
Council of Prison Locals C-33, Local 4036

And

US Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
Marianna, Florida

(FMCS Case No. 14-50476-3)

Arbitrator: Dr. Benjamin Wolkinson

Employer Representative
Justin Golart, Attorney

Union Representative
J. B. Godwin, President,
Local 4036

Grievant: Gregory Roland

Issue: Discipline

Facts

The Federal Bureau of Prisons (hereinafter BOP, Agency, or Employer) and the American Federation of Government Employees Council of Prison Locals C-33, Local 4036 (hereinafter Union) have stipulated to the following facts.

1. On January 29, 2012, Gregory Roland ("the Grievant") was assigned as the #4 Recreation Officer in FCI Marianna's Special Housing Unit (SHU).
2. While the Grievant was attempting to distribute lunch to Inmate Kent Hannigan, Register Number 13052-085, Inmate Hannigan slid his food tray off of his cell's food slot, onto the floor outside his cell.
3. The Grievant responded by repeatedly attempting to shut Inmate Hannigan's food slot door, but was unable to because Inmate Hannigan's arms were extended through it.
4. After failing to secure the food slot, the Grievant distributed lunch to the next SHU cell in line.
5. On February 2, 2012, the former warden at FCI Marianna – Paige Augustine – reported an allegation against the Grievant of "Physical Abuse of Inmates" to OIA.
6. On March 5, 2012, OIA deferred the matter to FCI Marianna, where an investigation was conducted by Lieutenant Ernie Lafferty, the institution's Special Investigative Supervisor (SIS).
7. On April 15, 2012, Lieutenant Lafferty completed his investigation, with a sustained charge of "Physical Abuse of Inmates."
8. On September 17, 2012, video of the incident was reviewed by Frank Lara,

Correctional Services Administrator, at the Agency's Central Office, who stated the Grievant did not act within the scope of his duties.

9. On December 18, 2012, the Grievant received a letter from Captain Theresa Lewis proposing that he be suspended 15 days for "Excessive Use of Force."
10. On January 16, 2013, the Grievant provided oral and written responses to Warden English, the deciding official. The Grievant was represented by Billy Baxley of the American Federation of Government Employees, Council of Prison Locals, Local 4036 (the "Union") during his response.
11. On February 14, 2013, the Grievant was suspended for five (5) calendar days for "Excessive Use of Force."
12. On March 12, 2013, the Union invoked arbitration. In its invocation, the Union stated, among other things, that the Grievant did not receive a copy of the video that Warden English relied on when she made her decision. This original invocation led to FMCS 13-54028.
13. Recognizing that the Grievant should have been provided a copy of the video, the Agency rescinded the Grievant's 5-day suspension and provided him an opportunity to view the video and present an updated response to Warden English. As a result, the Union withdrew its original invocation of arbitration on August 7, 2013.
14. On August 8, 2013, a second proposal letter was issued to the Grievant. This proposal letter was identical to the proposal letter of December 18, 2012, except it was signed by the new captain at FCI Marianna, Mariano Perez and it referenced a different human resources staff member.

15. On August 28, 2013, the Union and the Grievant submitted updated written responses to Warden English.

16. On September 13, 2013, the Grievant presented an updated oral response to Warden English. The Grievant's Union representative at this meeting was Jeremy Jenkins.

17. On September 25, 2013, the Grievant was suspended four (4) calendar days for "Excessive Use of Force." Warden English indicated that she "chose to consider the delay in [the] disciplinary process brought on by the rescission of the first decision letter" when she imposed a four-day suspension, as opposed to her original decision of a five-day suspension.

18. On October 23, 2013, the Union invoked arbitration, leading to the present case, FMCS 14-50476.

Issue

The Parties have stipulated that the issue is whether the Employer had just cause to suspend the Grievant for four days.

Relevant Contractual Provisions

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 to promote the efficiency of service.

Section d. Recognizing that the circumstances and complexities 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 right to receive the material which is relied upon to support the reasons for the action given in the notice.

Section g. The Employer retains the right to respond to an alleged offense by an

employee which may adversely affect the Employer's confidence in the employee or the security or orderly operations of the institution. The Employer may elect to reassign the employee to another job within the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.

Article 32- Arbitration

Section a. In order to invoke arbitration, the party seeking to have the issue submitted to arbitration must notify the other party in writing of this intent prior to the expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations and the requested remedy...

Section h. ...The Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

Employer Position

The Employer maintains that its suspension of the Grievant was for just cause as there is substantial proof that he used excessive force against an inmate. The Employer contends that proper use of force is determined by circumstances; if possible, force should not be used. However, in situations where force is necessary, calculated force should be used. Yet only in situations where force is necessary and calculated force is unavailable, specifically when an inmate presents a direct threat to himself or others, is immediate use of force available. However, at all times, only force that is reasonably necessary to subdue an inmate may be used.

Here, when the Grievant repeatedly slammed a food slot door on the exposed arms of a secured inmate, he clearly exceeded the amount of force necessary to subdue the inmate, and therefore violated Agency policy. The Grievant improperly used immediate force on an inmate who was inside a locked cell in the most secure area of FCI Marianna, the paradigmatic scenario for a calculated use of force. The inmate's location was stressed by Captain Perez, the chief of security at FCI Marianna, when he stated a

calculated use of force was "absolutely" possible. (Tr. 83) Captain Perez also indicated that the Grievant needed to "walk off the range, contact a supervisor, and the supervisor would have reported it to the unit, and dealt with the situation at hand." (Tr. 30)

Similarly, Warden English determined that the Grievant's perception did not justify the amount of force he used. (Tr. 115) She testified that rather than walking away from this incident, the officer chose to engage the inmate. (Tr. 116) She also testified that the video showed that the inmate engaged in no violent actions, as he remained behind a locked door. (Tr. 117) Additionally, the Grievant's statement that he acted in self-defense is seriously undercut by the fact that he continued to serve lunch following the incident, a response completely contrary to what one would expect from someone fearing an assault.

