FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of Arbitration	)	
	)	
Between	)	
	)	
The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correction Institution - Miami, Florida	)	
	)	FMCS 08-00539
and	)	Suspension Grievance of
	)	Jason Leichtman
American Federation of Government Employees, AFL-CIO, Local No. 3690	)	

Before: Robert B. Hoffman, Arbitrator

Appearances:
For the Agency: Gail L. Elkins, Esq.
For the Union : Lilliam E. Mendoza, Esq.

Place of Hearing: Miami , Florida
Dates of Hearing: May 14; June 24, 2009
Briefs Received/Hearing Closed: August 31, 2009
Date of Award: October 16, 2009

DECISION AND AWARD

A. Introduction

The U.S. Department of Justice, Federal Bureau of Prisons, Federal Correction Institution - Miami , Florida ("the Agency)" suspended Correctional Officer Jason Leichtman ("the grievant"). The Warden proposed a seven day suspension based on three investigations involving three separate charges: "off-duty misconduct" in violation of the Standards of Employee Conduct, when he was issued three traffic citations each over $150; "failure to timely report" the three traffic citations; "unprofessional conduct" concerning an incident with inmates. After considering the responses from the American Federation of Government Employees, AFL-CIO,

Local No. 3690 ("the Union") on behalf of he grievant that the Agency had consumed between 237 and 300 days to propose discipline, that this lengthy process violated the timeliness provision of the CBA as well as the Agency's guidelines, and a subsequent Agency directive deleting the reporting requirements in the Standards of Employee Conduct for traffic citations over $150.00, the Warden's decision letter changed the discipline to a three day suspension. He "dropped" the charge relating to "off duty misconduct" – the three traffic citations relying on the new directive; he supported the three day suspension with findings of "charges of failure to timely report [the traffic citations] and unprofessional conduct." At issue is whether there is just and sufficient cause under the parties' Master Agreement for this suspension, and if not, what shall be the remedy?

B. Facts

The grievant received three traffic citations in early 2007 -- January 9, 2007 - $223.50 (speeding); April 4, 2007 - $198.50 (running a red light); April 11, 2007 - (speeding). The Standard of Employee Conduct, Program Statement 3420.09, Section 11, requires employees to "immediately" report any traffic citation over $150.00. He learned from his Union President that he did not have to report fines over $250. He did not yet have the April 11 fine; he was awaiting a court appearance on June 8, 2007. The grievant then learned in court on June 8 that he was fined $385. The following day he reported this April 11 citation and the fine amount to the assistant Warden, who then advised him to inform SIS Lieutenant Vaughan. He did so and Vaughn asked about other citations. When told that he had to report citations over $150 the grievant then reported the other two citations.

On August 10, 2007 the grievant received a document "Warning and Assurance to Employee Required to Provide Information." In it he was advised that an official inquiry was

being made about "traffic citations and any other staff misconduct that may arise as a result of this investigation." Previously, according to Agency records, an investigation into citations began on June 18, 2007 when Vaughn received approval to conduct the investigation of "traffic citations." On August 17, 2007 the grievant wrote a memo to "all concerned" that he had citations on January 9 and April 4, 2007 in excess of $150. He did not refer again to the April 11 citation, the one where he had already informed the assistant Warden and Vaughn on June 9. Sometime in October 2007 Vaughn requested receipts for the two earlier citations, which the grievant supplied several days later. Only the April 11 citation was investigated as an off-duty misconduct violation in the investigation that began on June 18. And after being sent to the Office of Internal Affairs for review of the local investigation, it was sustained on September 24, 2007. No personnel action, i.e., proposed discipline and notice to the grievant, was taken until June 5, 2008.

Allegations of unprofessional conduct were made and another investigation ensued starting on August 15, 2007. Two of the three allegations involving separate incidents were not sustained, and the third involving a incident on October 5, 2007 (i.e., profanity in front of inmates) was sustained. All three were combined for an investigation under the category of unprofessional conduct. That investigation ended Nov. 19, 2007 and was finally sent to OIS on March 17, 2008 where it was sustained on April 7, 2008. No personnel action, i.e., proposed discipline and notice to the grievant, was taken until June 5, 2008, when it was combined with the sustained allegation regarding misconduct for the April 11, 2007 citation.

