FEDERAL MEDIATION AND CONCILIATION SERVICE

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IN THE MATTER OF THE ARBITRATION
Between

FMCS Case No. 12-55308-3

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE) LOCAL 525,

Union

And

OPINION AND AWARD

FEDERAL BUREAU OF PRISONS, FCC COLEMAN

Agency

Issue: Suspension Just/Sufficient Cause (Kevin Smith)

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APPEARANCES

For the Union
Ken Pike, Union Counsel
Joe Rojas, Union Counsel

For the Agency
Elisa Mason, Agency Counsel
David Honsted, AHRM

BEFORE: Barton W. Bloom, Arbitrator

Pursuant to the terms of their Master Agreement (MA), the undersigned was selected in accordance with the rules of the Federal Mediation and Conciliation Services ("FMCS") as Arbitrator, to hear and decide a dispute between the parties. The hearing was held on April 10, 2013 at the Central Administration Building of the Federal Correction Complex, Coleman, Florida. A stenographic transcript of the hearing was made; however the Arbitrator's notes, supplemented by the hearing transcript, constitute the official record of the hearing. The record was kept open pending receipt by the Arbitrator of post hearing briefs which were to be submitted and exchanged by the parties postmarked May 24, 2013 in lieu of and in addition to closing arguments. On May 25, 2013, the Arbitrator received post-hearing briefs from the parties, at which time the record was closed.

Based upon all the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

OPINION

ISSUE

Pursuant to Article 31 (Grievance Procedure) Section h (1) of the Master Agreement the issue before the Arbitrator is:

> Was the disciplinary action taken for just and sufficient cause, or if not, what shall be the remedy?

No issues of arbitrability were raised.

STIPULATIONS

At the outset of the hearing, the parties advised the arbitrator that several witnesses would not be called to testify. Instead, affidavits made by such witnesses, which were annexed to the Investigative Report made by Special Investigative Supervisor Anthony C. Joseph, which was received in evidence as a part of the Disciplinary File, as Joint Exhibit 3. The parties stipulated that had such witnesses testified, their testimony would have been consistent with their affidavits.

The parties further stipulated that the Master Agreement between the parties for the period March 9, 1998 – March 8, 2001, received in evidence as Joint Exhibit 2, remains in full force and effect.

EXHIBITS

JOINT EXHIBITS

1. Master Agreement between Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees, March 8. 1998 – March 8, 2001.

2. Invocation to Arbitrate, dated April 13, 2012.

3. Disciplinary File

   -Notice of Discipline dated April 09, 2012.

   -Kevin Smith Response to Proposed Discipline Memorandum for Warden Bechtold dated March 7, 2012.

- Office of Internal Affairs (OIA) Investigative Report of Anthony C. Joseph, dated January 6, 2012.

  -Warden Bechtold Referral of Incident, dated March 15, 2011. [1]

  -Unprofessional Conduct Past Practice

  -Proposal of Discipline, dated February 1, 2012

  -Memorandum from Tammy Padgett to Warden Bechtold dated November 18, 2011.

  -Memorandum from Warden to Staff re: reassignment of Unit Manager Coverage dated November 4, 2011.

  -Email dated December 6, 2011from Tammy Padgett to Anthony Joseph forwarding December 5, 2011 Memorandum from Warden Bechtold re: Unit Manager Re-assignment.

  -Email dated November 23, 2011 from Tammy Padgett to Anthony Joseph, naming additional possible witnesses.

  -January 4, 2012 affidavit of Kevin Smith.

  -December 28, 2011 affidavit of Tammy Padgett.

  -December 29, 2011 affidavit of Yvette Smith.

  -January 3, 2012 affidavit of Thomas Nowicki.

  -January 3, 2012 affidavit of David Gunter.

  -January 3, 2012 affidavit of Dwayne Kry.

  -January 3, 2012 affidavit of Charles Hilton.

  -December 29, 2011 affidavit of Joseph Peterson.

  -January 4, 2012 affidavit of Bruce Chambers.

  -December 29, 2011 affidavit of Samantha Carbone.

  -January 3, 2012 affidavit of Segundo Torres.

[1] The March 15, 2011 date appears to be a typographical error. According to an entry in the OIA investigative report, the matter was referred to OIA for screening and classification on November 15, 2011 and to FCC Coleman for local investigation on December 6, 2011, however; the November 15, 2011 date is questionable in that the allegations against Mr. Smith were not brought to the attention of Warden Bechtold until November 18, 2011..

-December 29, 2011 affidavit of Andrea Lawrence.

- November 22, 2011 Memorandum of Billy Romero re Workplace Violence Threat Assessment – Kevin Smith.

- May 26, 1999 Kevin Smith acknowledgment of receipt of Program Statement (Standards of Employee Conduct)

4. Mitigation of Penalties – Douglas Factors
5. Program Statement – Standards of Employee Conduct, dated February 5, 1999.

UNION EXHIBIT

1. United States Government Memorandum dated January 11, 2012 re: B 1/2 and B 3/4 Staff Meeting Minutes.

RELEVANT PROVISIONS OF THE MASTER AGREEMENT

Article 30 – Disciplinary and Adverse Actions

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

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offens4es so egregious as to warrant severe sanctions for the first offense up to and including removal.

Section d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

1. when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee…

Section e. When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations...

Section j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing...

Article 31 – Grievance Procedure

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse action will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"...

Article 32 – Arbitration

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

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.

RELEVANT PROVISIONS OF THE STANDARDS OF EMPLOYEE CONDUCT

Paragraph 9 of the Standards of Employee Conduct provides in pertinent part:

9. PERSONAL CONDUCT. It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. The following are some of the types of behavior that cannot be tolerated in the Bureau.

* * *

c. Additional Conduct Issues.

* * *

(3) An employee may not use physical violence, threats or intimidation toward fellow employees, family members of employees, or any visitor to a Bureau work site.

(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 w2ill not be demeaning to inmates, fellow employees, or others.

* * *

Attachment A: Standard Schedule of Disciplinary Offenses and Penalties

1. This table is intended to be used as a guide in determining appropriate discipline to impose according to the type of offense committed. The offenses listed are not inclusive of all offenses.

2. Ordinarily, penalties imposed should be within the range of penalties provided for an offense. In aggravated cases, a penalty outside the range of penalties may be imposed...

3. The deciding official will consider relevant circumstances including mitigating and aggravating factors, when determining the appropriate penalty. The range of penalties provided for most offenses is intentionally broad, ranging from official reprimand to removal. While the principle of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

* * *

NATURE OF OFFENSE	FIRST OFFENSE
8. Disorderly conduct, fighting, threatening, or attempting to inflict bodily injury to another, engaging in dangerous horseplay.	Official reprimand to removal.
9. Disrespectful conduct, use of insulting, abusive or obscene language to or about others.	Official reprimand to removal.

BACKGROUND

On November 18, 2011, Unit Manager Tammy Padgett reported to Warden William Bechtold that following receipt of an email dated November 4, 2011 from Warden Bechtold to all employees advising that effective November 18, 2011, she would be promoted to the position of Unit Managers of Unit B of the FCC-Coleman Low, she had been told by several unnamed staff members to be careful with the assigned counselors upstairs (the upper level of Unit B), that an unnamed staff member told her that Counselor Kevin Smith had made derogatory comments of a sexual and threatening nature about Ms. Padgett and comments about her sexual orientation (Ms. Padgett is gay) and that an unnamed non-staff person told her on November 17, 2011 that

Counselor Smith had verbally threatened Ms. Padgett's life. At his direction, Ms. Padgett submitted a written memorandum to Warden Bechtold which he referred to the Office of Internal Affairs (OIA) for screening and classification. On December 11, 2011, OIA referred the matter to FCC Coleman for local investigation. An investigation was conducted by Special Investigative Supervisor Anthony C. Joseph who, on January 6, 2012, issued his report in which he concluded there was sufficient evidence to support the charges of Unprofessional Conduct of a Sexual Nature and Unprofessional Conduct against Correctional Counselor Kevin Smith.

On February 1, 2012, Unit Manager Randall Mitchell issued a "proposal letter" to Counselor Smith, containing specifications of alleged unprofessional conduct, proposing discipline consisting of a five (5) calendar day suspension without pay and advising him of his right to representation and to reply to the warden orally and/or in writing prior to the imposition of the proposed penalty. The charges and specifications contained in the proposal letter provided:

> Unprofessional Conduct, a violation of the Standards of Employee Conduct:
>
> Specification A: In or around November 2011, you said words to the effect of "I am dreading when she takes over, she is probably going to fuck me so I've got something for her, I'm going to fuck her first" regarding Unit manager Padgett.
>
> Specification B: In or around November 2011, you made a comment to the effect of: "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore, and am not going to use a prophylactic."