The Employer also rejects the Union's claim that the adjudication was unfair because the Grievant was not given a copy of the video contained in the disciplinary file. The Grievant and his Union representatives were afforded the opportunity to view the video inside the FCI Marianna Human Resource office. (Tr. 117) Additionally, no member of the FCI Marianna staff ever denied a Union's request to view the video. (Tr. 223-24) Further, over the course of the entire case, the Union chose to view the video only once, at the prompting of the human resource staff. (Tr. 223-24)The Agency did not give the Union a copy of the video. Yet as Captain Perez testified, (Tr. 35) the video was likely withheld because it depicts the internal security procedures of the institution, making it exempt from disclosure under the Freedom of Information Act.

The Employer further asserts that the four-day suspension was an appropriate form of discipline for the grievant's excessive use of force. Warden English testified that

she had no similar cases with which to compare to the Grievant's incident, and the Union presented no evidence of past disciplinary actions relating to use of force that Warden English ignored. (Tr. 120) Because there was no history of similar discipline to consider in this case, Warden English treated the Grievant as equitably as possible under the circumstances. The four-day suspension was not only consistent with the Agency's table of penalties, it was on the lenient end of the table's "letter of reprimand to removal" range. The Employer also denies that a previous case from FCI Marianna involving Estel Rainey controls this case.

Additionally, it maintains that the discipline was imposed in a timely manner. Agency policy does not mandate a specific timeframe for either the investigative or adjudicative phases of the disciplinary process. The carefully crafted language of the Master Agreement reflects the parties' recognition that circumstances and complexities of individual cases will vary and "confirm[s] [the parties'] endorsement of the concept of timely disposition of investigation without attempting specific time limitations."[1]The ten-year-old Office of the Inspector General (OIG) report (J-1, Tab 20) cited by the Union, which recommends investigations and adjudications be completed in 120 days or less, is "neither regulatory nor statutory" and "merely a recommendation."[2]Because the 2004 OIG report is not—and never was—Agency policy, and because the parties' Master Agreement does not establish time limitations on disciplinary actions, the Union cannot rely on either to support its claim that the Grievant's discipline was untimely.

Warden English testified that in her 22-year career with the Agency—including assignments as an executive assistant, associate warden, and twice as warden—she had

[1]Attachment 10, *AFGE Local 1570 and Federal Bureau of Prisons, Tallahassee, Florida*, FMCS No. 12-54510 at 10 (Jan. 31, 2013) (emphasis added).
[2]Attachment 11, *Capo v. Dep't of Justice*, 110 LRP 29600 at 12 (Jan. 14, 2010).

never seen the OIG report or the Kenney memorandum prior to her preparation for this case (Tr. 124, 126) and that no superior of hers has ever mentioned the OIG report to her. (Tr. 156) Further, she testified that the report is not an Agency policy and that she is not aware of any specific timelines regarding employee discipline that are contained in statute, regulation, or the Master Agreement. (Tr. 156) The Employer further claims that arbitral precedent in the federal sector involving Bureau of Prison facilities support its position that there is no statute of limitations imposed on its administration of discipline.

This is not a case where the Agency disciplined an employee for misconduct from the distant past. The investigation began promptly, and no unreasonable delays took place until the ultimate four-day suspension was imposed. The incident took place January 29, 2012; (J-2, paragraph a) the incident was referred for investigation four days later on February 2, 2012; (J-2, paragraph c) The Office of Internal Affairs (OIA) deferred the matter for a local investigation on March 5, 2012 (J-2, paragraph f) and the investigation was completed 41 days later, on April 15, 2012. (J-2, paragraph g) At this point, there was a delay of roughly five months before OIA approved the local investigation on September 19, 2012. (J-1, Tab 2) There was no testimony regarding the cause of this delay or whether the delay was out of the ordinary. However, it is likely OIA approval was tied to a senior-level review of the video by Correctional Services Administrator Frank Lara on September 17, 2012. (J-2, paragraph h)

The initial adjudication began upon OIA's approval on September 19, 2012 and ended on February 14, 2013 when Warden English suspended the Grievant for five days—a time span of 148 days. (J-2, paragraph k) However, this suspension was rescinded after the Agency was informed the Grievant and his representatives were not

provided an opportunity to view video of the incident upon which Warden English relied. (J-2, paragraph m) Following the rescission of the five-day suspension on July 14, 2013, (E-1) the Grievant was ultimately suspended for four days on September 25, 2013—73 days later. (J-2, paragraph q)

Not only was no testimony offered regarding the five-month delay at OIA, no member of the Human Resource staff at FCI Marianna was called as a witness. This is inexplicable, given that the Union's timeliness argument is central to its case. The Union included Brenda Hoagland (Human Resource Manager) and Kylie Tisdale (Human Resource Manager Trainee) on its witness list, but it chose not to elicit any testimony from either. The Union is asking the Arbitrator to construe an evidentiary void against the Agency. The record shows no specific, enforceable timeline in Agency policy or the Master Agreement, and contains no testimony from the Human Resource staff at FCI Marianna. In sum, the Agency complied with the aspirational timeliness requirement of the Master Agreement and there is nothing in the record that supports the Union's argument that the Grievant's discipline was untimely. For these reasons, the Union's timeliness argument must be rejected.

Finally, the Employer contends that even if the Agency committed procedural error, the Grievant's suspension must be upheld because any error by the Agency does not meet the legal standard for "harmful error," as it did not cause substantial prejudice to the Grievant's rights by possibly affecting the Agency's decision. (Cornelius v. Nutt, 472 US at 652) At bottom, this is a clear case of excessive force that was captured on video. Absent a showing of harmful procedural error, the Grievant must be held accountable for

his actions and Warden English's reasonable decision to suspend him four days must be upheld.

The Grievant has not met his burden to establish harmful error. (Salter, 92 M.S.P.R. at 359) Whether the alleged error is the Agency's decision to withhold a physical copy of the video, the timeliness of the Agency's adjudication, or the Agency's admitted error in not initially making the video available to the Grievant, no evidence exists that the Grievant's rights were prejudiced. Moreover, in the case of the Agency's admitted procedural error, the Grievant benefitted from it, as his suspension was reduced from five days to four entirely on account of the delay associated with it. (Tr. 122) The Agency does not dispute the Grievant's stress from being under investigation, but that is not the "harm" considered by the harmful error doctrine. "Harm" means error that "substantially prejudiced his rights by possibly affecting the agency's decision." *(Salter*, 92 M.S.P.R. at 359) Ultimately, it was the Grievant's own misconduct that led to his reassignment, a management decision expressly permitted by Article 30(g) of the Master Agreement.

