FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration Between:

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTION COMPLEX COLEMAN, FLORIDA	)	
and	)	OPINION AND AWARD
	)	FMCS NO: 12-54672
COUNCIL OF PRISON LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO) LOCAL 506	)	

GRIEVANT: Cessane Sapp

For the Agency:

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I. BACKGROUND

This case arose under the Master Agreement effective March 9, 1998 and extended thereafter. On or about January 12, 1012 the Grievant was issued a proposed three (3) day suspension for violating Standards of Employee Conduct 3420.09 (Jt. Ex. 5). On January 27, 2012 the Grievant and Union submitted a written response to the Agency's proposal (Jt. Ex. 6). The matter was referred to the Warden as the deciding official. He issued his written decision on March 26, 2012 upholding the charge of "Unprofessional Conduct," but mitigated the discipline to a one (1) day suspension (Jt. Ex. 7).

The Grievant and Union grieved the Warden's decision and processed their case to this arbitration in accordance with the Master Agreement. A hearing was held on March 28, 2013 at which time the parties introduced their evidence, examined all witnesses and argued their respective positions. A transcript of the hearing was taken and prepared by Letha J. Wheeler, Electronic Reporter. The parties submitted written post-hearing briefs on or before the postmarked filing date of May 17, 2013. The time for

rendering an award was extended to July 19, 2013 by the mutual consent of the parties.

II. FINDINGS

This case occurred at the Agency's Federal Correction Complex in Coleman, FL. The Grievant was employed by the Bureau of Prisons in January 1999 as a correction officer and rose to the level of Lieutenant (GS 11). In 2009 she made a lateral change to be a Case Manager at the Coleman Complex. During her career she has had no disciplinary actions in her record prior to this case. According to the Warden, Case Managers have an important role. They are the liaison between inmates, the community and the administration. They assist inmates in going through incarceration, establish measurable goals, prepare progress reports, encourage program participation and see how they are conducting themselves. (Tr. p. 37). The Agency expects its staff to act as role models for inmates. (Tr. p. 38).

The Grievant further described Case Managers as being responsible for helping inmates resolve problems. Case Managers help with supplies, bed assignments, visiting lists, job assignments and other activities. (Tr. pp. 111 & 112).

This case arose out of an incident involving the Grievant and Counselor Bess on September 7, 2011. On the seventh (7^{th}) the Grievant was in her office drinking coffee with Secretary Morgan. The Grievant and Secretary Morgan both testified that an inmate came into the office and complained that inmate Gonzalez had threatened and bullied her the night before. The alleged threats involved changing her job and bunk assignments. While this inmate was explaining her complaint, another inmate came in the office asserting that her explanation is not what happened. The Grievant instructed both inmates to go their cubes, get their IDs and return to her office. When they both returned, the Grievant and Secretary Morgan began escorting the two inmates to the Message Center lobby.

Counselor Bess had an office adjacent to the Grievant's office. As the Grievant passed his office, she saw inmate Gonzalez in Bess's office. The Grievant motioned to Gonzalez to follow her to the message center lobby. Inmate Gonzalez complied and exited the office followed by Counselor Bess. The three (3) inmates and three (3) staff employees proceeded to the message center lobby. At least to this point in the sequence of events the evidence is consistent. The parties presented

substantially different versions of what happened after this point in the sequence of events.

Counselor Bess did not testify at the hearing. His affidavit, however, was submitted by the parties. [Jt. Ex. 8(B)]. In his affidavit Bess stated:

> 5. On September 7, 2011, at approximately 9:30 a.m., I heard Case Manager Sapp yelling and screaming at inmates in Unit F-2. I had inmate Gonzalez (Melissa Gonzalez, Reg. No. 82334-004) in my office signing a FRP contract.
>
> 6. Case Manager Sapp started screaming at inmates Thrasher and Suarez (Thrasher, Cheryl Reg. No. 26203-018 and Suarez, Shirley, Reg. No. 61538-019) to get to the Message Center.
>
> 7. Sapp then looked in my office and screamed at inmate Gonzalez to get there as well because she was sending them all to the County Jail.
>
> 8. I stepped out of my office and asked Mrs. Sapp what was going on. She continued yelling at the inmates, telling them to go to the Message Center.
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> 9. I again asked Mrs. Sapp what was going on. I then told Mrs. Sapp that she needed to calm down because she was making a scene and drawing attention to herself. Mrs. Sapp continued out of the unit and walked toward the Message Center. Mrs. Sapp continued yelling at the inmates across the compound.
>
> 10. As we entered into the Message Center Lobby, Mrs. Sapp was still yelling and screaming. I again asked Mrs. Sapp what had happened. Mrs. Sapp finally replied, she is tired of the inmates thinking they were staff members taking the side of inmates.
>
> 11. Mrs. Sapp continued to yell and again I tried to get her to calm down because she was making a scene. I asked Mrs. Sapp why she

pulled inmate Gonzalez out of my office and was going to send her to County Jail when she was in my office signing a new FRP contract.

12. Mrs. Sapp replied that Gonzalez was involved.

13. I left the Message Center Lobby with Mrs. Sapp, Mrs. Morgan and Officer Milo and headed back to the Unit. Mrs. Sapp continued to yell at inmates telling them to get back into the Unit.

14. Once we got back into the Unit we all went To Mrs. Sapp's office. I again told her that she needed to calm down. At that point Mrs. Sapp began yelling at me. I told her that I was not yelling at her and she should not be yelling at me. Mrs. Sapp then stated, "I am not yelling, this is how I talk."

15. Mrs. Sapp then said that inmate Thrasher and Suarez came into her office and told her that I told them they did not have to move rooms after Mrs. Sapp had instructed inmate Suarez to move. I informed Mrs. Sapp that I never had that conversation with either inmate.

16. Then told Mrs. Sapp that I did not care who moved in the Unit. Mrs. Sapp then began yelling and told me that she was sending all of them to the County Jail. I again asked why she was going to send the inmates to the County Jail and she replied, "Because I am tired of all this shit."