On March 7, 2012, Counselor Smith submitted a written memorandum to Warden Bechtold in response to the proposed discipline. Counselor Smith did not respond orally to Warden Bechtold.

On April 9, 2012, Warden Bechtold issued his decision to Counselor Smith imposing a four (4) calendar day suspension and advising Counselor Smith as to his right to appeal the decision.

On April 13, 2012, the Union submitted its Invocation to Arbitrate, proceeding directly to arbitration of Counselor Smith's suspension pursuant to Article 31 (h) (1) of the Grievance Procedure.

FACTS

Federal Correctional Complex, Coleman ("FCC Coleman") is a multi-tiered correctional facility in Coleman, Florida, containing high, medium, low and minimum security prisons.

The low security prison (the "Low") consists of three units, A, B and C. Each Unit has an upper and lower section. Each unit has a Unit Manager. Each section has its own case manager, secretary and correctional counselors. The Unit Manager supervises the case managers, secretaries and counselors within the unit.

Kevin Smith, the grievant, was employed by the Bureau of Prisons for more than 23 years. He had no prior disciplinary record. At the time of the alleged incidents, he was a Correctional Counselor assigned to the low security prison (the "Low") in the upper level of Unit B.

Tammy Padgett was employed by the Bureau of Prisons for more than 10 years. At the time of the alleged incidents, she was a Case Manager in the lower level of Unit B of the Low, where she worked with Unit Secretary Yvette Smith, and Correction Counselors Thomas Nowicki and David Gunter.

On November 4, 2011, William Bechtold, Warden of the Low, distributed an email to all staff advising that effective November 18, 2011 Tammy Padgett would become the Unit Manager of B Unit of the Low. As Unit Manager, she would have supervisory responsibility over all secretaries, Case Managers and Counselors assigned to Unit B of the Low, including Counselor Smith.

On November 18, 2011, Ms. Padgett reported to Warden Bechtold that subsequent to circulation of the November 4, 2011 email, she was told by staff who she did not identify "to be careful" with [correctional] counselors upstairs [upper level of Unit B of the Low]. Ms. Padgett did not report this incident at the time she was made aware of it. Ms. Padgett also reported to Warden Bechtold that a staff member who she did not identify advised her that Counselor [Kevin] Smith had stated on the compound to a group of people "well, I am dreading when she [Ms. Padgett] takes over she's probably going to try to fuck me, so I've got something for her, I'm going to fuck her first." She also reported that the same unidentified staff member had advised her that Counselor Smith had been making comments about her [Ms. Padgett] of a sexual nature, commenting about her "dick and balls" among other comments. Ms. Padgett did not report these incidents at the time she was made aware of them; nor did she report when she was made aware of the comments. Ms Padgett did not indicate the dates or times when these comments were allegedly made, the place or places where the comments were allegedly made, the name of the staff member who advised her of the comments or the names of the staff

members to whom the comments were allegedly made or the dates on which the staff members reported the comments to her. None of the comments were directed to Ms. Padgett. Nor did Ms. Padgett hear Counselor Smith make the alleged comments. Ms. Padgett was not informed by the staff member or members who told her about the comments where or when the comments were made. Believing that the comments had likely been made in an area outside the inmate mess hall where staff members congregated, Padgett named staff members who she knew to congregate in that area as possible witnesses to the comments, including Yvette Smith, Tom Nowicki, David Gunter, Joseph (Pepe) Peterson, Dwayne Kry, Bruce Chambers, Charlie Hilton, Samantha Carbone, Lieutenant Lawrence and possibly others.

Ms. Padgett further reported to Warden Bechtold that in the evening of November 17, 2011, while outside the facility, a non-staff member informed her that Counselor Smith had verbally threatened her life. Ms. Padgett, who is gay and was in a relationship with a gay partner, advised Warden Bechtold that she was concerned for her safety and that of her partner and their four-year old daughter. Ms. Padgett did not disclose the substance of the alleged threat, the name of the individual who told her about the alleged threat, the date or place at which the alleged threat was made or to whom the alleged threat was transmitted.

Warden Bechtold referred the matter to the Bureau of Prisons Office of Internal Affairs (OIA) for screening and classification. OIA referred the case to FCC Coleman for local investigation. Special Investigative Supervisor Anthony C. Joseph conducted the investigation which consisted of interviewing potential witnesses whose statements were memorialized in sworn affidavits and annexed to his OIA Investigative Report dated January 6, 2012. He did not interview the non-staff member who allegedly told Ms. Padgett that counselor smith had threatened Ms. Padgett's life. The Investigative Report concluded that there was sufficient evidence to support the charge of Unprofessional Conduct of a Sexual Nature/Unprofessional Conduct against Counselor Smith, specifically that the affidavits of Counselor Nowicki, Counselor Gunter and Unit Secretary Yvette Smith which, according to Supervisor Anthony, provided graphic details of their interaction with Counselor Smith and the comments attributed to him.

Associate Warden Billy Romero testified that on November 22, 2011 a Workplace Violence Threat Assessment Team met to review the allegations against Counselor Smith to determine whether there was a possible staff conflict between Ms. Padgett and Counselor Smith.

After reviewing Ms. Padgett's November 18, 2011 memorandum to Warden Berthold and interviewing Ms. Padgett and Counselor Smith, the team concluded that no threat of workplace violence existed, but that there was a lack of trust and underlying hostility, as a result of which Ms. Padgett was reassigned as Unit Manager of a different building and unit.

On February 1, 2012, Unit Manager Randall Mitchell issued a letter proposing that Counselor Smith be suspended for five (5) calendar days for Unprofessional Conduct, a violation of the Standards of Employee Conduct, which provides, "[i]t is essential to the running of any Bureau facility that employees conduct themselves professionally. 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."

The proposal letter included two specifications, to wit:

Specification A: In or around November 2011, you said words to the effect of "I am dreading when she takes over, she is probably going to fuck me so I got something for her, I'm going to fuck her first" regarding Unit manager Padgett.

Specification B: In or around November 2011, you made a comment to the effect of: "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore, and am not going to use a prophylactic."

The proposal further advised Counselor Smith of his rights regarding the proposed discipline, including the right to respond to the Warden orally, in writing or both orally and writing prior to imposition of the proposed suspension.

On March 7, 2012, Counselor Smith issued a written response to Warden Bechtold. He did not respond orally. In his written response, Counselor Smith denied having made the comments in question and stated that the accusations lacked credibility because the staff members who claimed to have witnessed the comments were friends of Ms. Padgett, worked and socialized with her. He further pointed out that the witnesses failed to provide dates, times and places where the comments were allegedly made and failed to report the comments as required by the Standards of Employee Conduct. He further indicated that the affidavits of the witnesses contained inconsistencies which rendered them unreliable.

On April 9, 2012, Warden Bechtold issued his decision in which he stated that the charges preferred against Counselor Smith were fully supported by the evidence in the

disciplinary file and, after considering Counselor Smith's 23 years of employment with the Bureau of Prisons, acceptable work performance and unblemished prior disciplinary record, he imposed a four (4) calendar day suspension.

POSITIONS OF THE PARTIES

Position of the Agency

The Agency posits that the four day suspension of Counselor Smith met the so called "Seven Tests" standard for just cause established by Arbitrator Daugherty in Enterprise Wire Cos., 46 Lab. Arb. (BNA) 359 (1966), claiming Counselor Smith was aware of the Agency's rule, the rule relating to the charge was reasonable, the Agency's investigation was fair and reasonable, the investigation uncovered substantial proof of Counselor Smith's guilt, Counselor Smith received equal treatment and the four day suspension was proper.

Specifically, the Agency points to the fact that Counselor Smith acknowledged receipt of the Agency's Standards of Employee Conduct which proscribed the kind of conduct with which Counselor Smith was charged and contained a Schedule of Disciplinary Offenses and Penalties relating to such conduct.

The Agency argues that professional conduct by its employees is critical to the orderly and efficient running of its correctional institutions and its rules, which proscribe unprofessional conduct on the part of its employees, are reasonably related to the charges against Counselor Smith.

The Agency further argues that a fair and thorough investigation of the matter was conducted, including the conducting of interviews and gathering of affidavits from all potential witnesses prior to the issuance of charges and proposed suspension. The Agency disputes the Union's argument that the investigation was improper because it was initiated as a result of an anonymous accusation against Counselor Smith. The Agency also disputes the Union's argument that the conclusion contained in the investigative report finding evidence to sustain the charges was improper because the evidence established that the comments allegedly made by Counselor Smith were figurative, not literal. The Agency argues that the Union's argument is irrelevant since the comments allegedly made by Counselor Smith, whether literal or figurative, were nonetheless unprofessional and thus constituted punishable unprofessional conduct under the Agency rules.