Notwithstanding the dramatic testimony of Mr. Baxley—who testified his advice to the Grievant would have been "completely different" if he had the opportunity to manipulate video of the incident (Tr. 191:23-25)—the Union put forth no evidence that the Grievant's individual rights were prejudiced. Mr. Baxley also testified that, when he watched the video, he saw "an officer defending himself." (Tr. 187:25) Unfortunately for the Grievant, Mr. Baxley's perception does not govern this case. It is Warden English's judgment—not Mr. Baxley's – that matters; and her judgment that the Grievant used excessive force is reasonable and supported by evidence. The Union's myriad distractions

must not distract from what is actually a very straightforward case: an officer who, when provoked, "snapped" and used excessive force on an inmate secured inside a locked SHU cell. Since the Grievant's conduct was unacceptable, it suspended him for just and sufficient cause.

Union Position

The Union maintains that the Agency's discipline lacked just cause, as the Grievant did not improperly use force against an inmate. Thus the video shows that when the Grievant was attempting to close the tray slot, the inmate reached his hand out from the cell toward Roland. (Tr. 76) Captain Perez further testified that Roland would be acting appropriately if he attempted to close the food slot at that point. (Tr. 73) Perez's testimony corroborates Roland's claim in his affidavit (J- 4) that as he attempted to close the tray slot, it was at that second that the inmate reached from the cell toward Roland. (Tr. 76)

Additionally, Warden English, the deciding official in Roland's discipline, initially stated in her testimony that she thinks the video contradicts Roland's claim that he believed the inmate was attempting to assault him. (Tr. 117) However, during cross examination and a thorough review of the video, Warden English was compelled by the clear video evidence to change her stance. Warden English testified the inmate's arm and hand did not come out of the tray slot until Roland attempted to close it, that as Roland attempted to close it, the inmate extends out more of his arm. She further indicated that she could not tell what the inmate intended to do with his hand. (Tr. 145) Since the inmate continually reached out as Roland was attempting to close the food slot, he

reasonably believed he faced an imminent threat. Consequently, his efforts to shut the food slot were justified as a response to what he believed to be was an imminent threat.

The Union further maintains that just cause was lacking, because the Agency failed to provide Roland with a copy of the video in breach of Article 30, Section e (1), of the parties' contract. The Agency further erred when it claimed that the contractual violation was rectified by allowing Roland and a Union representative an opportunity to view the video. Under the parties' contract, Roland should have been provided a copy, not merely an opportunity to view it. Additionally, Roland and his representative were allowed to view a different version of the incident than the deciding officials, as brought out through testimony of Chief Steward Billy Baxley. (Tr.186) The version utilized by the Agency at the hearing was capable of being paused, reversed, enlarged, and otherwise manipulated for viewing. The version Roland and Baxley were allowed to view in Human Resources was stuck in fast forward, had no zoom capability, and had to be watched entirely before starting over. (Tr. 28) Further, when Baxley complained about the speed of the video and requested to watch it in real time as opposed to fast motion, he was advised by management that there was no other version to watch. (Tr. 86) This statement by management represents a gross inaccuracy. The Union further notes it prepared for and went to arbitration having only been allowed to view the video in the Human Resource office.

The Union contends that the Employer had no reasonable basis for failing to provide a copy of the video to the Union. Captain Perez testified that he had no security concerns with the video being provided to the Union. (Tr. 57-58) Similarly, Warden Nicole English indicated she had no knowledge as to why the video was not provided (Tr.

158), in spite of the Union's implicit request for it in the March 2013 invoke to arbitration. (Tr. 175) The lack of any basis for denying the Union a copy of the video is further manifested in Rainey's (Tr. 19) and Baxley's testimony (Tr. 183-184) that video evidence is routinely provided the Union in accordance with Article 30 of the contract.

The Union also maintains that the Employer's failure to provide the video interfered with the Union's capacity to obtain exonerating information. Though the investigative packet completed by Lt. Lafferty (J-2) states both the inmate's hands are occupying the food slot prior to Roland's attempt to close it, freeze frame analysis of the video showed the inmate's hand, fingers or arms did not occupy the slot when Roland attempted to close it. Further close review of the video show repeated efforts by the inmate to reach out to the Grievant and that therefore the Grievant was responding to an imminent threat. Furthermore, Chief Steward Billy Baxley testified that if he had been allowed to screen the video in the manner the Agency presented it at hearing (normal speed, freeze frame, zoom, etc.), he would have categorically defended Roland's from all allegations of misconduct. (Tr.190-192)

Consequently, it contends that the Employer's failure to provide the Union with the video substantially harmed Roland, as it negatively affected the Union's ability to represent him. Furthermore a proper handling of this entire investigation and adherence to the Master Agreement could very well have resulted in a substantially different outcome in Roland's favor, up to and including not being disciplined in the first place. As such, what the Agency refers to as a procedural error is in fact a "harmful error" as identified in the Supreme Court's decision in Cornelius v. Nutt. (472 U.S. 648, 1985)

The Union further contends that just cause was lacking, because the Employer breached Article 6, Section b (2), requiring that employees "... be treated fairly and equitably in all aspects of personnel management." The Union advised the Agency that a similarly situated employee received substantially different treatment when faced with this charge. Estel Rainey, an officer at FCI Marianna, was charged with physically abusing an inmate and the incident was captured on video. While Rainey was proposed a suspension of five days, he received no penalty. The Grievant was subjected to disparate treatment, since both Captain Perez and Warden English characterized as inappropriate Rainey's behavior that they observed on the video. (Tr. 99, 101, 152).

Finally, the Union maintains that just cause was lacking, because the Employer's investigation and discipline of the Grievant was not timely conducted. In total, the discipline of Roland on a matter the Agency characterized as uncontested took 20 months. Though the contract offers no exact timeline for investigations and disciplines, it is hard to fathom how the timeline in Roland's case could be characterized as timely and "promoting efficiency"as stated in Article 30. The Agency offered no exceptional circumstances to justify the timeline. The Agency offered no explanation why it waited an additional five-months to address its denial of the video to the grievant. Warden English claims she considered the delay when she reduced the discipline to four-days (J-9), then later claims she reduced the discipline in consideration of denying the video.