17. Mrs. Sapp got up from her desk and made the comment, "you just think I am a mad black woman." I then left her office. Officer Milo, Mrs. Morgan and Mrs. Sapp were present in the office at the time. Standing outside of the office was Vickie Cooper, Reg. No. 5377-018 and Norinda Goe, Reg. No. 10652-003.

[Jt. Ex. 8(B)]

This affidavit version of the September 7th incident is the basis of the Agency's case.

To support this "yelling" version of the case the Agency called Ms. Greenup, Secretary to the Camp Administrator. She testified the Grievant, Secretary Morgan and Counselor Bass came to her office on September 7th. The Grievant wanted to see the Camp Administrator. She was in a meeting with Associate Wardens (AW) and was not available. Secretary Greenup further testified that the Grievant was yelling saying, "She was sick of inmates thinking they were staff and taking up for inmates; staff taking up for inmates" (Tr. p. 12). This testimony was consistent with her memorandum and her affidavit. [(Jt. Ex. 8(D)(1-3)].

The Grievant's version of the incident was different entirely from that of Counselor Bess and Secretary Greenup. After she motioned for inmate Gonzalez to come with her, she testified Counselor Bess said, "What's going on Ms. Sapp?" "What's going on?" The Grievant responded, "not now, Counselor Bess, we will wait until (sic) to discuss this in front of Ms. Bradfield." (Camp Administrator). According to the Grievant, Mr. Bess continued to ask her, "What's going on?" "What's going on?" "You are wrong about this one." "She was just in my office

signing paperwork." (Tr. p. 99). The Grievant responded again, "I don't want to discuss it right now. . ." "We will discuss this once we get to Bradfield's Office." "He continued asking me and I kept telling him that I didn't want to discuss it." (r. p. 99".

When the three (3) inmates and the three (3) staff members entered the lobby, the Grievant instructed the three (3) inmates to be seated. The three (3) staff then proceeded through another door several feet to the Camp Administrator's Office. When they arrived in that office, the Grievant asked to see Ms. Bradfield. Secretary Greenup said she was in a meeting with Associate Wardens (AW) and was unavailable. When the Secretary asked if everything is "okay," the Grievant responded, "I am just tired of inmates acting like staff and staff allowing them to get away with it." (Tr. pp. 100 & 101). The Secretary then said she would let Ms. Bradfield know you wanted to see her.

The Grievant, Counselor Bess and Secretary Morgan returned to the lobby. There the Grievant separated the inmates, putting one in the visitation room. Inmate Gonzalez came out and said, "Why am I here?" "I have nothing to do with this." The Grievant responded, "You are an inmate, not a staff member, have a seat like you were instructed to do." According to the Grievant, Counselor

Bess interjected, "I don't give a f - - - who you move." "But you are wrong about this one." (Tr. p. 101).

The Grievant and Secretary Morgan then started back to their office and Counselor Bess followed them. She called the operations lieutenant and gave her instructions regarding the three (3) inmates in the lobby. Again Bess said, "What is going on; tell me what's going on." The Grievant responded, "I don't want to discuss it." "We will all discuss it when Ms. Bradfield gets out of her meeting." According to the Grievant, he continued with saying, "I don't know what this is all about and I don't care who you move, but you have got the wrong one.," "I don't care." "I don't give a f_ _ _ who you move, you just got the wrong one." (Tr. p. 101 & 102). Then, the unit officer stopped in and asked if everything is okay. This ended the gathering of Bess, Morgan and the Grievant.

When asked what concerned her, the Grievant explained she did not believe inmates should be allowed to do things they shouldn't be doing like making bed assignments, job assignments and stuff like that. When asked if she knew such a practice existed, she replied, "It was just rumored at the camp all the time." (Tr. pp. 132 & 133). The Grievant admitted she had no specific incidents of such a practice. "It was just rumors." (Tr. p. 134).

Secretary Morgan was present throughout the September 7th incident. In her testimony she essentially related the same events and sequence that the Grievant described in her testimony. She denied hearing the Grievant "yelling" during this incident. (Tr. p. 144).

The parties introduced the logs of disciplinary actions administered for unprofessional conduct offenses during 2011 and 2012. (Jt. Ex. 10). These logs tracked the "Action Proposed. . ." versus the "Final Decision. . .:"

Unprofessional Conduct (1)
Action Proposed – Action Decision
2011 & 2012

Case No.	Action Proposed	Decision
1.	3 day	1 day
2.	LOR	No Action
3.	LOR	No Action
4.	1 day	LOR
5.	3 days	3 days
6.	3 days	LOR
7.	3 days	LOR
8.	3 days	No Action
9.	1 day	No Action
10.	3 days	LOR
11.	3 days	LOR

12.	3 days	LOR
13.	2 days	LOR
14.	5 days	No action
15.	1 day	No action
16.	5 days	1 day
17.	1 day	No action
18.	3 days	LOR
19.	4 days	1 day
20.	3 days	1 day

(1) Includes only single unprofessional conduct charges. Excludes combination of charges.

(Jt. Ex. 10)

These logs do not show whether an employee in a case had any prior disciplinary action(s).

The Warden of the Coleman Complex was the deciding official in this case. He testified about the process he followed in making his decision. When an incident is reported, it is referred to the Office of Internal Affairs (OIA). If the report is sustained, it is referred to the Office of Inspector General (OIG). If the OIG upholds the report, it is referred to our Employee Services Department, Human Resources (HR), to prepare a letter of proposed discipline that is issued to the offending staff member.

The staff member then has ten (10) days to submit an oral or written response. The Warden then makes the final decision based on the evidence and the staff member's response. (Tr. pp. 31 & 32).

The Warden then described how he made these decisions. He testified he goes through the disciplinary file which contains the "evidence," but no testimony. He reviews the affidavits, other documents like memos, videos and the staff member's and union's responses. Then, he makes a decision based on this record. (Tr. p. 33).