The Agency further argues that Counselor Smith's guilt of the charges was established by substantial proof in the form of affidavits from Agency staff members Yvette Smith, [Thomas] Nowicki, and [David] Gunter, each of whom stated that they heard Counselor Smith make the unprofessional comments in question. The Agency disputes the Union's argument that since affidavits made by more (7) staff members identified by Tammy Padgett as potential witnesses, denied having heard Counselor Smith make the comments in question, as opposed to affidavits from only three staff members who claim to have heard the comments, the charges were not supported by substantial evidence. It is the Agency's position that these other affiants did not deny the comments were made, but merely stated they did not hear the comments or were not present when they were made. The Agency further argues that the evidence in the record establishes that the comments were not made in the place suggested by Tammy Padgett, where the other potential witnesses were likely to have heard them, which would explain why they stated in their affidavits that they did not hear the comments. The Agency further argues that Yvette Smith, the only witness who testified at the hearing as to the comments, was credible and consistent with her earlier affidavit made during the investigation.

The Agency argues that the four day suspension imposed upon Counselor Smith constituted equal treatment as established by Unprofessional Conduct Past Practice table, which enumerated 27 charges of unprofessional conduct resulting in a range of proposed suspensions from one (1) to five (5) days. The Agency dismisses the fact that the table does not identify the specific forms of unprofessional conduct or distinguish between greater and lesser forms of unprofessional conduct, but concludes that because the four day suspension imposed falls within the one to five day range of proposed suspensions, the penalty proposed for Counselor Smith was therefore appropriate. The Agency further disputes the Union's argument that the penalty imposed on Counselor Smith was disparate because no charges were preferred against Padgett, [Yvette] Smith, Nowicki or Gunter for failing to report the comments at the time they were made, as required by the Agency's Standards of Employee Conduct. The Agency argues that for treatment to be disparate the offenses involved must be the same or similar, which is not the case here.

Finally, the Agency argues that given all of the mitigating and aggravating factors, the four day suspension imposed was appropriate because the unprofessional conduct was egregious

and demonstrated a bias which would limit Counselor Smith's ability to effectively deal in a correctional environment.

Position of the Union

It is the Union's position that since the catalyst which led Tammy Padgett to report Counselor Smith's alleged misconduct was not the subject of the charges preferred against Counselor Smith, but consisted of a report from an unidentified member of the community that Counselor Smith had allegedly made a verbal threat against Ms. Padgett and her family, the entire process which culminated in the suspension of Counselor Smith was flawed. The Union argues that since Ms. Padgett did not report the derogatory comments allegedly made about her by Counselor Smith when she first learned about them, but only reported them after she was told about the alleged threats by an unidentified person, the charges should not have been brought, because the catalyst for the reported misconduct was not included in the charges.

The Union further argues that since Ms. Padgett did not report the derogatory comments which formed the basis of the charges against Counselor Smith when she first learned of them, the charges should not have been brought because neither Ms. Padgett nor the witnesses to the comments, Ms. Smith, Counselor Nowicki and Counselor Gunter, felt they were serious enough to report. Put another way, it is the Union's position that if the comments were not serious enough to be reported by the witnesses when the comments were made or by Ms. Padgett when she first learned of them; they were not serious enough to form the basis of charges and a four day suspension. The Union posits that were it not for the threat allegedly made by Counselor Smith, which was not included in the charges and for which there is no supporting credible evidence in the record, no report would have been made to the Warden and no charges would have been brought. In essence the Union is arguing that since the derogatory comments would not have been reported but for the specious allegation that Counselor Smith had made threats against Ms. Padgett and her family, the charges would not have been brought and no suspension would have been imposed. The Union further argues that the entire process has been tainted or poisoned by the anonymous report of an alleged threat since the existence of the report of the threat, although not sustained by the investigation, included in the charges or considered in determining the penalty, was nevertheless in the back of Warden Bechtold's mind when he made his decision. The Union further notes that Ms. Padgett's credibility is called into question by her failure in her report to the warden to identify the name of the staff member who told her about

Counselor Smith's alleged derogatory comments, her failure to identify the name of the member of the community who told her about Counselor Smith's alleged threat and failure to notify law enforcement of the threat allegedly made against her by Counselor Smith, which would, if proven, constitute a crime or seek a restraining order against him. The Union claims Ms. Padgett's affidavit of December 28, 2011, wherein she stated that she was concerned for her safety and that of her partner and daughter because of the alleged threat, was disingenuous since she never reported the alleged threat to the police, leaving it to the Bureau of Prisons to handle in the investigative process. Thus the Union concludes Ms. Padgett's failure to alert law enforcement when she allegedly learned of the threat and her failure to report the derogatory comments to the Warden when she first learned of them, calls her credibility into question and raises doubt as to the seriousness of Counselor Smith's alleged unprofessional conduct. The Union questions Ms. Padgett's explanation that she did not notify law enforcement of the alleged threats, opting instead to let the Bureau of Prisons handle the matter, noting that the Bureau of Prisons would have no way of protecting Ms. Padgett and her family outside the prison.

In addition, the Union argues that by failing to report the derogatory comments allegedly made by Counselor Smith, when they were made, Yvette Smith and Counselors Nowicki and Gunter were in violation of the Code of Conduct which requires employees who observe such conduct to report it. Thus, claims the Union, the credibility of Ms. Smith and Counselors Nowicki and Gunter is called into question. Moreover, argues the Union, when Ms. Smith and Counselors Nowicki and Gunter informed Special Investigative Supervisor Joseph that they had heard Counselor Smith make the derogatory comments in question, it was apparent that that had committed code violations by failing to report the comments when they were made. When Supervisor Joseph was asked why charges were not brought against these witnesses for failing to report unprofessional conduct in a timely fashion, he responded that since the witnesses were reporting the comments to him during the investigation, they were not in violation for failing to report the comments when they were made. It is the position of the Union that the failure to prefer charges against these witnesses for failure to report the unprofessional conduct, while charging Counselor Smith constitutes disparate treatment and the failure of the witnesses to report the comments at the time they were allegedly made, as required by the Code of Conduct, calls into question their credibility.

It is the position of the Union that there are significant inconsistencies in the record. In her affidavit of December 29, 2011, Yvette Smith stated that she did not recall anyone else being present when Counselor Smith made the derogatory remarks about Ms. Padgett to her, which contradicts her own testimony and the statements contained in Ms. Padgett's November 18, 2011 memorandum to Warden Bechtold and in her affidavit of December 28, 2011 that an unnamed staff member (later identified as Yvette Smith) advised her that Counselor Smith had made the comments in question on the compound to a group of people. In her testimony, Yvette Smith stated that there were a group of people around when Counselor Smith made the remarks, but she does not recall who was in the group.

In addition, the Union notes that Ms. Padgett stated in her memorandum and affidavit that the unnamed staff member (Yvette Smith) told her Counselor Smith had made derogatory remarks about her sexual orientation, while Ms Smith stated in her December 29, 2011 affidavit and testified that she did not recall Counselor Smith making any comments about Ms. Padgett's sexual orientation.

In its post-hearing brief, the Union argued that it has been prejudiced by its inability to question or cross-examine Counselors Nowicki and Gunter at the hearing with regard to the statements in their affidavits and their failure to report Counselor Smith's comments when they were made.

The Union further argues that the Agency failed to conduct a fair and objective investigation. The basis of the Union's argument is that the investigative report merely concluded there was sufficient evidence to support the charge of Unprofessional Conduct of a Sexual Nature/Unprofessional Conduct, with making a finding of fact or specifying the conduct comprising such charges which had occurred or the evidence which supported the charges. The Union further argues that the investigation unfairly credited three affidavits, in which the witnesses claimed to have heard Counselor Smith make derogatory comments about Ms. Padgett, while disregarding or giving inappropriate weight to affidavits of seven witnesses who denied having heard such comments.

The Union further argues that the process was tainted because the proposal letter which gave Counselor Smith notice of the charges and proposed penalty was signed by his immediate supervisor, Unit Manager Randall Mitchell, who had not read the disciplinary file and who had no input in drafting the letter, which was prepared by the personnel department.