Finally, the Agency conducted a third investigation of the grievant involving the failure to timely report the January 9 and April 4 traffic citations as off-duty misconduct. This investigation began shortly after the grievant for the second time disclosed the two prior

citations, this time in an August 17 memo. On August 20 this investigation was routed to OIA for approval and was finally sustained on December 5, 2009. No personnel action, i.e., proposed discipline and notice to the grievant, was taken until June 5, 2008 when it, too, was combined with the above two sustained allegations.

Lieutenant Vaughn testified about the investigative process:

> Ordinarily an inmate or a staff member will make an allegation against a staff member. They do so ordinarily in writing or they can do it verbally. The Warden usually requests something in writing, and once he does the Warden makes a determination whether it's a performance issue or is it a conduct issue. Once he determines it's a conduct issue the Warden then forwards a memorandum to me and I prepare a referral for OIA. Once I prepare the referral I give the referral back to the Warden for his signature and review. Once the Warden reviews the referral and reviews the documentation that's submitted by the reporting staff member or inmate, once he reviews them and concurs that both information is in the referral he then signs off and I scan it or fax it to OIA.
> OIA then reviews the referral that I submitted and make sure that the allegation fits the complaint that was issued by the staff member or inmate. Once they do that they assign it a number and they send it either back to us for a local investigation, or if it's Cat One or a Category Two it gets sent to OIG and then back to OIA if OIG doesn't want to accept the case. Once it goes back to OIA, OIA at times sends it to the institution for a local investigation. . . .
> Classification Ones and Twos are usually combined together. Those are the ones that they could go for criminal prosecution, and that's why it has to go to the Office of Inspector General. The category threes usually go to OIA -- they always go to OIA -- and OIA sends those back for local investigations . . . . Once they send back an approval -- the approval is sent to myself and the CEO -- once the approval comes back immediately I take that whole case file and I send it to Human Resources.

Vaughn also testified that his investigations of category 3 allegations, which are less serious than one or two, do not involve the lengthy delays that can sometimes infringe on those investigations, such as FBI and OIG investigations that concern possible criminal conduct. None of that was involved here. This category 3 investigation involving the grievant was done locally. For his investigations concerning the traffic citations he took affidavits from Union President Soto and the grievant. He did not interview the assistant Warden or the Warden. He asked the grievant for receipts and by October 11, about a week after his request, the grievant supplied both copies and certified copies.

As to the unprofessional conduct charge relating to an incident on October 5, 2007 and his using profanity to an inmate, Lt. Vaughn took statements from another officer, which is in evidence. He may have interviewed two inmates. (Two other charges were not sustained and

Vaughn did not specifically disclose in his testimony how much investigation was involved.) The investigation part that he performed was completed in November 2007. Vaughn related that if he is involved in helping the FBI and or OIG in category 1 and 2 investigations his time is diverted from category 3 investigations. At times he receives help from others. He did not specify in his testimony whether he had conflicts in this grievant's investigation that prevented him from completing the investigations sooner.

Warden Pastrana testified about the length of time to investigate as follows.

> Yeah, we always -- on all the cases -- try to do them as soon as possible. . . . we got the time frame that is given -- no formal, you know -- that we need to do them within a real reasonable amount of time. And with the memos that came down to try to do them within a hundred and twenty days --

The Warden's reference concerned a memo from Assistant Director Kenny to all CEOs about 120 days as a length of time to investigate; she referred to this time limit as a guideline rather than any instruction or directive that would be formalized. The Kenny memo states in part:

> Time Guidelines: For Classification 1 and 2 allegations, local investigations should be completed and the investigative package forwarded to the OIA within 120 calendar days of the date a local investigation was authorized by OIA. . . . For classification 3 allegations . . . local investigations should be completed and the investigative packet forwarded to the OIA prior to any disciplinary action being taken and within 120 calendar days of the date a local investigation was authorized by the CEO.