The Warden further described how he determines the penalty in each case. He stated:

> To give the appropriate - - what I feel is appropriate for the individual based on - - I take into consideration, you know, work history, evaluations, prior discipline and so there are a lot of elements that I consider to make a final decision and make sure that if I find the charges - - if I support — if the charges are supported that the staff member could learn from that situation and move forward and correct, you know whatever behavior is presented.
>
> (Tr. p. 34).

In his testimony the Warden then walked through the disciplinary file and documents he relied upon in making his determination that the Grievant committed the unprofessional conduct offense and deciding on the

appropriate discipline. (Tr. pp. 35-58). When asked if he considered whether a letter of reprimand (LOR) was appropriate, he said, "I did no (sic) because she didn't take any responsibility – she didn't accept - - she denied the charges." (Tr. pp. 58 & 59).

In making his decision the Warden relied upon the "Douglas Factors." (Tr. p. 73). When asked about just cause principles, the Warden testified, "To me what I understand of Just Cause is the evidence that I have in front of me and what is presented, the charge, the testimony, the different testimony." In other words ". . . it's simply a consideration of the evidence and then when you get through considering the evidence you weigh it in terms of the Douglas Factors? That's correct." (Tr. p. 74). When asked about his understanding of progressive discipline, the Warden responded:

> The progressive discipline is if the person has no prior so that's a big factor that needs to be considered. If they have already some discipline within the 2-year reckoning period that we follow I may consider that.
>
> (Tr. p. 75)

The Warden acknowledged he knew the Grievant had no prior discipline. (Tr. p. 76).

The Warden was asked about his understanding of the difference between offenses warranting severe discipline up to and including immediate removal and offenses warranting progressive discipline. He understood that intentional harm offenses warranted severe discipline including removal. With respect to other offenses, he would use the Douglas Factors to decide which offenses would warrant progressive discipline and which ones would not on a case by case basis. (Tr. pp. 76 & 77).

Based on this evidentiary record the Agency contends the Grievant's one (1) day suspension was proper. On the basis of the same evidence the Grievant and Union maintain it was not proper.

III. POSITIONS OF PARTIES

The Agency contends the Grievant was disciplined "for just and sufficient cause" in accordance with Article 31, Section (h) of the Master Agreement. In support of its position the Agency relied on Arbitrator Daugherty's seven (7) tests of just cause in *Enterprise Wire Co,* 46 LA 335,362-65 (1966) as well as the *Douglas* factors from *Douglas v. Veterans Administration,* 5 MSPB 280, 303 (1981).

First, the Grievant was on notice of the Agency's expectations. The Grievant was aware of the Standards of Conduct requiring employees to conduct themselves in a professional manner. Secondly, the Agency rule relating to the charge is reasonable. All employees of the Bureau of Prisons are held to a higher standard as law enforcement officers. They are expected to act professionally. Acting in a demeaning manner and speaking in raised voices to inmates and others encourages such inappropriate behavior. Thirdly, the Agency investigated the Grievant's conduct. Fourthly, the investigation was fair and objective. The investigation process was not contested. Fifthly, the investigation provided substantial proof the Grievant's conduct was unprofessional. Counselor Bess and Secretary Greenup showed the Grievant was "yelling" and "visibly upset." Even the Grievant and Secretary Morgan noted the improper statements. Sixthly, the Grievant was treated as others for similar charges. The log of discipline shows twenty-seven (27) charges of unprofessional conduct with discipline ranging from ten (10) days to letters of reprimand. Decisions are made on a case by case basis for all employees. Seventh, and finally, the one (1) day suspension was appropriate given the charge and the Grievant's work history.

The Warden explained that the Grievant's remarks were demeaning to other staff personnel. Yelling is inappropriate. The one-day suspension was warranted to promote the efficiency of the service. Managers have the responsibility to discipline employees under 5 U.S.C. §7106 and Article 5 of the Master Agreement. The Grievant still does not understand her behavior was inappropriate. The discipline administered was warranted in this case.

The Union contends the Grievant was not disciplined for just and sufficient cause. The Master Agreement provides that employees are "To be treated fairly and equitably in all aspects of personnel management." (Article 6, Section b(2), Jt. Ex. 1). It further provides that "The parties endorse the concept of progressive discipline. . .except. . .offenses so egregious as to warrant severe sanctions for the first offense up to and including removal." (Article 30, Section C, Jt. Ex. 1).

The Grievant did not know her behavior would be treated as unprofessional under the Standards of Employee Conduct. (Jt. Ex. 3). It provides, "An employee may not use profane, obscene, or otherwise abusive language. . .with inmates, fellow employees or others. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees or others." (Jt. Ex. 3, p.

10). Nowhere does the standard say speaking in a loud voice is a violation.

The Agency did not present substantial evidence or proof that the Grievant committed an offense. It only presented one witness who testified she overheard the Grievant speaking in a loud voice that was "yelling." No Associate Wardens in a meeting across the hall reported such an incident. The Union presented three (3) witnesses that contradicted the Agency's one witness. They testified the Grievant was not "yelling." They did acknowledge the Grievant made the alleged statements about inmates acting like staff.

The Union further argues the discipline was not "fair and equitable." The Grievant had "outstanding" performance evaluations with no prior discipline. The Warden did not consider a letter of reprimand because the Grievant did not accept any responsibility. He believed a one-day suspension was necessary. He did not apply progressive discipline as required under the Master Agreement.

Finally, the Union contends the Warden did not consider past discipline administered in prior cases of unprofessional conduct. The discipline logs from 2011 and 2012 show twenty-nine (29) cases of employees charged with unprofessional conduct. Seven (7) resulted in no action.

Eleven (11) were issued letters of reprimand. Eighteen (18) were instances of suspension, six (6) of those being multiple charges. These logs show no consistency existed for discipline. Cases were decided only on a case by case basis. The Union concludes the Grievance should be sustained and the Grievant made whole.

IV. DISCUSSION

The U.S. Code *is controlling in* this case:

> 5 U.S.C. §7503 – Cause and Procedure
>
> (a) Under regulations prescribed by the office of Personnel Management an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service. . . .

The Office of Personnel Management (OPM) essentially repeated this standard in its regulations. 5 C.F.R. §752.202.