Additionally, in claiming that the just cause was lacking because of the inordinate time delays in disciplining the Grievant, the Union has cited arbitration awards involving BOP facilities. It also notes that the Agency's untimely investigation and discipline of the Grievant was in breach of the Agency's self-imposed directives. Thus in a September

2004 memorandum, Bureau of Prisons Director Harley Lappin established 120-days as the "upper-limit parameters" for local investigations, and 120-days as the "upper level parameters" for the adjudication phase of the investigative process (OIG Review, Appendix III, page 55). This was followed by an October 2006 memorandum from (then) Assistant Director Kathleen Kenney to all CEOs confirming Director Lappin's time frames for investigations. The Union also asserts that arbitration rulings on the issue of timely discipline have found that Director Lappin's directives to be binding on the Agency.

Given these considerations, the Union requests that Roland be made whole, that his personnel record be cleared of any and all reference of this matter, and that his pay be restored in full, to include applicable interest.

Discussion

In adjudicating this grievance, it is necessary to examine (1) whether there is substantial evidence that the Grievant used excessive force against an inmate, (2) the presence of any contractual and due process violations, (3) the allegation of disparate treatment, and (4) the impact of any disparate treatment violation or procedural or contractual breaches on the discipline that the Employer has imposed.

Allegation of Excessive Force

The parameters surrounding the nature of and circumstances when a guard can use force against an inmate are controlled by the Agency's Use of Force policy. Under it, it is apparent that force should normally be used only as a last resort.

> The Bureau of Prisons authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of

inmates, staff and others, to prevent serious property damage, and to ensure institution security and good order. (J-1, Tab 17, p.1)

Additionally, the Agency's use of force policy specifies which type of force—calculated or immediate—is appropriate in a given situation. "Calculated Use of Force" occurs in the following situation:

...where an inmate is in an area that can be isolated (e.g., a locked cell, a range) and where there is no immediate threat to the inmate or others. ... Calculated use of force permits the use of other staff(e.g. psychologists, counselors, etc.) to attempt to resolve the situation non-confrontationally. (Id. at 4)

The Arbitrator has reviewed the video and finds that it supports the conclusions of Captain Perez and Warden English that the Grievant used excessive force. It is undisputed that the Grievant was isolated in a secure area and locked up in his cell. As a result, the Grievant was required by policy to engage in a calculated use of force and attempt to resolve the situation non-confrontationally through the intervention of other staff. The Grievant improperly failed to implement this approach.

In making this determination, the Arbitrator is aware of the Grievant's concern that the inmate was trying to grab him when he thrust his hand through the food slot. Nevertheless, there was no justification for Roland to continuously slam shut the food slot door while the inmate's hand was extended and thereby risk the potential of injuring the inmate. Thus the Grievant was under no immediate threat, since nothing prevented him from avoiding physical contact with the inmate by stepping back and calling other personnel to address the situation non-confrontationally. In this regard it is undisputed that the Grievant possessed a radio and could have called other personnel for assistance.

The Union has further claimed that the video indicates that no excessive force was used, as the Grievant closed the food slot when the inmate's hand had already been

withdrawn and that only after he started closing it did the inmate reach into the food slot towards Roland. Yet even assuming arguendo that when the Grievant initially closed the food slot, the inmate's hand had yet been extended, it is also true that at some point thereafter the inmate opened the food slot and extended his hand. The inmate may have been trying to grab the Grievant. Yet rather than backing away and avoiding a confrontation which posed no direct threat to him, as the inmate never was able to grasp him, the Grievant for several seconds repeatedly and forcefully closed the food slot while the Grievant's hand was extended, a reaction that exposed the inmate to injury. Consequently, the Employer was justified in concluding that he had used excessive force against an inmate. Before determining if discipline was warranted, the Arbitrator must examine the Union's allegations that the Agency's conduct in breaching the Grievant's procedural and contractual rights and subjecting him to disparate treatment warrant setting aside the Grievant's four day suspension.

Allegation of Excessive Time Delays

It is generally accepted that an element of just cause is that an employer must impose discipline within a reasonable period of time after learning of misconduct. Thus an unreasonable delay subjects an employee to suspense, anxiety, and uncertainty which may be viewed as a penalty itself. (Furr's Supermarket, 95 LA 1021, 1024, 1990; Sunweld Fitting Co., 72 LA 544, 557, 1979; Gibson Refrigerator, 52 LA 663, 666, 1969) The notion that discipline should be timely administered is one apparently recognized by the Bureau of Prisons. The Office of Inspector General of the US Department of Justice in a September 2004 report, Review of the Federal Bureau of Prisons Disciplinary

Systems, recommended that local investigations and adjudications each be completed within 120 days. (J-1,Tab 20, p.55)

The Employer has contended that this timeline is neither statutory nor regulatory in nature and not Agency policy. It further notes that timelines are not established by contract. While the 2004 Report may not have the force of policy or law and strict timelines for the administration of discipline is not governed by contract, the Arbitrator disagrees that this omission affords the Employer the authority to cavalierly and arbitrarily subject employees to inordinate delays when imposing discipline, when the timeliness of discipline is a well-established component of just cause. Similarly, it is irrelevant that Warden English never saw or heard of the OIG report or that no one apprised her of any specific guidelines. As the executive officer charged with administering and complying with the parties' contract at the Marianna facility, she was not authorized to ignore her contractual obligation incorporated in Article 30 Section d to timely execute disciplinary determinations.

It is also apparent that the Grievant's discipline was occasioned by unreasonable and excessive delays. The confrontation between Roland and the Grievant which precipitated his discipline took place on January 29, 2012. (J-2, paragraph A) The Investigation was completed on April 15, 2012. (J-2, paragraph e) The Office of Internal Affairs (OIA) approved the local investigation on September 19, 2012. As a result, it took over eight and one-half months, or approximately 255 delays before the investigation stage had been completed. No explanation was provided nor is there any apparent rationale for the extended period of time taken to complete an investigation which primarily consisted of viewing a tape of one minute duration and interviewing the

Grievant. The excessive delays were exacerbated when the Warden waited approximately five additional months to suspend the Grievant for five days on February 14, 2013. As a result, over a year elapsed before discipline was imposed for the incident that occurred on January 29, 2012.