On June 4, 2008, the Warden issued his proposed suspension of seven days. The grievant received it on June 5, 2008. Warden Pastrana relied on three charges. First , off-duty misconduct involving the three traffic citations He cited Program Statement 3420.09, the Standards of Employee Conduct, and the expectation that employees "shall obey not only the letter of the law, but also the spirit of the law . . . ". The Warden concluded that the grievant's conduct in speeding reflected negatively on the Agency. Secondly, he found that the grievant failed to timely report all three citations and waited until August 17 to report them in writing to the Warden. Program Statement 3420.09 provides that an employee who is arrested must "immediately" report such arrest in a written report to the CEO[1] and his "failure to timely

report calls into question your ability to follow the rules and regulations set forth by the Agency." Thirdly, the grievant engaged in unprofessional conduct on October 5, 2007 when insulin patients entered the back door to Food Service to eat first, the grievant stated "I do not give a fuck, go to the back of the line." The grievant's conduct was unprofessional, the Warden concluded; it violated the abusive and profanity prohibitions in the Standards of Employee Conduct.

On July 2, 2008, the grievant and his Union representative met with Warden Pastrana to respond to his proposed disciplinary action. The grievant did not dispute the merits of the charges. He instead maintained that the discipline was now untimely. In his written reply of July 1, 2008 he stated that the off-duty misconduct charge involved some 300 days from its inception of the investigation on August 10, 2007 [not the actual start on June 18, but the date the grievant received notice] to June 5 when the grievant received the proposed discipline. And the failure to timely report charge involved some 293 days from August 17, 2007 to June 5, 2008. The unprofessional conduct charge, from the date of the grievant's interview on October 12, 2007 to June 5, 2008 covered 237 days.

The Union contended that these long delays were governed by Articles in the Master Agreement concerning precedence over Agency policy not derived from higher-government wide laws; the contractual concept of "timely dispositions of investigations and disciplinary/adverse actions;" Director Lappin's recommendation spurred by an OIG report that the length of an investigation be no longer than 120 days [Assistant Kenney's memo to all CEOs confirming Director Lappin's 120 day limitation.] "Given these factors," the Union wrote, "a deciding official imposing discipline at this time would not be correcting or improving employee

behavior. The discipline would be tantamount to punishing the employee, which the parties mutually agreed that is not for such purpose." The Union cited one federal agency case.

Then two and one-half months later, on September 12, 2008, Ms. Kenney and Associate Director LeBlanc, issued a Memorandum eliminating the reporting requirement for traffic citations over $150.00 effective as of that date. Over a month later, on October 23, 2008, the grievant received the Warden's decision letter dated October 20, 2008. Warden Pastrana first stated that "[i]n accordance with the memorandum dated September 12, 2008 from [Kenney and LeBlanc] titled Traffic Citations, the charge of off-duty misconduct is dropped." He found that the charges relating to timely report these traffic violations as well as the unprofessional conduct were "fully supported" by evidence. He noted that the grievant failed to address the merits of the charges, did not acknowledge the seriousness of his behavior and did not show any remorse that he learned from this experience. He concluded that a three day suspension "should have the desired corrective effect." On November 10, 2008, the Union invoked arbitration under Article 31. h.

C. Discussion and Decision

At issue is whether there is just and sufficient cause for suspending this grievant and if not, what shall be the appropriate remedy. There is no issue on the merits. They were not contested either in the grievance procedure or at this hearing. And the Union 's brief makes no reference to them. The Union maintains that the long delays in investigating and finally imposing discipline sufficiently violate Article 30.d of the CBA, and, as such, allow the arbitrator to sustain the grievance on that basis alone. Article 6.b.2 speaks to employees being "treated fairly and equitably in all aspects of personnel management." And in b.6 of the same Article their right "[t]o have all provisions of the Collective Bargaining Agreement adhered to." In this regard, it

cites FLRA rulings holding that arbitrators may order disciplinary actions rescinded for delays in imposing the discipline (see infra). Further, it contends that the grievant was actually disciplined twice for the traffic citation charges when shortly after receiving his affidavit in August 2007 about the citations, the Agency revoked his Agency driving privileges and thus denied him overtime for over one year. The Union concludes that this double incidence of discipline violated the labor relations principle inherent in due process that protects employees from double jeopardy, citing a decision of this arbitrator (also see infra at note 7).