The Union further argues that the final decision to impose a four day suspension was flawed for several reasons. First, Warden Bechtold was admittedly influenced by the fact that Counselor Smith submitted a written response to the proposal letter rather than a verbal response, which would have given the warden an opportunity to ask questions and observe Counselor Smith's responses. The Union points to Article 30, Section j of the Master Agreement, which gives an employee against whom disciplinary action is proposed, the option of responding either orally or in writing. The Union maintains that the warden acted improperly in drawing an adverse inference from Counselor Smith's failure to respond orally, when the Master Agreement afforded him the absolute right to only respond orally to the proposal letter.

Secondly, the Union claims that Warden Bechtold improperly gave greater weight to the affidavits of the three witnesses who stated that they heard Counselor Smith make the comments in question, than the seven affidavits of witnesses who stated that they did not hear Counselor Smith make the comments, leading the warden to ignore the preponderance of evidence. The Union points to Warden Bechtold's testimony regarding the seven affidavits: "So I kind of pushed them aside, meaning that, you know, maybe they weren't present during the time that it was said or they just didn't hear it."

Finally, the Union claims that Counselor Smith's testimony was credible.

The Union requests that the four day suspension not be upheld, that Counselor smith be awarded full back pay with interest pursuant to 5 U.S.C. § 5596(b)(1)(B),

DISCUSSION

Burden of Proof

In a disciplinary arbitration case, the Employer has the burden of proving that the charged employee is guilty of the misconduct alleged in the Notice of Discipline (proposal letter). Once the employer sustains its burden of proving guilt, the burden shifts to the Union to demonstrate that the penalty proposed or imposed is too severe. Since it is primarily the function of the Employer to decide upon the appropriate penalty, if the Employer acts in good faith and fixes a penalty consistent with the penalties imposed in other similar cases, the Arbitrator should not disturb the penalty unless the Union establishes an abuse of discretion by the Employer based on discrimination, unfairness or arbitrary and capricious action. Factors such as seniority, previous

good conduct, family status, disparate treatment and other mitigating circumstances may be considered to establish abuse of discretion by the Employer.

The Merit System Protection Board ("MSPB") established a list of 12 criteria, known as the "Douglas factors," which federal agencies are required to consider when determining disciplinary action. Application of the Douglas factors may be used to decrease or increase proposed penalties. An employee suspended for more than 14 days, demoted or removed has the right to appeal such action to the MSPB which may mitigate the penalty if it determines that the penalty imposed is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. While the appellate jurisdiction of the MSPB is limited to the extent of the penalty imposed, the authority of the Arbitrator is not bound by such limitations. Rather it is within the province of the Arbitrator to determine whether there was just and sufficient cause to impose the discipline in question. Warden Bechtold testified that although the Douglas Factors are only applicable to disciplinary actions involving a suspension of more than fourteen (14) days, not the case here, he considered them when imposing Counselor Smith's four (4) day suspension.

Quantum of Proof

The quantum of proof required in a disciplinary arbitration depends on the severity of the alleged misconduct. If the alleged misconduct also constitutes a violation of criminal law or involves moral turpitude, Arbitrators generally require proof by a minimum of "clear and convincing evidence" and in some cases "beyond a reasonable doubt." Where the alleged misconduct does not constitute a crime or involve moral turpitude, arbitrators universally require just and sufficient cause to be proven by "a preponderance of the credible evidence in the record." Inasmuch as the misconduct alleged in this case does not constitute a crime or involve moral turpitude, the Arbitrator holds that the Agency has the burden of proving by a preponderance of credible evidence in the record that there was just and sufficient cause to discipline Mr. Smith by suspending him without pay for four (4) days.

Just and Sufficient Cause

There is no single definition or agreement used to explain the "just cause" principle. It requires more than a simple determination of guilt or innocence of the misconduct alleged. There must also be actual or imputed knowledge on the part of the employee that a particular type of conduct will likely result in discipline or discharge. Further, there must be a reasonable

relationship between the employee's misconduct and the penalty imposed. In addition, absent a contrary provision in the collective bargaining agreement, the notion of "progressive discipline" must be considered. Finally, the penalty must not be disparate. That is to say, discipline must be administered even-handedly among similarly situated employees. While the Arbitrator is not required to base his decision regarding just and sufficient cause on the Agency's adherence to the Douglas factors, clearly he may do so inasmuch as they were promulgated to insure that penalties imposed were reasonable.

The Charges

The Proposal Letter or Notice of Discipline, dated February 1, 2012, proposed imposition of a five day suspension for Unprofessional Conduct in violation of the Standards of Employee Conduct in that in or around November, 2011, Mr. Smith said words to the effect of "I am dreading when she (referring to Unit Manager Tammy Padgett) takes over, she is probably going to fuck me so I've got something for her, I'm going to fuck her first" and "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore, and am not going to use a prophylactic."

Standards of Employee Conduct

The Program Statement issued by the Bureau of Prisons regarding Standards of Employee Conduct (Exhibit J-5) prescribes the manner in which employees are expected to conduct themselves and includes a Standard Schedule of Disciplinary Offenses and Penalties intended as a guide for the imposition of penalties for offenses committed by employees. The Notice of Discipline alleged that Mr. Smith was guilty of unprofessional conduct in violation of the portion of the Standards of Employee Conduct which provides: "It is essential to the orderly running of any Bureau facility that employees conduct themselves professionally. 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."

The Standard Schedule of Disciplinary Offenses and Penalties provides range of penalties for offenses. The penalty for a first offense of disorderly conduct, fighting, threatening or attempting to inflict bodily injury to another or engaging in dangerous horseplay, the penalty ranges from an official reprimand to removal.

The penalty for a first offense of disrespectful conduct, use of insulting, abusive or obscene language to or about others ranges from an official reprimand to removal.

The Standard Schedule of Disciplinary Offenses and Penalties further provides that in aggravated cases, penalties outside the normal range of penalties may be imposed.

The Arbitrator finds that the misconduct alleged in the Notice of Discipline falls within conduct proscribed by the Standards of Employee Conduct, to wit: unprofessional conduct by use of profane, obscene or otherwise abusive language when communicating with other employees. The Arbitrator further finds that that the four-day suspension imposed falls within the range of penalties for a first offense prescribed by the Standards of Employee Conduct, to wit: range of official reprimand to removal. Accordingly, there is a reasonable relationship between the misconduct charged and the proposed/imposed penalty. However, the fact that the penalty imposed falls within the prescribed range of penalties does not necessarily mean that it will be upheld upon a determination of guilt. If the Union establishes that the Agency has abused its discretion in imposing a four-day suspension based upon all relevant circumstances including mitigating factors, the Arbitrator may reduce the penalty.

Inasmuch as Counselor Smith acknowledged receipt of a copy of the Standards of Employee Conduct on May 26, 1999, the Arbitrator finds that Counselor Smith had actual or imputed knowledge that such conduct, if proven, would likely result in discipline or discharge.

The Arbitrator notes that inasmuch as the comments alleged to have been made by Counselor Smith concerned an individual who had been appointed to a supervisory position over Counselor Smith, the making of such comments, if proven, would also fall within the generally accepted definition of insubordination, which includes disrespect to or conduct which tends to undermine constituted authorities. However, since insubordination was neither alleged in the Notice of Discipline nor identified as misconduct which formed the basis of the discipline imposed, it will not be considered by the Arbitrator in this case on the issue of just and sufficient cause. While some arbitrators have held that although a particular type of misconduct may not be specifically alleged, it may be subsumed within another type of misconduct which is charged, so that an employee may actually be found guilty of an offense with which he has not been specifically charged. This Arbitrator subscribes to the notion that due process in discharge and a disciplinary case requires actual notice of charges with sufficient specificity or particularity so as to enable the charged employee to prepare an effective defense to the charges. Moreover, the

performed by Counselor Smith or whether the mitigating factors in those cases were similar to those involving Counselor Smith.

The Arbitrator notes, however, that of the 23 charges of Unprofessional Conduct enumerated in the "table of charges," five-day suspensions were proposed in only two instances. In both cases, the proposed five-day suspensions were ultimately reduced to two-day suspensions. Of the 23 final dispositions, there was one three-day suspension, three two-day suspensions, three one-day suspensions and sixteen letters of reprimands. The table of like charges did not contain a single final imposition of a four-day suspension. The table does not indicate whether misconduct was found to be "egregious," whether the charges involved a first, second or subsequent offense or the length of service of the employees charged in each case.