Yet the Grievant was subjected to even further delays. The Agency on July 15, 2013 rescinded this suspension after being informed that the Grievant and his representatives were not provided an opportunity to view the video of the incident upon which Warden English relied. (E-1; J-2, paragraph m) Following the rescission of the five-day suspension, the Warden for unexplained reasons waited another seven months to ultimately suspend the grievant for four days on September 25, 2013. (J-2, paragraph q) Consequently, 20 months transpired before the Grievant was suspended for the incident occurring on January 12, 2012. Even taking into consideration the reassessment of discipline, it is difficult to understand or excuse the excessive delays associated with the Grievant's suspension.

The Employer has also contended that it would be improper to establish a lack of timeliness, as the Union is seeking to construe an evidentiary void against the Agency. It notes that no testimony was offered regarding the five-month delay at OIA and that no member of the Human Resource staff at FCI Marianna was called as a witness.

This argument is also unpersuasive. The plethora of documents introduced in the record clearly establishes the excessive time delays associated with the Agency's completion of its disciplinary process in this case. Furthermore, having demonstrated that the Grievant's discipline was not executed in a timely manner, it was not the Union's responsibility to call management or HR personnel as witnesses. Rather that burden fell

upon the Agency, as it and not the Union was responsible for the administration of its disciplinary process and therefore management should have known and been prepared to articulate the factors precipitating and justifying the delays. Yet the Employer failed to call any witnesses to explain why it took 20 months to discipline the Grievant. Through this omission, the Employer has implicitly conceded that no basis other than perhaps administrative misfeasance precipitated the untimely discipline meted out to the Grievant.

In contending that the excessive delays warrant setting the aside the Grievant's suspension, the Union has relied on arbitration awards which have overturned disciplinary determinations that are untimely and thereby in breach of Article 30, Section d of the parties' contract requiring that disciplinary actions be timely completed. (Federal Bureau of Prisons and AFGE, Local 2052, 107 LRP 50311, Foster 2003; Federal Bureau of Prisons and AFGE Local 3690, 109 LRP 70605, Hoffman, 2009; Federal Bureau of Prisons and AFGE Local 612, 111 LRP 23336, Block 2010)

On the other hand, the Employer has cited arbitration awards rejecting Union efforts to overturn discipline based on lengthy time delays in the administration of discipline. (AFGE Local 2001 and Federal Bureau of Prisons, Fort Dix, New Jersey, FMCS No. 12-55984-1 at 25-26, Apr. 28, 2014; AFGE Local 506 and Federal Bureau of Prisons, Coleman, Florida, FMCS No. 10-59428 at 10, Jul. 25, 2013; Federal Bureau of Prisons, Chicago, Illinois and AFGE Local 3652, FMCS No. 12-55359 at 16-17, Apr. 18, 2013;. AFGE Local 1570 and Federal Correctional Facility, Tallahassee, Florida, FMCS No. 12-54510 at 10, Jan. 31, 2013; AFGE Local 2001 and Federal Bureau of Prisons, Fort Dix, New Jersey, FMCS No. 11-53658-1 at 9, May 25, 2012) Underlying these decisions is the consideration that the parties' contracts, as in our case, do not contain an

explicit time limit within which to complete the investigative or adjudicatory processes. Under these circumstances, these arbitrators have concluded that to impose a specific time limit on the parties would be tantamount to creating for them a statute of limitations in breach of the arbitrator's requirement under Article 32 h not to add or disregard the terms of the parties' contract.

This Arbitrator has carefully reviewed all the cited arbitration awards. He finds that the awards cited by the Union are more compelling and controlling. The Arbitrator recognizes that Article 30, Section d does not establish precise time limits. Yet the absence of specific time limits for imposing discipline does not warrant the conclusion that there are no time limits at all, and that the Employer can drag out the adjudicatory process for as long as it desires. Such an approach undermines the intended corrective nature of discipline and undermines the "efficiency of the service" the very purpose for which the Employer is entitled to discipline under Article 30, Section a of the parties' contract. Thus if an employee is denied prompt notification of discipline, he/she may not appreciate the prohibited nature of their conduct and repeat the transgression. Long delays in imposing discipline will even undercut the employer's argument that the employee's alleged misconduct was serious. (Bureau of Alcohol, Tobacco, and Firearms, 93 LA 393, 399, 1989) Delay in the administration of discipline also hinders the Union in timely investigating an incident and identifying witnesses. Furthermore, the Grievant, who in this case had to wait 20 months to find out if and how he/ would be disciplined, had to unfairly and arbitrarily work under a cloud of uncertainty and anxiety. Given these considerations, the Arbitrator finds that by delaying for 20 months its discipline of the grievant, the Employer breached Article 30, Section d of the parties' contract requiring

the "**timely** disposition of investigations and disciplinary/adverse actions." (emphasis added) Furthermore, were this Arbitrator to fail to enforce this contractual right, the Arbitrator would be ignoring and abrogating an employee's contractual right to timely discipline in breach of his obligations under Article 32, Section h not to disregard terms of the agreement.

Additionally, the Arbitrator rejects the notion that the parties' failure to put in the contract specific time limits demonstrates that both parties obviously benefit from the delays intended and that no penalties should be imposed because of them. (See, for example, Federal Bureau of Prisons, Chicago, Illinois and AFGE Local 3652, FMCS No. 12-55359 at 16-17, Apr. 18, 2013) It is difficult to maintain that an employee benefits from the uncertainty, anxiety, and possible loss of status occasioned by prolonged delays. Certainly the efficiency of service is undermined. Moreover, the notion that the Union somehow waived its right to challenge undue delays because of its failure to modify the current language and set specific limits is unpersuasive, given the Union's aggressive and continuous efforts over the years to vindicate in the arbitration forum its right to timely discipline.