The Agency argues that the time frames needed to investigate and impose discipline violated neither the CBA nor the Union 's reliance on the Kenney 2006 memo. The latter memo refers to a maximum 120 day investigation, which it accomplished in two of the investigations that were under 120 days; in a third investigation multiple allegations involving different incidents were investigated requiring more time. The Agency maintains, however, that this memo is simply a "guideline," which fails to use any mandatory language such as "shall," but instead advises CEOs that the investigation "should" be completed in that time frame. Nor is there any legal basis to construe this memo as a rule or regulation adopted by the Justice Department. Nor is there any contractual basis for imposing an exact number of days for completing an investigation. The Agency suggests that Article 30.d when read in its entirety recognizes that the concept of "timely disposition" is conditioned by the phrase: ". . . the circumstances and complexities of individual cases will vary. . . . " Inasmuch as there is no set time for investigations, either by contract or otherwise, the Agency contends it is only bound by the "reasonable" language in Article 30.d.

It is noteworthy that the parties have endorsed the notion of timely disposition of investigations and imposing discipline by including this principle in their CBA. Article 30

contains the basis for their adopting the well-accepted principle that the due process inherent in just cause and for public employees includes the right to timely disposition of discipline. They agreed to the following in relevant part:

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

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

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

And to be clear about the meaning behind the principle the parties embedded in their CBA that "timely disposition" is critical, the notion of due process, which public employees derive from both the Constitution and developed principles of labor relations due process,[2] includes a variety of protections meant to assure that the investigatory and disciplinary process is fair and reasonable. Labor arbitrators widely agree that there are a number of elements that make up due process, such as (1) notice to the accused of the specific accusations; (2) an opportunity for the accused to respond to the accusations before determination of discipline; (3) a fair investigation; (4) no double jeopardy; (5) consistent and non-discriminatory penalties; and (6) *timely employer action.* See *Discipline and Discharge in Arbitration,* ABA Labor and Employment Law Section (BNA, 1998), p. 37; Elkouri & Elkouri, at 918-921.

In *Levy County, Florida*, 109 LA 1184 (1998) this arbitrator recognized the principle of timely employer discipline in defining just cause. He wrote:

Just cause is not defined in this contract, nor is it in most contracts. However, arbitrators generally agree that the decision to discharge must be reasonable, fair and objective. A determined effort must be made by management before making its decision to be certain that the basis for the discharge is supported by sufficient evidence. So, too,

just cause involves certain procedural protections to assure that the employee, if he is to lose his job or be disciplined, be treated fairly by management in making the decision and *thereafter imposing the discipline.* Factors such as forewarning, especially if the conduct does not require immediate action, a fair-sided investigation, affording the employee a chance to explain, and *promptness in imposing discipline, are some of the factors inherent in cause that are just.* [Emphasis added]

A report given at the ABA 's Annual CLE Conference from the Section of Labor and Employment law concluded much the same – a delay in imposing discipline is clearly a due process violation:

When an employer becomes aware of alleged misconduct, due process requires the employer to investigate and take action within a reasonable time. See *Discipline and Discharge in Arbitration* (BNA, 1998), pp. 37-39; *Discipline and Discharge in Arbitration*, 2001 Supplement (BNA, 2001), p. 5. Delay in notifying an employee of pending charges may impair the employee's opportunity to mount a defense, as memories fade and witnesses become unavailable. Id. Delay in imposing discipline, except where excused, may also be considered a due process violation. An employee who was discharged for sexual harassment was reinstated and his discipline reduced to one-week suspension where the proven misconduct either preceded the discharge by over a year or occurred at an undetermined time. [*Analysis of Investigative Evidence, Communication and Implementation: Due Process Rights in Investigations.* Section of Labor and Employment. AAA CLE Conference, Nov. 8, 2007)

In its report the Labor and Employment Section relied on arbitrator Franckiewicz' reasoning in *Mead Corp.*, 113 LA 1169, 1182-1184 (2000):

Discipline based on stale offenses is disfavored for a number of reasons. As time passes, memories fade, witnesses depart, and records are discarded. The reliability of the evidence diminishes as the interval from the alleged misconduct increases. Likewise, it becomes more difficult for the accused employee to recall or reconstruct events and to marshal evidence in his own behalf as the underlying event becomes more remote in time. Finally, the gap between the occurrence and the discipline not only represents an additional investment of the employee's finite years of work life into the enterprise, but also counters any inference that the individual is an unacceptable employee, at least where (as here) no other discipline has been issued in the interim. For these reasons, the strength of the case for discharging an employee decreases as the length of time since the misconduct involved increases.