The Arbitrator is unwilling to speculate as to which, if any, of the 23 charges of Unprofessional Conduct involved charges and mitigating factors similar to those involved here. However, it is clear to the Arbitrator that most of the forms of unprofessional conduct enumerated in the Standards of Employee Conduct appear to be far more serious or egregious than the conduct described in the Notice of Discipline. Moreover, it would appear from a purely statistical basis that both the proposed (5-day) and imposed (4-day) penalties in this case are excessive when compared to the proposed and imposed penalties enumerated in the "table of like cases." In view of the fact that the Standards of Employee Conduct list forms of employee misconduct which, in the opinion of the Arbitrator, are far more serious or egregious than the unprofessional conduct with which Counselor Smith was charged, the Arbitrator finds that Warden Bechtold's conclusion that Counselor Smith's conduct was "pretty egregious" was, in the absence of other comparative charges and accompanying penalties, arbitrary. Accordingly, the Arbitrator finds that based upon the "table of like charges" promulgated by the Agency, the imposition of a four day suspension in this case is disparate, particularly in view of Counselor Smith's length of service, prior work record and prior disciplinary record (first offense).

Affidavits in Lieu of Testimony

The Disciplinary File, which was received in evidence as a joint exhibit, included the OIA Investigative Report made by Special Investigative Supervisor Joseph. The Investigative Report summarized statements made by numerous staff members who were interviewed during the investigation and included affidavits made by such staff members. In lieu of testimony by the

staff members, the parties stipulated that had the staff members been called to testify, their testimony would have been consistent with their affidavits. Accordingly, the statements contained in the affidavits are deemed uncontested testimony of the affiants. However, although the affidavits were admitted into evidence without objection, they are still considered hearsay, are subject to the rules of evidence for hearsay testimony and will be given such weight as the Arbitrator deems appropriate. By stipulating that had the staff members testified at the hearing, their testimony would have been consistent with their affidavits, both parties waived the right to cross-examine the affiants and to object to the introduction of the affidavits into evidence. This stipulation suggests that the affidavit testimony be given weight. However, the Arbitrator reserves the right to attribute such weight to the affidavit testimony as he deems appropriate taking into account that the submission of affidavit testimony deprives the Arbitrator of the opportunity to observe the demeanor of the affiants and determine their credibility.

To the extent that affidavit testimony is supported by evidence that has been subjected to cross-examination, it will be given greater weight. Conversely, to the extent that it is contradicted by testimony that has been subjected to cross-examination, by other affidavit testimony or by other evidence in the record, it will be given less weight. Affidavit testimony, which contradicts live testimony which has been subjected to cross-examination, may be considered to discredit to discredit the live testimony. To the extent that conflicting testimony, affidavits and other evidence is present, it falls to the Arbitrator to attribute appropriate weight by whatever means is available to him in the record and to make a determination supported by a preponderance of the credible evidence in the record.

A review of the affidavit testimony discloses that three staff members, Yvette Smith, Thomas Nowicki and David Gunter, whom Ms. Padgett had named as possible witnesses, recalled hearing Counselor Smith make derogatory comments about Ms. Padgett, while six staff members who Ms. Padgett had also identified as possible witnesses, stated that they did not hear Counselor Smith make any derogatory, negative or sexual comments about Ms. Smith.

None of the three employees who claim to have witnessed the comments specified a date or time when the alleged comments were made by Counselor Smith. This lack of specificity presents a problem. Without knowing when such comments were allegedly made, Counselor Smith is deprived of the opportunity to mount an effective defense by proving that he was not present when the comments were allegedly made by him or to produce witnesses who were or

may have been present at the time in question to dispute the allegations. When asked why he credited the affidavits of the three staff members who allegedly witnessed Counselor Smith making the comments about Ms. Padgett over the affidavits of the seven staff members who denied hearing Counselor Smith making such comments, Warden Bechtold testified that that he was influenced by the fact that the charges against Counselor Smith had already been sustained by the investigative report and because the seven staff members who denied having heard the comments never said that they never heard Counselor Smith make those remarks or that he absolutely did not make those remarks. In essence, warden Bechtold simply adopted the conclusion contained in the Investigative Report that there was sufficient evidence to sustain to support the allegations against Counselor Smith. In so doing, Warden Bechtold abrogated his responsibility of reviewing the record and making specific findings of fact to sustain the charges against Counselor Smith. Warden Bechtold dismissed the affidavits of the seven staff members because they merely stated that they weren't there or never heard Counselor Smith make those comments.

The Arbitrator is not persuaded that the Union was placed at a disadvantage by reason of the fact that it did not have an opportunity to cross-examine Counselors Nowicki and Gunter at the hearing. By stipulating that had the individuals whose affidavits taken during the course of the investigation testified at the hearing, their testimony would have been consistent with their affidavits, the Union waived the right to object to the introduction of the affidavits as evidence and waived the right to cross-examine the witnesses. Parenthetically, it is noted that it was the Union, not the Agency, which called Yvette Smith, whose affidavit was stipulated to by the Union, as a witness at the hearing. It had the same opportunity to call Counselors Nowicki and Gunter as witnesses. Accordingly, the Union may not now be heard to complain that it has been prejudiced by its inability to cross-examine the witnesses whose affidavits were received in evidence by stipulation.

Allegation that Counselor Smith Verbally Threatened Ms. Padgett's Life

Ms. Padgett's allegation that an unnamed individual who was not a staff member of FCC Coleman told her that Counselor Smith had verbally threatened Ms. Padgett's life is of no value in this matter. Although Ms. Padgett informed Warden Bechtold that this unnamed individual had informed her of the threat, the threat was not specified in the Proposal or Notice of Discipline. Moreover, the statement of an unnamed witness who is not called to testify at the

hearing is pure hearsay and therefore not admissible as evidence that Counselor Smith made the alleged threat. Accordingly, it will not be considered by the Arbitrator as a basis for just and sufficient cause for the discipline imposed upon Counselor Smith.

However, the Ms. Padgett's affidavit and uncontested testimony that she was told that Counselor Smith had threatened her life is admissible to show that the unnamed individual informed her that Counselor Smith had made the threat, but not as evidence that Counselor Smith's made the alleged threat. The evidence that Ms. Padgett was informed of a threat made against her life establishes her state of mind and provides justification for bringing the entire matter to the attention of Warden Bechtold on November 18, 2011.

Testimony

Tammy Padgett

Tammy Padgett was not a witness to the comments of a derogatory or sexual nature allegedly made about her by Counselor Smith, which are the subject of the disciplinary action. Accordingly, her testimony as to what Yvette Smith told her Counselor Smith said is hearsay and will not be considered as evidence of the comments allegedly made by Counselor Smith. However, her testimony may be considered for the purpose of assessing Yvette Smith's credibility, particularly if there are discrepancies between what she told Ms. Padgett, what she said in her affidavit and in her testimony at the hearing.

Ms. Padgett's testimony also provided background information. She had not worked with Counselor Smith, who had never made any threatening remarks to her or remarks about her sexual orientation (she is gay) although he did in passing make what Ms. Padgett described as grade school comments . There had never been any issues between Counselor Smith and her, except that Counselors Smith and Chambers had expressed their displeasure at Ms. Padgett's plan contained in an email she sent around November 14, 2011 advising that Counselors Smith and Chambers would be included in an Administration and Orientation rotation when she became Unit Manager.

Ms. Padgett testified that Yvonne Smith told her that Counselor Smith had made derogatory remarks in front of a group of (staff) people about her (Ms. Padgett's) sexual orientation and that he (Counselor Smith) dreaded when she (Ms. Padgett) took over (as Unit Manager). Ms. Smith did not tell her who the other staff members were or where or when the comments were made. No other staff members told Ms. Padgett about the remarks. Ms. Padgett

did not provide the date on which Yvette Smith told her about Counselor Smith's comments. Ms. Padgett did not immediately respond to or report the comments. It was not until an unnamed individual who was not a staff member told Ms. Padgett on November 17, 2011 that Counselor Smith had allegedly made threatening remarks about her that Ms. Padgett reported to Warden Bechtold that she had been informed that Counselor Smith had made derogatory and comments about her as well as the threatening remarks. Ms. Padgett also reported that Ms. Smith and Samantha Carbone, a Case Manager on Unit B Lower of the Low, had told her to be careful with assigned counselors upstairs (Unit B Upper of the Low), but stated that she did not know what that meant. No misconduct on the part of Counselor Smith relating to this statement from Ms. Smith and Samantha Carbone is alleged. Reference to the statement is irrelevant, unsupported on the record and will be disregarded.

Ms. Padgett made no effort to determine where or when the alleged comments, reported by Ms. Smith, were made or which staff members other than Ms. Smith were present when they were made. Ms. Padgett stated that there was a bench where Counselor Smith and other staff members hung out during the mainline procedure (when inmates were fed). She made the assumption that Counselor Smith made the comments in the area of this bench and that staff members who hung out at the bench might have witnessed Counselor Smith's comments, so she named them in her November 18, 2011 memo to Warden Bechtold as possible witnesses.