Furthermore, the parties' failure/unwillingness to set specific time limits, rather than signifying that there are no time limitations at all, simply reflects the parties' recognition as expressed in Article 30, Section d that circumstances and complexities make it unrealistic and impractical to do so. Thus the length of time needed to investigate an incident and impose discipline is contingent on many varying circumstances including (1) the range of misconduct allegedly committed, (2) the necessity of police or judicial intervention, (3) the number of parties involved in the alleged infraction, (4) availability

of witnesses, and other factors which preclude a cookie cutter approach to setting a specific time limit. Yet, as indicated earlier, the absence of a specific limit does not signify that there are no time limits at all nor does it afford the Employer the license to breach its obligation to timely impose discipline. Consequently, in taking 20 months to discipline the Grievant in this case, the Arbitrator finds that (1) the Employer breached the Grievant's rights under Article 30, Section d of the parties' contract and (2) breached his due process rights that are implicitly incorporated in the Employer's obligation under Article 30, Section a to discipline for just and sufficient cause to promote the efficiency of the service.

The Employer has also maintained that even if the Arbitrator determines that the Agency committed a procedural error, the Grievant's suspension must be upheld because any error by the Agency does not meet the legal standard for "harmful error," as it did not cause substantial prejudice to the Grievant's rights by possibly affecting the Agency's decision. Thus the Employer has cited decisions of the Merit Systems Protection Board pursuant to the Supeme Court Decision in Cornelius v. Nutt, where the Supreme Court held "the harmful-error rule is to apply [when] the employee challenges the agency action through...binding arbitration." (Cornelius, 472 U.S. at 652) Additionally, the Employer has noted that under the harmful error rule, "harm" means error that "substantially prejudiced his rights by possibly affecting the agency's decision."(Salter, 92 M.S.P.R. at 359) Yet the Employer contends that ultimately it was the Grievant's own misconduct that led to his discipline and there is no showing that a different decision would have been reached absent the delays.

The Supreme Court decision in Cornelius v. Nutt provided a restricted scope of review in certain circumstances where the Agency committed procedural errors or contractual violations. For discipline to be overturned, it indicated that the error must be of a " kind that cast doubt upon the reliability of the Agency's fact finding or determination." (472 US 648, 663, 1985) Yet that decision did not apply to all discipline cases. Rather, as the Court indicated, it established this definition of "harmful error" in cases where the agency under Section 4303 of the Civil Service Reform Act of 1978 removed or demoted an employee or where under Section 7512 of the Act the agency took "adverse action" against an employee by suspending him for "more than 14 days." (Id. at 650) At the same time, there is no evidence that the harmful error rule applies to cases where the Agency suspends, as here, employees for less than 15 days. Consistent with this interpretation, the Federal Labor Relations Authority made the following determination shortly after the Supreme Court's ruling in Cornelius v. Nutt:

> In one of its exceptions, the agency contended that the award was deficient because the arbitrator failed to find that the violation of the agreement constituted harmful error. In denying this exception, the Authority explained the proper application of the harmful error rule of section 7701 (c) as it pertains to disciplinary actions. The Authority explained that the rule applies in accordance with section 7121(e) (2) of the Statute only to more serious adverse actions enumerated in 5 USC section 7512 that are taken under section 7513; the rule does not apply to suspensions for 14 days or less. (INS and AFGE Local 505, 22 FLRA 643 (1986)

The Federal Labor Relations Authority (FLRA) has continued its policy that an arbitrator need not apply the harmful error rule in cases where employees are suspended for 14 or fewer days. (Federal Bureau of Prisons, Terre Haute Indiana and AFGE Local 720, 38 FLRA No.112, 1991) More recently the FLRA has indicated that nothing in the law, rule, or regulation precludes an arbitrator from applying the harmful error rule in cases where its application is not required if he/she desires. (AFGE Local 331 and US

Department of Veteran Affairs, VA Maryland Health Care Systems, 61 FLRA No. 103, 2006) Yet this Arbitrator declines to apply the harmful error rule, as its application precludes enforcing the Grievant's contractual and due process rights to timely discipline, both of which promote the efficiency of service. Furthermore, decisions to the contrary by the Merit Systems Protection Board (MSPB) are not controlling, as the FLRA and not the MSPB has the authority to review labor arbitration awards. As the Grievant was subjected to discipline well short of the 15 days, the harmful error is not applicable. The Arbitrator is therefore not prevented from ruling that in postponing discipline for 20 months, the Employer breached standards of just cause and Article 30, Section d of the parties' contract.

Alleged Contractual Breach

Under Article 30, Section e (1), of the parties' contract, "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." The material relied upon by the Employer to substantiate the Grievant's misconduct was the video showing the Grievant repeatedly slamming shut the food slot door while the inmate's hand had been extended. Under Article 30 there existed an affirmative obligation to provide the video to the Grievant. Additionally, it is clear that the Employer breached this obligation. Thus it is undisputed that HR trainee Kylie Tisdale, citing instructions she had received from a Lt. Freeman, advised the Grievant and the Union on August 8, 2013 that the video would not be given to them. (J-1, Tab 15) By failing to give the Grievant and/or the Union copy of the video, the Employer breached the Grievant's rights under Article 30, Section e (1) of the contract.

In defending its failure to provide the video to the Grievant, the Employer has relied on Captain Perez's testimony that the video was likely withheld because it depicts the internal security procedures of the institution, making it exempt from disclosure under the Freedom of Information Act. Thus it notes that under the Freedom of Information Act, 5 U.S.C. § 552, certain agency records are exempt from mandatory disclosure. (Agency Attachment 9) Specifically, § 552(b)(7)(F) exempts records "compiled for law enforcement purposes to the extent that the production of such law enforcement records or information...could reasonably be expected to endanger the life or physical safety of any individual."

The Employer further notes that at the hearing Captain Perez testified that the video depicted: a) the layout of cells in the SHU; b) the method of opening SHU food slots; c) the position of the grill at the end of the SHU; d) the number of officers on duty during lunch distribution in the SHU; e) the type of containers in which food is delivered; f) and how keys are used to open and shut SHU food slots. (Tr. 84) The Employer contends that public knowledge of this information could reasonably lead to reduced safety for officers—like the Grievant—working inside a SHU. Consequently, it asserts that its decision to keep the video of its internal security practices closely-held was in compliance with the Freedom of Information Act and should be given considerable deference.