This arbitrator is bound to decide this case in accordance with the parties' intent as found in Article 30.d. There the parties specifically agreed that they "endorse" the "concept" discussed above, that promptness in deciding discipline must occur. They called it the "timely disposition of investigations and disciplinary/adverse actions." And what constitutes "timely" will depend on "the circumstances and complexities of individual cases," which they note "will vary." Moreover, they contractually recognize in Article 30.a that when discipline is imposed it is based on "just and sufficient cause," which as seen encompasses those due process principles of promptness in investigating and imposing discipline or doing so in a "timely" manner per 30.d.

Moreover, the Master Agreement signifies why promptness or timeliness is significant to the parties, for in 30.c they agree that when employees are disciplined progressively, the intent is "to correct and improve employee behavior," as opposed to severe misconduct that can lead immediately to termination, or in some instances result in prolonged investigations involving possible criminal conduct and the intervention of other Agencies.[3] Discipline then is what these parties use to help the employee overcome any conduct or performance deficiency, for in so doing both the employee and the Agency benefit.

Noteworthy, too, is that support for avoiding delays in imposing discipline and the rescinding of discipline of such long delays comes directly from the FLRA. In a number of cases it has ruled that arbitrators may order disciplinary actions rescinded for delays in imposing the discipline and without any showing that substantial harm occurred. For example in *Immigration and Naturalization Service and AFGE Local 505*, 22 FLRA 643 (1986), the Authority upheld the Arbitrator's award to rescind the discipline as follows:

> Consistent with *Northeastern Program Service Center*, we conclude in this case that the Arbitrator was not required by law to find that the unwarranted delay in proposing disciplinary action constituted harmful error within the meaning of section 7701(c). . . [a]s stated by the Arbitrator, this case involves review of final disciplinary action to determine whether the Agency's eight-month delay in imposing discipline resulted in an action which was arbitrary, capricious, and unreasonable and which did not promote the efficiency of the service.

Also see *U.S. Customs Service and NTEU*, 22 FLRA 68 (1986), where a delay of several months in imposing the discipline was a contract violation and the harmful error standard did not need to be applied to procedural errors for minor discipline.

And other arbitrators in the public sector using this same due process principle of promptness in imposing discipline, whether inherent in just cause or contractually stated as here, or both, find that long delays in imposing discipline violate due process and provide a sufficient basis to rescind the discipline. The notion, whether stated contractually (as here) or inferred from just cause that rehabilitation is the objective in disciplining employees, as opposed to

outright termination, is undone by long delays. The impact of the operative event losses its thrust as a corrective measure. The notion that one year later a three day disciplinary action will somehow correct behavior that occurred in the distant past makes little sense. Arbitrator Donoghue in AFGE, Local 1917 and INS, 106 LRP 44664:

> Another matter of serious concern is the delay in processing this matter. Between four and six months have elapsed between the incidents and the commencement of discipline--a lapse of time that raises the serious issue of the sincerity of Management. Generally, there are no precise guidelines as to what timeliness means in employee disciplinary matters. However, a wait of between four and six months certainly is unduly long.

What happened here? There are any number of delays throughout this process – a process that included a bundling of allegations that had no relationship to each other, such as the traffic citations along with the unprofessional conduct. To discipline an employee based on an accumulation of unrelated incidents spread out months apart can be interpreted as an effort to impose the greatest amount of discipline on an employee by somehow making the allegations look more serious.[4] And while that option can also constitute unfairness and create some due process concerns, it is not considered here as to whether it is a due process violation; the thrust of this decision is on the untimeliness of the discipline.