The Master Agreement includes several provisions relevant to this case:

> ARTICLE 6 – RIGHTS OF EMPLOYEE
>
> Section 6. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights. . . .including the *right:*

> 2. to be treated fairly and equitably in all aspects of personnel management;
>
> ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS
>
> 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.
>
> (Jt. Ex. 1)

These Master Agreement provisions are applicable to this case.

The Agency adopted Standards of Employee Conduct 3420.09. They included the following standard:

> 9. PERSONAL CONDUCT. It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. The following are some types of behavior that cannot be tolerated in the Bureau.
>
> c.(4) An employee may not use profane, obscene, or otherwise abusive language when communicating with inmates, fellow employees, or others. Employees shall conduct themselves in a manner which will not be demeaning to inmates, fellow employees, or others.
>
> (Emphasis Added)
> (Jt. Ex. 3)

Attachment A to the Standards of Conduct is a table of offenses and discipline. One of the offenses listed and

the discipline for committing the offense is relevant to this case:

> OFFENSE:
>
> 9. Disrespectful conduct, use of insulting, abusive or obscene language to or about others.
>
> EXPLANATION: Includes verbal abuse of inmates, ex-inmates, their families or friends.
>
> FIRST OFFENSE: Official reprimand to removal
>
> SECOND OFFENSE: 14-day suspension to removal
>
> THIRD OFFENSE: Removal
>
> (Emphasis Added)
> (Jt. Ex. 3)

These Standards of Conduct provisions and Attachment A are controlling in this case.

The parties are bound by the provisions in 5 U.S.C. §7503(a) and 5 C.F.R. §752.202. These code and regulation provisions establish the principle that federal employees may be suspended for 14 days or less ". . .for such cause as will promote the efficiency of the service. . . ." This language does not say employees may be disciplined "to promote the efficiency of the service." If it did the Agency would be free to impose any discipline based on management's subjective opinion. Whatever discipline a

deciding official felt was appropriate would be appropriate. Whatever a deciding official felt about evidence would be appropriate. In other words such a system's discipline would be based on the subjective view of each deciding official. No employee would know what to expect. No supervisor would know what discipline to administer or propose under such a system. Only a deciding oracle would know what conduct and/or discipline was to be expected.

Clearly, Congress did not intend such an arbitrary subjective system for administering discipline in the federal sector. To prevent such a system Congress required that discipline had to be "for such cause" that would "promote the efficiency of the service." The term "cause" has a long history in collective bargaining and arbitration. The terms "cause," "proper cause," "just cause" and the like, have the same meaning in the history of collective bargaining. The purpose of the just cause or cause doctrine is to protect employees from unexpected adverse treatment and, at the same time, protect an employer's right to adopt and enforce necessary employment standards. The just cause doctrine is due process and equal treatment. Due process involves management's adoption of standards, notifying employees of those

standards and the discipline for their violation, investigating suspected misconduct, administering discipline and resolving disputes regarding alleged violations. Throughout these processes parties, as a classification, and employees as a classification, are entitled to equal treatment. This Arbitrator's statement of just cause is attached as Appendix A.

No doubt the Agency had the authority to set a standard prohibiting verbal abuse of inmates, fellow employees and others in its Standards of Conduct 3420.09. Clearly, the Agency had the authority to prohibit conduct that would demean inmates, fellow employees and others. Verbal abuse and demeaning conduct were offenses under 3420.09, paragraph 9C.(4). The Grievant acknowledged receiving the Standards of Employee Conduct containing these offenses. (Jt. Ex. 4). The Grievant, therefore, knew that verbal abuse and demeaning conduct would warrant discipline.

The Agency contends the Grievant engaged in unprofessional conduct on September 7, 2011. The Grievant and Union deny she engaged in any misconduct. In a discipline case the Agency has the burden of proving the alleged misconduct. What does the evidence prove, if anything, under the "cause" or "just cause" doctrine? The

Agency presented one witness that was present during part of the events on September 7th. The Secretary to the Camp Administrator testified she heard the Grievant "Yelling" saying, "she was sick of inmates thinking they were staff and taking up for inmates; staff taking up for inmates." At the time Counselor Bess and Secretary Morgan were present along with the Grievant. No inmates were present in or around the Camp Administrator's office.

Counselor Bess did not testify at the arbitration hearing. His affidavit was admitted, however, as part of the record. [Jt. Ex. 8(B)]. However, an affidavit is not admissible as a substitute for a material witness whose testimony can be probed by direct and cross examination. Ultimately, testimony and other evidence must be sponsored by someone who appears as a witness to explain either what they said, heard, felt or otherwise detected through their senses. The presence of a sponsoring witness is essential to determine the competency and credibility of evidence being offered into the record. Without a live sponsoring witness evidence in the form of testimony, documents, physical objects and other items can not be tested or contested to determine its competency and/or credibility. Counselor Bess's affidavit, therefore, is not admitted as substitute evidence of the events on September 7th.

Nevertheless, the Secretary's testimony stands as evidence that the Grievant was "yelling" and made the quoted statements.

The Union presented two (2) witnesses that were present throughout the events of September 7th. Both denied the Grievant was "yelling" at any time during the incident. Both testified that Counselor Bess repeatedly interrogated the Grievant about what she was doing in front of the inmates. The Grievant acknowledged that in response to Counselor Bess's repeated challenges to her, she initially replied that they would discuss this once we get to the Camp Administrator's office. When the three (3) staff members reached the Camp Administrator's office, her secretary asked if anything was wrong. The Grievant responded, 'I am tired of inmates acting like staff and staff allowing them to get away with it." Even when the three (3) staff personnel returned to the lobby, Counselor Bess, in front of the inmates, continued to interrogate the Grievant about what was going on, adding "I don't give a f - - - who you move" and ". . .you are wrong about this one." Counselor Bess continued his attempts to interrogate the Grievant when he followed her and Secretary Morgan back to her office.

At the hearing the Grievant was asked if she knew of

any specific incidents when inmates were acting like staff. The Grievant admitted she knew of no specific incidents. "It was just rumors."