Ms. Padgett did not recall when Ms. Smith told her about Counselor Smith's remarks except that it was sometime between Warden Bechtold's November 4, 2011 email to staff and the November 17, 2011 comment made to her outside the facility. She did not recall whether Ms. Smith told her about the remarks before or after her November 14, 2011 email regarding Counselor Smith's inclusion in the Administration and Orientation rotation.

Yvette Smith

Yvette Smith was called as a witness on behalf of the Union. She is the Unit Secretary of Unit B lower level of the Low and is the only staff member who testified with respect to the statements Counselor Smith allegedly made regarding Ms. Padgett, although several staff members had been identified by Ms. Padgett as possible witnesses.

She testified that she overheard Kevin Smith say in front of a group of people that it was going to be bad for him if Ms. Padgett ever became his supervisor and that he knew she was going to fuck him so he was going to fuck her first. Ms. Smith did not recall who was around

when he made the comments. She did not hear him make any other comments of a sexual nature. Ms. Smith did not indicate where or when these comments were allegedly made by Counselor Smith.

She testified that on another occasion Counselor Smith told her Ms. Padgett was throwing her dick and balls around acting like a dude. She did not know what Counselor Smith meant by those remarks. She did not understand the comments to be of a sexual nature. It was more that she was throwing her weight around like a man. Counselor Smith has not been charged with making the comment regarding Ms. Padgett throwing her "dick and balls" around. Therefore, such testimony will not be considered.

She did not recall Mr. Smith making any direct comments about Ms. Padgett's sexual orientation or any other derogatory comments about Ms. Padgett. While Counselor Smith never said anything about Ms. Padgett's sexual orientation, she had the impression that he had a problem with her being his supervisor because of her sexual orientation. However, Counselor Smith is not charged with having a problem with Ms. Padgett's sexual orientation and Ms. Smith's impression that he had a problem with Ms. Padgett's sexual orientation was not drawn from anything Counselor Smith said. Ms. Smith's impression of what was in Counselor Smith's mind absent something he said or did to convey that impression, will not be considered

When asked what she thought Counselor Smith intended when he commented that she (Ms. Padgett) was going to fuck him when she took over, so he was going to fuck her first as figurative, Ms. Smith said she did not view it as sexual in nature.

She told Ms. Padgett about the comments Counselor Smith made in front of a group of people because she knew there were issues between Counselor Smith and Ms. Padgett and she felt Ms. Padgett should be careful. She does not recall who was in the group.

Ms. Smith worked in the same unit as Ms. Padgett, had a lot of interaction with her and socialized with her while off duty prior to Ms. Padgett's promotion to Unit Manager.

Ms. Smith did not report Counselor Smith's comments to the Warden when they were made because she did not feel she had to. She did not think they were serious unless Ms. Padgett became boss. After the email regarding Ms. Padgett's promotion was circulated, Ms. Smith told her about the comments because she thought there could be trouble, which she took to mean that he was not going to put up with her being her supervisor and was not going to work for her.

Ms. Smith knew that Counselor Smith disliked Ms. Padgett because they had a dozen conversations about it. He had never made any reference to her sexual orientation. He never said that he was going to do anything of a sexual or violent nature to Ms. Padgett.

Affidavits

Yvette Smith

In her affidavit, Ms. Smith recalled that Counselor Smith made the comment to her "I am dreading when she takes over (referring to Padgett) she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first." She did not recall that anyone else was present when he made the comment. She had no idea what he meant by the comment. She did not indicate where or when the comment was made.

She also recalled Counselor Smith making comments about Padgett's dick and balls and other sexual comments. She did not recall the nature of the sexual comments and stated that she did not recall anyone else being present when the comments were made.

She did not recall Counselor Smith making any comments about Ms. Padgett's sexual orientation.

She did not recall ever hearing that Counselor Smith made any threats toward Ms. Padgett and had no knowledge of any issues between Counselor Smith and Ms. Padgett.

Thomas Nowicki

Thomas Nowicki, a correctional counselor, stated in his affidavit:

> I do recall Counselor Smith once making a comment during Fog Watch or when we were picking up supplies "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic." During the time Smith made this comment Counselor Gunter and Chamber were present.

Counselor Nowicki made further statements regarding comments Counselor Smith allegedly made regarding Ms. Padgett over a period of time; however, there are no allegations against Counselor Smith in the proposal letter with respect to these additional comments. Accordingly, these additional statements will not be considered.

David Gunter

David Gunter, a correctional counselor, made the following statements in his affidavit:

> I do recall Counselor Smith making the comment "I am dreading when she takes over (referring to Padgett) she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first."
>
> I do recall Smith making the following statement while we were picking up supplies. "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic." During the time Smith made this comment Counselor Nowicki and Chambers were present.

Counselor Gunter made further statements regarding comments Counselor Smith allegedly made regarding Ms. Padgett; however, there are no allegations against Counselor Smith in the proposal letter with respect to these additional comments. Accordingly, these additional statements will not be considered.

Analysis of Testimony and Affidavits

Yvette Smith

There are significant contradictions between Ms. Smith's testimony and her affidavit.

Ms. Smith testified that Counselor Smith said in front of a group of people that it would be bad for him if Ms. Padgett became his supervisor and he would fuck her before she fucked him. In her affidavit, she said that Counselor Smith made that comment to her and she did not recall anyone else being present when he made the comment.

Ms. Smith testified that she was aware of issues between Counselor Smith and Ms. Padgett from a dozen conversations with Counselor Smith. In her affidavit, Ms. Smith said she was not aware of any issues between Counselor Smith and Ms. Padgett or interactions between Counselor Smith and Ms. Padgett that she was involved with.

Ms. Smith testified that she did not hear Counselor Smith make any comments of a sexual nature regarding Ms. Padgett. In her affidavit, Ms. Smith said she recalled Counselor making comments about Padgett's dick and balls and making other sexual comments.

Based upon the contradictions between her testimony and her affidavit regarding critical issues, the Arbitrator concludes that she is lacking in credibility. Moreover, Ms. Smith's failure to provide evidence as to when she allegedly heard Counselor Smith make the remarks specified in the proposal letter prevents the Agency from proving by a preponderance of credible evidence in the record that the comments were made by Counselor Smith when the specifications say they were made.

Tammy Padgett

Ms. Padgett was not a witness to the comments allegedly made by Counselor Smith. Her testimony consists of background information and hearsay as to what other people told her.

As a Case Manager, she worked in Unit B Lower at the Low with Unit Secretary Yvette Smith and counselors Gunter and Nowicki, with whom she socialized outside of work. Case Manager is not a supervisory position. When she was promoted to Unit Manager of Unit B Lower, which is a supervisory position, she no longer socialized with these employees whom she supervised.

On November 4, 2011 an email was sent to all to staff advising that she was going to be the Unit Manager for Unit B Upper as well as Unit B Lower (and part of Unit C). Ms. Padgett testified that sometime between November 4, 2011 and November 17, 2011, Yvette Smith informed her of the comments allegedly made about Ms. Padgett by Counselor Smith in front of a group of people. Ms. Smith is the only staff member who informed her of Counselor Smith's comments. Ms. Padgett did not testify as to the specific comments Ms. Smith told her Counselor Smith had made.

In her affidavit, Ms. Padgett said that after the November 4, 2011 email she was told by (unnamed) staff to be careful with the upstairs counselors, referring to Kevin Smith and Bruce Chambers. She further stated in her affidavit that Yvette Smith told her that Counselor Smith had stated in front of a group of people, whom Ms. Smith did not identify, "well, I am dreading when she takes over (referring to me), she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first."

Ms. Padgett also stated in her affidavit that Yvette Smith told her Counselor Smith had been making comments about her (Ms. Padgett) in a sexual manner, making comments about her 'dick and balls" and other sexual comments. Ms. Smith also told her that Counselor Smith made derogatory comments about her sexual orientation.

Ms. Padgett also stated in her affidavit that on November 17, 2011, she was told by a non-staff member, whom she declined to identify, that her (Ms. Padgett's) life had been verbally threatened by Counselor Smith.

She also stated in her affidavit that staff members who may have heard Counselor Smith's comments included Butch Torres, Yvette Smith, Tom Nowicki, David Gunter, Joseph (Pepe) .Peterson, Dwayne Kry, Bruce Chambers, Charlie Hilton, Samantha Carbone, Lieutenant

Lawrence and possibly others. Ms. Padgett did not state in her affidavit that Yvette Smith told her where the comments were made, which staff members were present when Counselor Smith allegedly made the comments or why Ms. Padgett believed that these staff members might have heard the comments. In her testimony, Ms. Padgett stated that because Counselor Smith and a bunch of smokers hung out at a bench after the mainline procedure (food line), she assumed they might have been witnesses to the comments.