The entire process, from the start of all three investigations (June, August and October 2007) to decision letter by the Warden (October 2008) took over one year. That fact alone suggests that the "timely disposition of investigations and disciplinary/adverse actions," the standard from Article 30.d, was at the least a prima facie violation by the Agency. A reasonable standard for investigating and issuing discipline in category 3 cases, as here, cases that are straightforward, can by no reasonable standard in judging timeliness amount to over a year until a grievant is notified of discipline. That period can hardly be what the parties intended by agreeing to the word "timely" in Article 30.d. The common legal definition of "timely" is clear-cut – "falling within a prescribed or reasonable time." *Merriam-Webster's Dictionary of Law*

(2001). By no stretch of the imagination is over one year "reasonable time" for the simple factual matters involved here.

However, this simplicity and the passage of one year or more does not preclude the Agency from asserting that there were "circumstances and complexities" causing the one year plus delay. And that preclusion is the burden of the Agency once it is shown that a prima facie unreasonable period existed, as here. What the Agency did show for its investigation is the following from its investigative packet in evidence:

a) *for the traffic citation violations* involving both the timeliness of disclosure of the citations to the Agency by the grievant and that the citations themselves amounted to improper conduct:

-Affidavit of grievant 8/10/07 – 1.5 pages – taken by Agency;
-Affidavit of grievant 10/12/07 – 1.5 pages – taken by Agency
-Affidavit of Union President Soto 10/12/07 – 1.5 pages -- taken by Agency
-Documents received by Agency from grievant – memo from grievant, nine lines, ¼ page 8/17/07; copies of citations and court order for April 11 citation (3 pages).

No statements were taken from the assistant Warden or Lt. Vaughn regarding the grievant's disclosure to them of all three citations on June 9, 2007. No explanation was given as to why the investigation for all three citations could not have started on June 18, when only the April 11 citation was investigated, despite the fact that the documentation for approving the investigation referred to "citations." Records from the Agency show its completion at the end of September even though Vaughn asked for documentation, which he received from the grievant by mid-October 2007. No factual investigation occurred after that time. Given that the Agency only had 4.5 pages of affidavits for the two witnesses and 3 ¼ pages of documents supplied to them, it is inconceivable that the matter could not have been completed in less than 30 days instead of the over one year it took to come to a decision (October 20, 2008).

b) *for the unprofessional conduct investigations* regarding incidents on 8/13/07, 10/5/07 and "after 10/15/07" ending on 11/19:

-affidavit of officer Otero 11/1/07 – 2 pages.

No other documentation is in evidence to demonstrate what more, if anything, the Agency did to investigate these charges. In regard to the 10/5 investigation, the only one sustained, there is some reference to two inmates who were witnesses. Their statements, if any, are not in the investigative packet in this record. If statements were taken, they could not have been any longer than the two pages needed for Officer Otero. At best then the 10/5 investigation consumed six pages of statements. That investigation was completed in November or December 2007. And as seen, there is neither testimony nor documentation to show what, if anything, the Agency did to investigate the other two charges. That they were not sustained could suggest that nothing was done. But that, too, is speculation just as it is conjecture to try and determine how much work was involved in these two matters without the benefit of the documentation and testimony. The burden rested with the Agency to show "circumstances" or "complexities" that would make a one year or more wait reasonable. It has not done so. And even if had evidence showing that more time was needed for these other two investigations, and thus some reasonable circumstances existed during the fact gathering process, there is no explanation why the Warden then needed some seven more months to decide discipline.

The arbitrator recognizes and well appreciates that Lt. Vaughn had other duties to perform and that even though these cases were simple, he may have been stalled by other duties. But he failed to testify what duties somehow made it necessary to add many more months than set forth in the guideline to investigate the unprofessional conduct charges. And the same holds for the Warden. He is the CEO of this facility and by the very nature of this position has vast responsibilities. Although he has no guideline, he is still bound by 8.d's "timely" direction. But again, he did not explain why it took him many months to first issue proposed discipline and then even more months to issue his decision letter in this uncomplicated matter.