The Grievant's version of the events that occurred on September 7th was corroborated by the testimony of Secretary Morgan. Their corroborated testimony essentially does not conflict with the testimony of Secretary Greenup except for the characterization of the Grievant "yelling" versus the loud talking characterization of the other two witnesses. Secretary Greenup, of course, had no knowledge of the events before the staff entered the lobby and what occurred in the lobby. Counselor Bess did not testify, so the corroborated testimony of the Grievant and Secretary Morgan about these earlier events, could not be rebutted by Secretary Greenup. Even if Bess had testified to a different version, the Grievant's corroborated version of the September 7th incident would stand under burden of proof principles. A grievant's conflicting corroborated evidence controls over the corroborated evidence of a party with the burden of proof under just cause principles.

Given this proven version of the September 7th incident, has the Agency met its burden of proving the Grievant engaged in unprofessional conduct. Certainly, it has not met the burden of proving that "yelling" occurred

as a basis for the unprofessional conduct charge. What about the Grievant's other behavior and the conduct of Counselor Bess? The Agency had adopted a standard that prohibits verbal abuse and demeaning conduct under its Standards of Employee Conduct, 3420.09, 9C(4). What is "verbal abuse" and "demeaning conduct?" At the core of any definition is the recognition that words and language from one person to others may cause harm. The improper or unfair use of words or language that cause harm is abusive. Demeaning conduct is conduct that diminishes a person's character, reputation, position or status. If words are used, demeaning conduct involves verbal abuse. What makes a definition so difficult is the infinite incidents that could involve verbal abuse and/or demeaning conduct. Context is everything when defining verbal abuse and demeaning conduct.

What was the context in this case? The September 7th incident occurred in the presence of staff and inmates. In a prison setting staff authority, status and credibility are important elements in relationships with inmates. Behaviors that undermine staff authority and status are to be taken seriously, especially in a prison setting. The Grievant initiated the sequence of events on September 7th. Inmate Gonzalez was in Counselor Bess's office for a proper

purpose. The Grievant simply ignored Counselor Bess and motioned for Gonzalez to follow her. This conduct demeaned Bess as a Counselor with the authority to have an inmate in his office for legitimate reasons. The Grievant made no effort to inform Bess about needing to see the inmate and proceed to the lobby. The Grievant simply signaled the inmate to follow her without regard to Bess's authority and position as a Counselor.

What was Bess's reaction to this demeaning behavior? He began a pattern of conduct to follow the Grievant and interrogate her in front of three (3) inmates. He followed her down the hall into the lobby repeatedly attempting to interrogate her. When the Grievant responded she will discuss the situation with the Camp Administrator, Bess continued his interrogation in front of inmates. Finally, the Grievant leveled a charge that inmates are acting like staff, meaning staff aren't doing their jobs. Yet, the Grievant was basing her allegation only on rumors, not any incident. Bess continued his interrogation attempts as he followed the Grievant back to her office.

The contextual evidence shows the Grievant's demeaning conduct initiated the sequence of events. Counselor Bess escalated the confrontation with his interrogation attempts challenging the Grievant in front of inmates. The Grievant

added to the confrontation with her unsubstantiated charge based on rumors. One can only imagine what inmates may have learned or done after observing this episode. No doubt staff-inmate relationships were at risk of harm.

In the context of this September 7th incident the Grievant engaged in demeaning conduct disregarding Counselor Bess and being verbally abusive toward all staff by making a rumor based allegation of staff unsatisfactory performance. Yet, the incident would not have escalated had it not been for the verbal abuse of Bess attempting to interrogate the Grievant in the presence of inmates. Both engaged in unprofessional conduct during the events of September 7th.

The record does not reveal whether Counselor Bess was disciplined or not disciplined for unprofessional conduct. The Grievant received a one (1) day suspension. Was this discipline for cause that would promote the efficiency of the Agency? The cause or just cause doctrine recognizes that offenses involving carelessness warrant progressive discipline beginning at least with a letter of reprimand, followed by a suspension before removal is appropriate. These progressive steps allow employees the opportunity to correct their unsatisfactory behavior. On the other hand, employees who commit offenses with the intention to cause

personal, physical or emotional injury or other harm are subject to severe discipline up to and including immediate removal under the cause or just cause doctrine.

The parties endorsed these cause principles in their Master Agreement. Article 30, Section C. provides for . . ."progressive discipline designed to correct and improve employee behavior. . .." At the same time they recognized ". . .that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal. . ." (Jt. Ex. 1). The parties did not attempt to distinguish between what offenses warrant progressive discipline and those warranting immediate severe discipline up to and including removal. That distinction was left to the difference between carelessness offenses and intentional harm offenses under the cause doctrine.

Was the Grievant's conduct in this case a carelessness offense or an intentional harm offense? No evidence was presented to show the Grievant intended to harm Counselor Bess or any other staff member. No evidence was presented to show a prior conflict relationship existed between Bess and the Grievant. No evidence was presented to show the Grievant was retaliating or intending to harm any particular staff members. If fact, the Grievant testified she did not believe she did anything wrong. Unfortunately,

often persons who are verbally abusive and demeaning don't realize the harm they may be causing. The record shows the Grievant is such a person. She did not realize her words and actions were offensive. In other words, she has been careless in her use of language and her behavior. Such an offense warrants progressive discipline under the Master Agreement and the cause doctrine. Nothing else appearing, the Grievant should have received a letter of reprimand for verbal abuse and demeaning conduct under progressive discipline principles.

Something else may appear in this case. Counselor Bess engaged in the same or similar misconduct as did the Grievant. He should have received the same discipline as the Grievant for committing the same offense. Or, if he had prior misconduct offense(s), he should have received the next step of progressive discipline. The cause or just cause doctrine recognizes that employees committing offenses in the same classification are entitled to be treated equally. Otherwise, a grievant is the victim of disparate treatment. Such a defense is grounds for vacating discipline under the cause doctrine.