In her testimony, Ms. Padgett testified that Yvette Smith is the staff member who told her to be careful with the upstairs assigned counselors (Kevin Smith and Bruce Chambers) and that Counselor Smith made the comment in front of a group of people about dreading when she (Padgett) takes over.

The memorandum, affidavit and testimony of Tammy Padgett with respect to what Yvette Smith and an unidentified told her about what Counselor Smith said about is hearsay and will not be considered to support the allegations in the proposal letter. Moreover, Counselor Smith is not charged with making threats against Ms. Padgett as the unidentified individual allegedly told Ms. Padgett. However, Ms. Padgett's testimony that the unidentified person told her Counselor Smith had made threats against her is admissible solely for the purpose of establishing Ms. Padgett's state of mind in reporting the alleged threats to Warden Bechtold. On the other hand, Ms. Padgett's failure to report the Counselor Smith's comments when told about them by Yvette Smith and her failure to report the alleged threats to a law enforcement agency, detract from Ms. Padgett's credibility in reporting the matters to Warden Bechtold.

Thomas Nowicki and David Gunter

Thomas Nowicki and David Gunter, correction counselors who worked and socialized with Ms. Padgett, both testified that Counselor Smith made the statement "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic." They could not agree on where the comment was made. Nowicki said it was made during Fog Watch or when they were picking up supplies. Gunter said it was made when they were picking up supplies. Nowicki said Gunter and Counselor Chambers were present. Gunter said Nowicki and Chambers were present. Counselor Chambers said in his affidavit that he was not present with the other counselors when such a comment was made. Neither Nowicki nor Gunter provided a time, a date or even a month when the comment was allegedly made by Counselor Smith.

The fact that the words used by both Nowicki and Gunter to describe what Counselor Smith allegedly said about Ms. Padgett were identical and, as discussed infra, were likely put in their mouths by Supervisor Anthony, detracts from their credibility. As does the fact that they were unable to agree as to where the comment was made. The fact that Counselor Chambers denies having been present to hear the comment, when Nowicki and Gunter both say he was there, further detracts from their credibility. However, the most critical piece of the puzzle missing from their testimony is the time and date when the comment was allegedly made by Counselor Smith. The specifications in the proposal letter specifically allege that the comments were made in or around November 2011. The failure of Nowicki and Gunter to state when the comments were made in their presence is a fatal defect in the Agency's case as it prevents the Agency from proving by a preponderance of credible evidence in the record that Counselor Smith said what the specifications allege in or around the month of November 2011.

The Warden's Final Decision

In his final decision, Warden Bechtold's concluded that the charges against Counselor Smith were fully supported by the evidence in the disciplinary file and imposed a four day suspension. Warden Bechtold's thought process in arriving at his decision is revealed in his testimony.

Warden Bechtold testified that he discredited Counselor Smith's written response to the charges because Counselor Smith failed to schedule an oral response. As the Union correctly pointed out, Article 30, Section j of the Master Agreement specifically provides that an employee against whom disciplinary action is sought may respond orally or in writing, leaving the method of responding to the sole discretion of the employee. The Arbitrator concludes that the Warden improperly drew a negative inference from the fact that Counselor Smith elected to submit a written rather than an oral response, as was his right.

Moreover, a review of Counselor Smith's written response reveals that Counselor Smith denied each and every allegation made in the charges against him and pointed out numerous inconsistencies in the affidavits contained in the disciplinary file and questioned the credibility of the witnesses because they had failed to report the alleged comments when they were made as required by the Standards of Employee Conduct. Not only did Warden Bechtold fail to consider these inconsistencies and credibility issues, he went so far as to criticize Counselor Smith for

spending more time in his written response attacking the credibility of the witnesses than he did defending the fact that he didn't make the comments in question. Warden Bechtold's rationale in this regard is illogical. The charges allege that Counselor Smith made certain comments. What more can Counselor Smith do than deny that he made the comments? How do you prove a negative? You cannot prove that you did not do something other than to prove that you were not present at the time and place where it is alleged that you made the comments or present evidence from others who were present at the time that you did not make the comments. However, the allegations made against Counselor Smith do not say where or when the comments were made except to say they were made in or around November, 2011. Not one of the affidavits of the three witnesses who stated that they heard Counselor Smith make the comments provided a date or time when the comments were allegedly made. Yvette Smith did not indicate where or when the comments she heard were made. Counselors Nowicki and Gunter did not agree as to where the comments were made. It is unreasonable to expect Counselor Smith to prove that he was not present at an unspecified time and place sometime in November, 2011. Moreover, based on the testimony and affidavits of Yvette Smith, Nowicki and Gunter, the comments attributed to Counselor Smith could have been said at any time during the years of service they shared at FCC Coleman. This is precisely why there is a requirement in the disciplinary process for specificity and particularity of charges. The failure of the witnesses, whose affidavits were relied upon by the investigator and by Warden Bechtold, to specify the dates, times and places at which the comments were allegedly made by Commissioner Smith, deprived Counselor Smith the opportunity to prepare an effective defense to the charges. Apart from denying that he made the comments in question, the only means of mounting a defense was to place the credibility of the witnesses in question.

Warden Bechtold further testified he was particularly impressed by the affidavits of the three witnesses who stated that they heard the statements allegedly made by Counselor Smith. The Warden said:

> And what stood out to me in the affidavits – in reviewing the affidavits, they were like cookie cutter forms. It appeared to me that, you know, they were all saying the same thing but in their own words. So that type – I put a lot of credibility into the three of those testimonies.

Warden Bechtold's testimony that the affidavits were "like cookie cutter forms" is right on the money. Indeed, the first four or five paragraphs of each of the three affidavits were

identical. However, Warden Bechtold's placement of credibility on his observation that each witness said the same thing, but in his or her own words is not warranted. Not only is his observation unsupported by the evidence, it is diametrically opposed to the evidence in the record.

Yvette Smith said in her affidavit:

> I do recall Counselor Smith making the comment "I am dreading when she takes over (referring to Padgett) she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first." Smith made that comment to me and I don't recall anyone else being there when he said this."

David Gunter said in his affidavit:

> I do recall Counselor Smith making the comment "I am dreading when she takes over (referring to Padgett) she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first.

Contrary to Warden Bechtold's observation, the witnesses did not say the same thing in their own words. The witnesses' statements were identical, evidencing the fact that they did not testify in their own words, but rather responded to leading questions posed to them by the investigator, who put the words in their mouths. A further review of the disciplinary file reveals the source of these words. In her November 18, 2011 memorandum to Warden Bechtold, Tammy Padgett said the following:

> I also had a staff member approach me and advise me that Counselor Smith had stated on the compound to a group of people, "well, I am dreading when she takes over (referring to me) she's probably going to try to fuck me, so I've got something for her, I'm going to fuck her first."

Moreover, Ms. Padgett stated in her December 28, 2011 affidavit:

> I recall being approached by Yvette Smith and her telling me that Counselor Smith had stated in front of a group of people who she did nit identify "well, I am dreading when she takes over (referring to me), she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first."

It is patently obvious to the Arbitrator that the investigator took the words contained in Tammy Padgett's memorandum to Warden Bechtold, repeated it in her affidavit and asked the witnesses if they heard the comments. The witnesses then signed the affidavits using the exact words provided by the investigator in their affidavits. The statements of the witnesses were

clearly not in their own words. As further evidence that the words were suggested by the investigator, in his affidavit, Counselor Bruce Chambers said the following:

> I do not recall ever hearing Counselor Smith making the comment "I am dreading when she takes over (referring to Padgett) she's probably going to try to fuck me so I've got something for her, I'm going to fuck her first."

How would Counselor Chambers know these words, which he denied hearing, if the investigator did not supply the words and ask whether he heard Counselor Smith say them?

Moreover, none of the affidavits indicate a time or date or even a month or year when the comment was allegedly made by Counselor Smith.

The Arbitrator further notes that while Counselor Gunter stated that he heard the comment, Yvette Smith stated in her affidavit that the comment was made to her and that she did not recall anyone else being present when the comment was made to her. Both the investigator, in his report, and Warden Bechtold, in his final decision, ignored this inconsistency in the affidavits.

Similarly, the affidavit of Thomas Nowicki contains the following:

> I do recall Counselor Smith once making a comment during Fog Watch or when we were picking up supplies "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic." During the time Smith made this comment Counselor Gunter and Chamber (sic) were present.