More specifically, an analysis and breakdown of the time frames occurring throughout this process, from start to finish, visibly demonstrate these long delays occurring at various junctures.

1. Start of Investigations to Warden's Decision Letter (October 20, 2008) – 12 to 17 months

a. Citation Investigation (off-duty misconduct). Started June 18, 2007 – 489 days (16.3 months or one year and five months)
b. Citation Investigation (failure to timely report citations). Stated August 17, 2007 – 429 days (14 months or one year and one month)
c) Unprofessional Conduct Investigation. Started October 5, 2007 – 380 days (12.5 months or one year).

2. Start of Investigation to Proposed Discipline Notice to Grievant (June 5, 2008) – eight to ten months:

a) Citation Investigation (off-duty misconduct). Started June 18, 2007 – 353 days or 11 months.
b) Citation Investigation (failure to timely report citations). Stated August 17, 2007 – 293 days or 9.7 months
c) Unprofessional Conduct Investigation. Started October 5, 2007 – 244 days or 8.1 months.

3. Start of Investigation to "Pending Personnel Action"[5] -- three to six months

a) Citation Investigation (off-duty misconduct). June 18, 2007 – September 24, 2007 (98 days or 3.2 months)
b) Citation Investigation (failure to timely report citations). August 20, 2007 – December 5, 2007 (107 days or 3.5 months)
c) Unprofessional Conduct Investigation. October 5, 2007 – April 7, 2008 – (175 days or 5.8 months).

4. End of Investigation to Proposed Discipline – two to eight months

a) Citation Investigation (off-duty misconduct). September 24, 2007 – June 5, 2008 (255 days or 8.5 months)
b) Citation Investigation (failure to timely report citations). December 5, 2007 – June 5, 2007 (183 days or six months)
c) Unprofessional Conduct Investigation. April 7, 2008 - June 5, 2008 (59 days or two months)

5. Union Meeting with Warden re Proposed Discipline to Decision Letter (July 2, 2008 to October 20, 2008) – 110 days or 3.6 months

6. Proposed Discipline letter (June 5, 2008) to Decision letter October 20, 2008 – 137 days or 4.5 months

None of these time frames suggest a "timely disposition of investigations and disciplinary/adverse actions." The unprofessional conduct factual investigation took 175 days to complete, well over the guideline set forth in the Kenney memo to all CEOs. Again, Lt. Vaughn provided no "circumstances" to explain why it took so long, other than referencing the two other

allegations that were made part of this Oct. 5 incident but were found unsustained. At no time did Vaughn suggest that the other investigations caused an almost two month delay beyond the guideline or that any other circumstance caused this delay.[6]

And as seen the entire "investigatory/disciplinary" process, as it is called in 30.d, is not completed until "reviewed by the Chief Executive Officer or designee" as per Article 30.d.1. And that review period here not only unduly extended the entire lengthy investigation process, but on its own was an untimely disposition of the disciplinary action required by Article 30.d. It took the Warden some eight and one-half months to decide proposed discipline for the traffic citation in the first investigation, over six months for the second investigation regarding the citations, and then two months before he decided the proposed discipline for the conduct charge. And then once he made that proposed decision, it was another long stretch that can hardly be deemed "timely," when he took some four and one-half months from his proposed discipline to his decision letter. And even after the Union meeting, he waited some three and one-half months to issue his final decision on discipline. In all it was a process from beginning to end that exposed the grievant to a wait of over a year and one-half.[7]

In somewhat similar circumstances in *Federal Bureau of Prisons and American Federation of Government Employees, Local 2052,* 107 LRP 50311 (Foster 2003), it took one year from the start of the investigation until the proposed discipline issued. Construing this same Master Agreement that Arbitrator also found that there was no explanation for the one year process. He wrote: "There was nothing cumbersome or complicated" involved. He found that this one year delay harmed the grievant.