The parties recognize these principles in their Master Agreement, Article 6, Section b,2. All employees have the right "to be treated fairly and equitably in all aspects of

personnel management;" (Jt. Ex. 1). Counselor Bess and the Grievant both should have received the appropriate progressive discipline for their offenses. If Counselor Bess was not disciplined, the Grievant should not have been disciplined under the Master Agreement and the cause doctrine.

In a prior case this Arbitrator reasoned that the term "cause" in 5 U.S.C. §7503(a) was to be read as requiring that discipline under the statute had to be for "cause." *Dept. of the Army, Dental Activity HDQ, Ft Bragg, NC*, FMCS Case No. 05-61606 (2005). This Arbitrator rejected the view that any discipline without regard to "cause" was appropriate as long as it promoted the efficiency of the service. Except for intentional harm offenses warranting severe discipline up to and including removal, the efficiency of a service is promoted by using discipline to motivate employees to correct their unsatisfactory performance. The "cause" doctrine recognizes this corrective action policy by providing progressive discipline for employees committing the same category of offenses, namely equal treatment for all employees. Progressive discipline calls for discipline of increasing severity until employees correct their behavior or performance. If they don't, they ultimately should be

removed. In other words the cause doctrine does promote the efficiency of a service. What it also does is prohibit arbitrary and discriminatory unequal treatment of employees.

The Agency in the cited case appealed this Arbitrator's ruling that the term "cause" in 5 U.S.C. 7503(a) required the application of "cause" principles derived from collective bargaining and arbitral history. The Agency took exception to this Arbitrator's ruling that a first offense warranted progressive discipline beginning with a first step letter of reprimand. The Authority held that this Arbitrator's ruling was contrary to law because it was ". . .without support in the language of §7503(a). . . ." The Authority repeated its earlier recognition ". . .that the "cause" language of §7503(a) means only that an agency must establish a nexus or connection between employee conduct and the efficiency of the service in order to support a suspension. Then the Authority repeated its holding that ". . .arbitrators have the power to mitigate suspensions under §7503(a)." *Dept. of the Army, Dental Activity HDQ, Ft. Bragg, NC,* 62 FLRA No. 20 (2007) and cases cited therein. One only can observe that without the term "cause", §7503(a) would have the same meaning. Namely, only discipline to promote the efficiency of the

service would be warranted. The statute requires a "connection" between discipline and the efficiency of a service without the word "cause" or the Authority's "nexus." The Authority's interpretation is redundant. According to the FLRA discipline must be doubly "connected and connected" twice to the efficiency of a service. The Authority repeated its prior holdings that arbitrators must decide "whether the penalty assessed was reasonable" and they "have the power to mitigate suspensions under §7503(a)." *Id. at 5.* Yet, §7503(a) has no language saying discipline must be "reasonable" in the mind of an arbitrator, whatever that means. Experienced labor-management arbitrators are knowledgeable about "cause" or "just cause" principles. If the Authority means arbitrators should decide what is "reasonable" by applying these principles we may be debating words, not substance. Nevertheless, nothing else appearing the Authority's holdings are controlling.

Something else does appear. The parties in this case have addressed cause principles in their Master Agreement. The parties expressly adopted the principle of progressive discipline offenses designed to correct and improve employee behavior. [Art.30, §c, Jt. Ex.1]. In interpreting this section arbitrators experienced in just cause cases

would recognize that the first step of progressive discipline should be a letter of reprimand. They would recognize such first step discipline as "reasonable." The parties also expressly adopted language that employees have a right "to be treated fairly and equitable in all aspects of personnel management." [Art. 6, §b(2), Jt. Ex. 1]. In interpreting this section arbitrators experienced in just cause cases would recognize that employees committing the same or similar offenses should be treated equally. They would recognize the prohibition against disparate treatment and require the same discipline. They would recognize this appropriate discipline as "reasonable."

No doubt the parties could negotiate and adopt these just cause principles. Management still has the authority to discipline employees to promote the efficiency of a service. Management's discipline policy, however, must follow progressive corrective discipline principles for carelessness offenses under the Master Agreement as well as the cause doctrine. Management's discipline policy must treat employee's equally for the same classification of offenses under the Master Agreement as well as the cause doctrine.

The deciding official testified about the process he followed in making his decision. He essentially reviewed

the case file and made his decision. In making his penalty decision, he relied upon the "Douglas Factors" on a case by case basis. In other words he made up a discipline standard after the fact on a case by case basis. Neither employees nor supervisors would know about any penalty for an offense until after deciding oracles made their discipline decision. The Agency does have a table of penalties, but does it prescribe penalties for offenses? For example, the penalties for unprofessional conduct in this case are described as follows: First offense, reprimand to removal; Second offense, 14-day suspension to removal and; Third offense, removal. In other words a first offense invites the entire range of penalties from reprimand to removal. It gives no notice of which unprofessional conduct offenses warrant progressive discipline and which ones warrant immediate removal. The Agency has standards of conduct, but no standards of discipline. Discipline is made up after the fact on a case by case basis. Such a system invites discriminatory unequal treatment.

The logs of discipline show such discriminatory treatment. (Jt. Ex. 10). Unprofessional conduct offenses triggered proposed discipline ranging from: two (2) Letters of Reprimand; three (3) one (1) day suspensions; one (1)

two (2) day suspension; ten (10) three (3) day suspensions; one (1) four (4) day suspension; and two (2) five (5) day suspensions. These proposed disciplines resulted in: eight (8) Letters of Reprimand; four (4) one (1) day suspensions; one (1) three (3) day suspension; and seven (7) no actions. Admittedly, the logs do not show whether the discipline was for a first, second, third or later offenses. The fact that the logs don't provide such information shows the Agency doesn't follow any uniform progressive discipline standard. Otherwise, it would record discipline accordingly. Unfortunately, employees, supervisors and deciding officials are left to guess at what discipline would be appropriate under the "Douglas Factors".