The Arbitrator is sensitive to the security concerns that reasonably prevail in a security setting. At the same time, where an employee's explicit right to material is recognized by contract, such right can not be abrogated absent clear and substantial evidence that there was a justification for doing do so, especially when the denial of

materials may compromise a Union's capacity to adequately represent and defend an employee who has been disciplined.

At the same time, the Arbitrator finds that no material evidence supports the Employer's contention that concerns over security precluded giving over to the Union or Grievant a copy of the video. To begin with, it is doubtful that merely showing to others how food is delivered to an inmate in a prison wing could in any manner threaten the life and safety of any individual, the exemption relied upon by the Employer for not providing the video to the Grievant. Furthermore, no deference to alleged security concerns can be given when those in charge of security at the facility fail to identify and even deny the existence of any such concerns. When asked point blank whether he would have had any security concerns had the video been given to the Union, Captain Perez, who manages the Correctional Services Department at the Marianna facility, answered, "No." (Tr. 57-58) Furthermore, when asked if she knew why the video was not given to the Grievant, Warden English responded that she had "no knowledge of why he was not given that opportunity." (Tr. 158) Surely were there any security risks associated with providing the Grievant a copy, the Warden would have identified them. Finally, the absence of any security concerns is manifested in the undisputed testimony of Chief Union Steward Billy Baxley that in other cases employees including Rainey have received from management videos of the incident giving rise to their proposed discipline. (Tr. 189) Given these considerations, there was no justification for the Employer's failure to provide the Grievant with a copy of the video showing his confrontation with the inmate.

The Employer has rationalized its failure to give over the video, by noting that no one ever denied the Union the opportunity to view it. Moreover, it contends that viewing the video only once was the Union's choice. Yet these considerations do not absolve the Employer of its breach of the Union's contractual rights. Article 30, Section e(1) explicitly gives the employee the right "to **receive** the material which is relied upon to support the reasons for the action given in the [disciplinary] notice. (emphasis added) Therefore, the Grievant had the right to receive the video and view it in surroundings he chose.

Furthermore, it was not unreasonable for the Union to have eschewed viewing the video another time in the HR office, when management showed it to the Union in a manner that rendered it useless from a probative standpoint. Chief Union Steward Baxley provided un-rebutted testimony that when viewing the video in the HR office, the video was presented in fast motion and not in real time. (Tr. 189) Additionally, he had no capacity to pause and review the film multiple times as occurred in the arbitration hearing and afterwards when the Union was given a copy of the video. Consequently, by denying the Union a copy of the film and thereby depriving it of the opportunity to screen it properly, the Employer hindered the Union's capacity to defend the Grievant.

The Employer has contended that the denial of the video is not a proper basis for overturning or modifying the penalty imposed because this omission did not cause a harmful error within the framework of the Supreme Court's decision in Cornelius v. Nutt. As indicated earlier, an arbitrator need not apply the harmful error rule to cases where employees have been disciplined for 14 or fewer days. Since the Grievant was suspended

for only four days, whether a different determination would have been made in the absence of the contractual breach is not a relevant consideration.

Allegation of Disparate Treatment

At the arbitration hearing, the Union introduced into the record a video taken of an incident occurring on March 21, 1999 involving corrections officer Estel Rainey while he was delivering food to an inmate who was in a secured cell. The video shows that after Rainey finishes delivering the food through the food slot door, the inmate thrusts his hand out. Rainey responds by trying with force to push the inmate's hand back and to close the food slot door. The food slot door appears to be closed, when we observe the inmate again thrusting his hand through the food slot door. Rainey responds by pushing the inmate's hand back and closing the food slot door.

This incident resembles that involving the Grievant. Both Rainey and the Grievant encounter inmates who thrust their hands through the food slot door in what may well be an effort to grab the guard. Both react not by stepping away and using a non-confrontational tactic, but by using force. Both forcefully close the food slot door while the inmate with his hand is struggling to keep it open. In both cases, the correctional officer's reaction exposed an inmate to potential injury.

In reviewing the video of Rainey's incident, Captain Perez indicated that Rainey had not acted properly. (Tr. 99) He further noted that he saw no material difference between the Grievant's and Rainey's behavior. (Tr. 101) Both used excessive force. Similarly, Warden English testified that Rainey's conduct was improper. (Tr. 152)

It is generally well accepted that standards of just cause require that the penalty selected must be compatible with penalties imposed for similar offenses, unless a valid

reason exists for treating employees differently. (JPI Plumbing Products, 97 LA 387, 388, 1991; Commercial Warehouse Co., 100 LA 247, 251, 1992; USS, 106 LA 708, 1996; Great Eagle Markets Co., 108 LA 828, 829, 1997) Differences in the application of discipline may reasonably occur as a result of differences in the record of employees, the kinds of jobs employees occupy, length of service and other relevant factors. Here it is apparent based on Captain Lewis' report and the video of Rainey's confrontation with the inmate that the Employer had a reasonable basis to discipline Rainey for his use of physical force against an inmate. (J-4) However, Warden Paige Augustine decided approximately four months later to take no action against him. (J-5) Significantly, the Employer failed to articulate any explanation for selectively punishing the Grievant for committing essentially the same misconduct for which Rainey was never disciplined.

The Employer, however, has argued that the allegation of disparate treatment should be rejected, because the Union has withheld evidence and precluded open discussion of what the Rainey case stands for. In this regard, the Employer notes that no testimony was provided by any of the relevant actors in the Rainey case. Additionally, it notes that neither Captain Perez nor Warden English were at FCI Marianna when the Rainey incident took place, so neither could comment meaningfully on the case. Additionally, Rainey and the Grievant were charged with different offenses. The Employer maintains that this fact is particularly important, because Warden English testified that, as the deciding official, she would have been informed of the Rainey decision if it had been for the same charge. (Tr. 120)

These contentions are without merit. The lack of testimony from Rainey, Warden Augustine, and Captain Theresa Lewis, the proposing official, is neither controlling nor

relevant, when the video clearly demonstrated Rainey's misconduct just as a similar video established the Grievant's excessive use of force. Furthermore Captain Lewis' findings concerning Rainey's improper use of force (J-4) and Warden Augustine's written decision to take no action (J-5) are in the record and further establish the disparate treatment to which the Grievant was subjected. Additionally, while neither Captain Perez nor Warden English were present at Marianna when Rainey was charged with misconduct, both viewed the video and agreed that Rainey had acted improperly when slamming shut the food slot with an inmate's hand still inside it.