The affidavit of David Gunter contains the following:

> I recall Smith making the following statement while we were picking up supplies. "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic." During the time Smith made this comment Counselor Nowicki and Chambers were present.

The quoted language in each affidavit is exactly the same, down to the poor grammar and punctuation. Contrary to Warden Bechtold's observation, the witnesses did not say the same thing in their own words. It is abundantly clear to the Arbitrator that either the words used in both affidavits were provided by the investigator or the words were used by one of the affiants and repeated for the second. The two affidavits are inconsistent as to where the witnesses allegedly heard Counselor Smith make the comment. The Nowicki affidavit says the comment was made either on Fog Watch or when they were picking up supplies. The Gunter affidavit says

it was while they were picking up supplies. Neither affidavit provides a time, a date or even a month or a year when the comment was allegedly made.

Although both the Nowicki and Chambers affidavits state that Counselor Chambers was present when the comment was made by Counselor Smith, Chambers, in his affidavit, denied being present:

> I do not recall being with other Counselors when Smith allegedly Made the comment "I got something for that cunt, when I get done fucking her she is not going to be a lesbian anymore I am not going to use a prophylactic."

Although it almost appears from the wording of this statement that Chambers is saying that he heard the comment but was not with other counselors when he heard it, the Arbitrator concludes that the investigator provided Chambers with the quoted comment and asked Chambers whether he had heard Counselor Smith make the comment in the presence of the other counselors (Nowicki and Gunter). Chambers' statement denies having heard Counselor Smith make the comment in the presence of the other counselors. Thus, there is an inconsistency between the affidavits Nowicki and Gunter on the one hand and Chambers on the other.

Neither the investigator in his report nor Warden Bechtold in his final decision discuss or attempt to explain these inconsistencies. In fact, Warden Bechtold, in his testimony, criticized Counselor Smith for attempting to challenge the credibility of the witnesses in his written response to the charges.

Conclusion

The initial question as to whether the Agency has sustained its burden of proving by a preponderance of credible evidence in the record that Counselor Smith made the comments alleged in Specifications A and B of the proposal letter (notice of discipline) in or around November 2011 must be answered in the negative for the following reasons:

1. There is not a shred of evidence in the record, either in the affidavits of the witnesses received in lieu of testimony or in the testimony, to prove that the comments, if made, were made "in or around November 2011." In fact, the affidavits of Yvette Smith, Thomas Nowicki and David Gunter, as well as the testimony of Yvette Smith, the only witnesses who claimed to have heard Counselor Smith make one or both of the comments specified in the charges, failed to provide a date or even month when the comments were allegedly made. Thus, it is impossible to

conclude that even if the comments were made, there is evidence in the record that they were made "in or about November 2011," as alleged.

2. The inconsistencies in the affidavits and testimony of the witnesses as well as their failure to report the comments allegedly made by Counselor Smith as required by the Standards of Employee Conduct cast doubt on the credibility of the statements of the witnesses who claimed to have heard Counselor Smith make the comments alleged in the proposal letter, to wit:

a. Yvette Smith stated in her December 28, 2011affidavit that the comment she heard Counselor Smith make about Ms. Padgett alleged in Specification A was said to her and she did not recall anyone else being present when the comment was made, while in her testimony on April 10, 2013, she stated that the comment was made in front of group of people who she could not name.

b. Thomas Nowicki stated in his affidavit that he heard Counselor Smith make the comment alleged in Specification A; however; Yvette Smith said in her affidavit that the comment was made to her with no one else present.

c. Counselor Nowicki said in his affidavit that he heard Counselor Smith make the statement alleged in Specification B during Fog Watch, while Counselor Gunter said he heard Counselor Smith make the comment either during Fog Watch or while they were picking up supplies.

d. Counselors Nowicki and Gunter both stated in their affidavits that Counselor Chambers was present when Counselor Smith made the comment alleged in Specification B; however Counselor Chambers said in his affidavit that he did not recall being present when the alleged comment was made.

The question as to whether the allegations against Counselor Smith received a full and fair investigation must also be answered in the negative. None of the three witnesses who claimed in their affidavits provided a date or time or even a month or year when the alleged comments were made and Supervisor Anthony made no effort to ascertain dates and times when the comments were allegedly made. The failure to ascertain dates and times when the comments were allegedly made by Counselor Smith is fatal to the investigative process. The failure to advise Counselor Smith of the dates and times when he allegedly made the comments deprived him the opportunity to prepare an effective defense. In addition, during the course of the investigation, Supervisor Anthony provided the comments allegedly made by Counselor Smith

as stated in Ms. Padgett's memorandum to Warden Berct6old and asked the witnesses whether they had heard them, rather than ask the witnesses whether they had heard Counselor Smith make unprofessional comments about Ms. Padgett and if so, to describe what they heard in their own words. Furthermore, in his investigative report, Supervisor Anthony failed to address the inconsistencies in the witness affidavits and merely concluded that affidavits provided graphic details of the comments made by Counselor Smith and thus constituted sufficient evidence to sustain the charges.

Warden Bechtold's reliance on the largely incredible evidence and his failure to consider the inconsistencies in the testimony and affidavits of the three witnesses who stated that they heard the Counselor Smith make the comments contained in the specifications is not justified.

For the foregoing reasons, the Arbitrator concludes that the Agency has failed to sustain its burden of proving by a preponderance of credible evidence in the record that Counselor Smith made the comments contained in the specifications of the proposal letter in or around November, 2011.

Had the Agency proven by a preponderance of credible evidence on the record that Counselor Smith made the comments contained in the specifications, the Arbitrator would have reduced the penalty to a one-day suspension. As discussed at length infra, based on the failure of the table of like charges relied upon by Warden Bechtold to specify the nature of the charges and the mitigating factors involved in the list of penalties imposed for Unprofessional Conduct, the Arbitrator concludes that the table of like charges does not support the Agency's claim that the four day suspension imposed on Counselor Smith was appropriate because it fell within the range of penalties contained in the table. The fact is that the comments allegedly made by Counselor Smith are far less serious or egregious than most of the forms of Unprofessional Conduct proscribed by the Standards of Employee Conduct. Accordingly, Warden Bechtold's conclusion that Counselor Smith's conduct, if proven, was "egregious" is, in the opinion of the Arbitrator, arbitrary.

Yvette Smith testified that from what she observed the comments made by Counselor Smith were figurative, not literal, and stemmed from friction resulting from a homophobic bias demonstrated by Counselor toward Ms. Padgett. There is also some evidence in the record of issues involving favoritism on the part of Ms. Padgett to other employees, Ms. Padgett's denial of Counselor Smith's request for certain holidays and Ms. Padgett having notified Counselor

Smith of a new assignment to which he objected. In addition to these issues, which would be considered as aggravating and mitigating factors, the Arbitrator would consider Counselor Smith's 23 years of service and his unblemished work record in assessing an appropriate penalty. The Agency argues that whether the comments were literal or figurative, the language used is nevertheless violative of the Standards of Employee Conduct. The Arbitrator agrees with the Agency's argument in this regard. Use of the language which Counselor Smith allegedly used regarding Ms. Padgett is unacceptable behavior, clearly proscribed by the Standards of Employee Conduct. If proven by a preponderance of credible evidence in the record, a penalty would be appropriate. However, the appropriateness of penalty will vary in proportion to the context in which unprofessional language is used. Clearly, unprofessional language which is used in a figurative sense is less offensive than if the language conveys a literal intent.

Accordingly, in view of the foregoing, the Arbitrator concludes that disciplinary action taken against Counselor Smith was not for just and sufficient cause. Therefore, the grievance is sustained, the four day suspension is vacated and the Agency shall pay Counselor Smith back pay and benefits for the period of the four-day suspension, together with interest pursuant to 5 U.S.C. § 5596 (b) (2). In addition, the Agency shall expunge all references to the disciplinary action from Counselor Smith's personnel file.

By reason of the foregoing, the Arbitrator renders the following

AWARD

1. The grievance is sustained.

2. The disciplinary action taken against Kevin Smith in the form of a four-day suspension without pay was not for just and sufficient cause.

2. The four day suspension imposed upon Kevin Smith by the Agency is vacated.

3. The Agency shall forthwith pay to Kevin Smith the salary and benefits he would have earned for the period of his four day suspension, together with interest pursuant to 5 U.S.C. § 5596 (b)(2).

4. The Arbitrator shall retain jurisdiction for the purpose of resolving any issues which may arise with respect to implementation of this award.

Dated: June 13, 1013
Clayton, North Carolina

Barton W. Bloom, Arbitrator