The "Douglas Factors" provide little or no guidance to employees, supervisors or deciding officials. Given the list of factors, what employee, supervisor or deciding official would know beforehand the appropriate discipline for unprofessional conduct. The "Douglas Factors" may be useful factors to consider in developing discipline policy standards. They are little, if any, value as discipline standards. These factors simply allow deciding officials to make almost any subjective personal opinion the basis of discipline decisions, a rule of men, not a rule of law. An Agency should be willing to establish discipline standards

that comply with the cause principles in the Master Agreement. Such standards should be part of an agency's personnel policy for correcting employee unsatisfactory performance.

The Agency does acknowledge that just cause principles should apply in this case. It argued the Agency decision satisfied the "Seven tests of Just Cause" first promulgated by Arbitrator Daugherty in the 1960s. These so-called tests were developed by a referee under the National Railroad Adjustment Board (NRAB) appellate type process in which a neutral decides a case based on information in a case file, not on evidence presented to him or her in a live hearing. Experienced arbitrators reject this methodology in most instances of a de novo proceeding. John Dunsford, an experienced arbitrator, professor and former President of the National Academy of Arbitrators (NAA) has presented the "critically convincing" rejection of Daugherty's approach. *The Common Law of the Workplace, The Views of Arbitrators, Second Edition* (St. Antoine, ed., NAA/BNA Books, Inc., 2005) p. 171; citing Dunsford, John E., *Arbitral Discretion: The Tests of Just Cause: Pt. I,* 42 NAA 23 (1990). This Arbitrator concurs in Arbitrator Dunsford's analysis and sees no reason to repeat his convincing presentation in this case. Daugherty's

methodology suffers from the fault of most appellate processes. Namely, no analysis of how evidence should have been analyzed under burden of proof principles occurs in most appellate forums. For the most part whatever "facts" are determined and found below are accepted on appeal. Yet, most discipline cases are factual disputes that must be resolved under burden of proof principles. The resolution of such factual disputes are not reviewable under most appeal procedures like FLRA proceedings. Arbitrator Daugherty's methodology would deprive parties from having a real de novo hearing and review process. In his question 5 Arbitrator Daugherty only requires that a deciding official have "substantial and compelling evidence or proof." In Note 2 to question 5 Daugherty says when evidence is conflicting then the neutral is only required to determine whether a deciding official ". . .had reasonable grounds for believing the evidence presented to him by his own people instead of that given by the accused employee and his witnesses." *Id.* at 48 & 49. No effort would be made to analyze evidence to determine whether a deciding official's analysis properly applied burden of proof principles. Daugherty's question 5 would deprive Grievants, like the one in this case, of an unbiased and neutral analysis of evidence under burden of proof

principles. For this reason alone and those presented by Arbitrator Dunsford, the "Seven Tests of Just Cause" must be rejected as a concept of the just cause doctrine.

The grievance, therefore, must be denied with respect to the commission of the offense and sustained with respect to the one (1) day suspension. Nothing else appearing the Grievant shall receive a letter of reprimand for unprofessional conduct on September 7, 2011. If employee Bess was not disciplined for his unprofessional conduct, the grievance must be sustained and no discipline administered as the result of disparate treatment. The Grievant shall be made whole for all lost time.

V. AWARD

1. The grievance is hereby denied, in part, and sustained with respect to the administered discipline in accordance with the reasoning in the opinion. The one (1) day suspension shall be converted to a Letter of Reprimand for verbal abuse and demeaning conduct that proved the offense of unprofessional conduct. The Grievant shall be made whole for all lost time.

2. In the event Counselor Bess was not disciplined for his unprofessional conduct on September 7, 2011, the

grievance with respect to the administered discipline shall be sustained and the Grievant shall receive no discipline.

3. The Arbitrator hereby retains jurisdiction to hear any dispute arising out of or relating to the implementation of this award.

4. The fees and expenses of this arbitration shall be shared equally by the parties in accordance with Article 30, Section d of the Master Agreement.

This the 15th day of July, 2013.

Robert G. Williams

Robert G. Williams, Arbitrator

APPENDIX A

Cause, Just Cause, Proper Cause, Etc.

By Robert G. Williams

The just resolution of disputes is a process of analyzing and developing evidence in accordance with burden of proof principles. This process leads to equal treatment by protecting parties from unproven claims and defenses. Parties claiming the benefit of language have the burden of proving their interpretation controls over conflicting views. An arbitrator's primary function is to enforce the terms and conditions of agreements adopted by parties. Arbitrators are prone to say their mission is to enforce the intentions of the parties. Intentions are a state of mind and must be proved through evidence. The best evidence of parties' intentions is their basic relationships and the language in their agreements. They intend to have their basic relationships preserved in interpretations of their agreements. They intend their written agreements to be evidence of their intentions. They intend for the words, phrases, sentences, punctuation, paragraphs, sections, articles and preambles to be read, comprehended and applied as internally consistent documents regulating the relationships among the parties.

Unfortunately, occasions arise when parties unintentionally adopt ambiguous language. It is capable of two or more interpretations. Ambiguities present themselves in different clothing. Patent ambiguities appear in the language of a document as words, phrases, sentences, paragraphs and articles that are capable of more than one interpretation. Latent ambiguities, on the other hand, arise when clear and unambiguous language is applied to a set of circumstances. These are dormant, hidden or unforeseen ambiguities. For example, an agreement provides that seniority controls in the awarding of a job among equally qualified candidates. Two (2) or more equally qualified bidders have the same seniority date. Who is entitled to the job? A latent ambiguity exists. When clear language was applied, a latent ambiguity resulted.

Faced with different interpretations, parties claiming the benefit of language have the burden of proving which interpretation manifests the intentions of the drafters. The party with this burden must prove his interpretation is consistent with the relationships of the parties in the entire agreement and the opposing party's view is inconsistent with the entire agreement. If either interpretation is both consistent or inconsistent with the

entire agreement, the party with the burden fails to meet its burden of proof.

Besides the relationships among the parties and their agreement, what are other sources of evidence useful for resolving language ambiguities? First, the notes, minutes or other memoranda prepared by parties during negotiations are valuable sources of evidence regarding their intentions at the time language was formulated. Secondly, post agreement interpretations followed by the parties as past practices, grievance settlements, arbitration awards under the same agreement, joint memoranda and the like are valuable sources of intention evidence. Once this evidence becomes part of the record, the interpreter of language may resolve ambiguities in a manner consistent with an entire agreement, the relationships of the parties and a party's burden of proof.