Equally without merit is the notion that the incidents are not comparable, because Rainey and the Grievant were charged with different offenses. It is true that Roland was charged with "excessive use of force." (J-1, Tab 6) In Rainey's notice of proposed discipline, there is no specific allegation that he used excessive force. Yet the allegation of improper conduct incorporated in the notice of proposed discipline that Captain Theresa Lewis issued against Rainey mirrors the allegation of excessive force for which Roland was suspended:

> … Video recordings reveal you grabbed the inmates (sic) hand pushed it back into the food slot and kicked the cell door. Another staff member was approximately two cells in front of you and could have provided you assistance, but you appear not to have called for any assistance. …The video of the incident also shows that when you closed the food tray slot it struck the inmate in the forearm as you attempted to close the door. (J-4)

Consequently, as both Rainey and the Grievant committed essentially the same misconduct, both merited discipline. Certainly, nothing justified suspending the Grievant for four days and imposing no discipline on Rainey.[3]

---

[3] At the same time, this Arbitrator is not suggesting that because of a prior policy of treating employee misconduct laxly, the Employer is permanently precluded from enforcing its policies. To avoid such outcomes, the Employer must afford clear notice to employees that it will discipline them for excessive use

Also without merit is the Employer contention that comparisons between Rainey and Roland are unfair, given the absence of information on the contents of affidavits in Rainey's disciplinary file and Rainey's oral and written responses to Warden Augustine. The Employer was aware at the outset of the hearing that Rainey was present and available to testify. The Employer therefore had the opportunity during the hearing to both question him and access his file. Having chosen not to do so, it has no standing to speculate that other information in the record might present a different picture of Rainey's confrontation with the inmate than that confirmed by the video of his confrontation, the report of Captain Lewis, and the credible opinions offered by Captain Perez and Warden English that Rainey's conduct had been improper.

The Employer has also maintained that the contention of disparate treatment merits rejection, because Warden English was never given an opportunity to consider the Rainey incident prior to making her decision in this case. It has noted that the Union elected not to file a formal grievance which would have generated an Agency response and failed to mention the name of the "similarly situated employee" in its invocation of arbitration. It therefore claims that the Union's actions were not a good faith attempt to inform the Agency of a prior disciplinary action that could be relevant to the Grievant's case. Instead, the Union hid the ball, waiting until the arbitration itself to reveal the identity of the "similarly situated employee."

This Arbitrator agrees that it is unfair to introduce relevant information without giving the other side an opportunity to respond. The arbitration process is not trial by ambush. At the same time, the Arbitrator finds that evidence of Rainey's confrontation

---

of force. After such notice has been disseminated, it may then discipline employees who *continue* to violate policy.

and the Employer's response to it is admissible as Warden English was given sufficient notice to their introduction into the record. It is undisputed that in the Union's original invocation to arbitration of March 12, 2013 it raised the contention that a similarly situated employee who engaged in the same misconduct received a significantly lesser sanction. (Union Ex. 5) On October 23, 2013, the Union again requested arbitration and identified the contention that other officers had been treated differently. (E-1, Tab16) Significantly, in both invocations to arbitration, the Union advised Warden English that if she had questions or wished to discuss the matter, she should contact Union President Mills. Yet according to Warden English, she never met with the Union to discuss the allegation, never asked questions of the Union as to the identity of others who may have been treated more leniently, and is unaware if anyone else from management who did. (Tr. 139, 141, 143) In short, although advised of the disparate treatment claim eleven months prior to the arbitration hearing, the Employer essentially chose to ignore it. Additionally, although expressly informed of the Rainey incident at the outset of a whole day hearing before this Arbitrator, the Employer continued eschewing efforts to introduce evidence concerning this event. Having done all in its power to ignore the allegation of disparate treatment, the Employer has no standing to complain that Warden English was caught by surprise or that the Union had acted in bad faith by not revealing Rainey's identity prior to the current arbitration hearing held on February 26, 2014.

Finally, the Arbitrator finds unpersuasive the Employer's contention that the Union waived its right to raise the matter of disparate treatment, since the Union should have grieved this issue separately and thereby generated an Employer response. As noted in the Arbitrator's rejection of the Employer's request for summary judgment, (J-3)

equal treatment is a core element of just cause and therefore the Union's allegation of disparate treatment was properly incorporated in its invocation of arbitration under Article 32 of the parties' contract whereby it challenged the Grievant's suspension as not being for just cause. Furthermore, given the Employer's complete failure to investigate or ask questions of the Union about the matter of disparate treatment, we can only speculate whether management would have gathered information about it prior to any hearing even had the Union initiated a separate grievance over it.

As a result of the foregoing discussion, it is apparent that (1) the improper actions of both Rainey and the Grievant were very similar if not identical, (2) the Employer singled out the Grievant for discipline, and (3) failed to justify its disparate treatment of the grievant. As a result, the Arbitrator finds that its suspension of the Grievant constituted unfair disparate treatment.

In summary, the record indicates that Warden English had made a credible determination that the Grievant had used excessive force against an inmate. However, given (1) the Employer's failure to impose timely discipline upon the Grievant in breach of Article 30, Section d of the parties' contract (2) its failure to provide a copy of the video to the Union in breach of Article 30, Section e (1), and (3) its discriminatory treatment of the Grievant, the Employer's suspension of the Grievant lacked just cause and failed to promote the efficiency of service in violation of Article 30 Section a of the parties' contract. As a result of the Employer's multiple and serious breaches of the Grievant's procedural and contractual rights and its disparate treatment of the Grievant, the Arbitrator finds its necessary and appropriate to void his four day suspension.

Award

The grievance is sustained. The Employer shall expunge the written suspension from the Grievant's personnel record and make him whole for any losses he incurred as a result of his suspension.

July 21, 2014

Benjamin Wolkinson
Arbitrator