One of the most common phrases in agreements is the refrain, "management shall discipline only for just cause." Since management claims an employee violated rules or other standards, it has the burden of proving the unsatisfactory job performance as well as the appropriate remedy. The "just cause" phrase has been developed over the eons into a doctrine for fairly resolving these disputes.

The purpose of the just cause doctrine is to protect employees from unexpected adverse treatment and, at the same time, protect an employer's right to adopt and enforce necessary employment standards. The just cause doctrine is due process and equal treatment. Due process involves the adoption of standards, notifying employees of these standards and the discipline for their violation, investigating suspected misconduct, administering discipline and resolving disputes regarding alleged violations. Throughout these processes the parties and employees are entitled to equal treatment.

Management is responsible for establishing employment standards for employees to follow in their respective jobs. Essentially, every job has three (3) categories in which standards are developed:

(1) Productivity - quantity and quality of work

(2) Attendance - punctuality during scheduled work days

(3) Conduct - work related misconduct

These categories of work are useful for classifying related offenses under the just cause doctrine. The unsatisfactory habits that produce one category of offenses violating employment standards are not the same difficulties resulting in another category of offenses.

Since the causes of unsatisfactory performance are different for each category, discipline applies separately to each category. Unsatisfactory productivity, attendance or conduct may be either intentional or unintentional carelessness. Employees who neglect their job duties expect to receive progressive discipline beginning with at least a written warning, followed by a suspension before discharge is appropriate for the same category of work. These progressive steps provide employees an opportunity to correct their unsatisfactory habits in that category of work. On the other hand, employees who engage in misconduct intended to cause personal injury, property damage, or other unsatisfactory performance expect to encounter severe discipline including immediate discharge. Employees who intentionally disregard management authority are insubordinate and subject to the same discipline up to and including immediate discharge.

The just cause doctrine also includes cases of disability and job incompetence. Employees who have become physically or mentally impaired and are unable to perform their jobs satisfactorily are entitled to notice and at least one opportunity to receive treatment and cure their condition before they may be terminated. Employees unable to perform their jobs as a result of their medical

condition are terminated, not as a matter of discipline, but because they are disabled. Employees who are unable to understand their deficiencies and correct unsatisfactory work habits, are terminated not as a matter of discipline, but because they are incompetent at their work. Such persons simply are unable to function as employees in their jobs.

Under the just cause doctrine an employer alleging an employee's unsatisfactory performance has the burden of proof. In these cases, management must show: (1) The employment standards adopted are within management's discretion to establish offenses and discipline; (2) The Grievant knew beforehand that his/her contemplated behavior was an offense that could result in the discipline administered; (3) The Grievant actually engaged in the alleged unsatisfactory performance and; (4) The discipline administered complied with the steps of progressive discipline or the offense warranted severe discipline including immediate discharge. In disability cases, management continues to have the burden of proving an employee's record is unsatisfactory as the result of his medical condition and that the employee has been provided at least one leave opportunity to receive treatment to cure or control their medical condition. In incompetence cases

management has the burden of proving an employee does not understand the difference between unsatisfactory and satisfactory performance on the job. Management cannot prevail unless it meets the applicable burdens of proof under the just cause doctrine.

Employees and their unions have the burden of proving their claims of management misconduct and affirmative defenses to their own unsatisfactory performance. In management misconduct cases a Grievant has the burden of proving entrapment, provocation, anti-union *animus*, disparate treatment, denial of due process, conspiracy, sex or racial discrimination as well as other offenses. In affirmative defense cases a Grievant may acknowledge his unsatisfactory performance, but prove this performance was the result of a treatable disability, provocation, as well as other defenses. Employees and their unions have the burden of proving the allegations supporting these claims and defenses.

The burden of *proof* often is described with phrases such as beyond a reasonable doubt, by a preponderance of the evidence, by clear and convincing evidence, by substantial evidence, by the greater weight of the evidence and the like. These phrases may be more misleading than informative. They tend to describe evidence in

quantitative terms. The party with the most physical, documentary or testimonial evidence has the greater bulk of the evidence. Yet, that party's evidence may be analyzed to show it supports an opposing party's theory of the truth. The function of evidence is to prove the truth, prove reality, and prove what actually happened. If evidence supports more than one party's theory of the truth, the party with the burden cannot prevail as long as the evidence supports another theory of the truth.

The party with the burden of proof must prove his theory of the facts as the truth to the exclusion of inconsistent theories. Stated simply, in the event evidence is ambiguous, any ambiguity is resolved against the party with the burden of proof. Witnesses are to be believed as competent and credible persons describing what they have observed, heard, felt or otherwise detected through their senses. Only when their testimony is internally inconsistent or inconsistent with known facts should their competency be discredited. If the evidence shows they knew their testimony was erroneous, their credibility should be impugned. Corroborated testimony controls over uncorroborated versions of events. Authentic documents and other physical evidence control over inconsistent witness recollections of the same events.

Scientific evidence controls over other inconsistent evidence. Burden of proof principles must be applied in the analysis of evidence to prove rights and responsibilities in any case.

This process is essential for all parties to protect those persons innocent of misconduct or other unsatisfactory behavior. When an innocent person does not engage in unsatisfactory behavior, no proof may exist because the person did not engage in the misconduct. On the other hand, a person engaging in unsatisfactory behavior may leave no evidence of his or her involvement in an incident. The absence of proof in both cases may mean a person is innocent or culpable. It is ambiguous. The burden of proof, therefore, resolves ambiguities in favor of the person charged with unsatisfactory behavior to protect the innocent and against the party with the burden of proof. A charging party who suspects another person engaged in unsatisfactory behavior is left to prove his suspicions on another day. The innocent are not disciplined when these principles are properly followed in the analysis of evidence. The preceding overview of the just cause doctrine must be understood to analyze and decide any unsatisfactory job performance case.