Nor is there any reasonable explanation here why on one hand the Warden chose to drop the traffic citation charges that are off-duty misconduct, and at the same time cite the Kenney

memo of September 12, 2008 but retain the failure to timely report charges. That memo deals with eliminating the reporting requirement for citations over $150.00. It is true that the memo states that it is effective immediately and makes no reference to retroactive elimination. Nonetheless that is the citation the Warden used for dropping the off-duty misconduct charges – the very charges that can only occur if there are traffic citations reported. That being the case, it is unclear and confusing why the remaining failure to timely report charges were not dropped. If the conduct involved by the traffic citations is not off-duty misconduct by dropping them (without any explanation), then why should there be any duty to report them? Moreover, his statement in the proposed discipline letter that all three were not reported until August 17 is erroneous. The April 11 citation was reported immediately to the assistant Warden after the grievant learned of the fine from his court appearance in June 8, 2007. There was no indication on the citation of the amount owed. It would take a court order to determine that amount.

In all the traffic charges for failing to report and the disposition of discipline for them are severely untimely and violate the Master Agreement's Article 30.d. And as seen the erroneous reliance on the Kenney memo to drop traffic misconduct charges while retaining the untimely charges violates both the just and sufficient cause provisions in Article 30 and the employees rights in Article 6.b.2 and 6. As such the Article 6 and 30 violations constitute unwarranted personnel actions. By delaying this matter for well over a year the Agency kept the grievant in a state of unknown and did so without any explanation either to him, the Union or this arbitrator as to why these relatively simple matters required this lengthy process. Merely stating that several other investigations were combined with those that were untimely sustained is not a reasonable explanation and offers no guidance to the arbitrator to conclude that this should be an exception

under 30.d. Nor does a lack of explanation from the Warden as to why he needed many months more to formulate discipline help explain this need to extend out this process to well over a year.

Moreover, it is evident from this record that without these explanations the grievant's long period in the unknown is both unfair and destructive to the Article 30 disciplinary process, specifically 30.d. Clearly the parties intended for a process to be "timely," and at the same time, if discipline is imposed for it to be corrective under 30.c. By violating 30.d the effect instead is more of a punishment than correcting an employee for any wrongdoing. The result is an action that is arbitrary and unreasonable, which by its very nature then harmed the grievant. And it harmed him to the extent that he had to endure this overly long wait, while at the same time being deprived of compensation and other benefits. In light of these unwarranted personnel actions that violated the Master Agreement he is entitled to be made whole, including any lost overtime opportunities and/or other lost compensatory opportunities he suffered from these actions.[8]

Award

Based on the above and the entire record, the grievance is sustained. The Agency's personnel action against the grievant was unwarranted for the reasons found above. But for these unwarranted actions that violated the Master Agreement the grievant would have been entitled to compensation and benefits as also described above. The three day suspension is therefore rescinded, all records of this suspension shall be expunged and the grievant shall be made whole. The grievant's demand for interest and attorney's fees is denied. In light of a dispute over remedy already made known at the hearing and in the briefs, the arbitrator shall retain

jurisdiction for a period of 90 days from this award, or from any appeal found to uphold all or any portion of this award, for the sole purpose of resolving any dispute regarding the administration of the remedy.

_____ Robert B. Hoffman

[1] Rule 11 of this PS provides: ("Should an employee be charged with, arrested for, or convicted of any felony or misdemeanor, that employee must immediately inform and provide a written report to the CEO. Traffic violations resulting in fines under $150 shall be exempt from the reporting requirements." Another reporting provision in this PS (Rule 8i) states: "Immediately report to their CEOs, or other appropriate authorities, such as the Office of Internal Affairs or the Inspector General's Office, any violation or apparent violation of these standards."

[2] See *Cleveland Board of Education v. Loudermill,* 105 S.Ct. 1487, 1491 (1985). Elkouri & Elkouri, *How Arbitration Works* (BNA, 6th ed. 2003), pp. 1255-1269)

[3] Indefinite suspensions, which are set forth in the CBA by reference to the federal code, may involve such situations, and unlike more everyday or simple matters of discipline can contractually and legally prolong the investigation and discipline or discharge, as seen for example in a case decided by this arbitrator. *Federal Bureau of Prisons, FCC Coleman , Fla. and American Federation of Government Employees, Local 506,* 107 LRP 4507 (2005).

[4] The Agency maintains that the discipline is usually less. It also contends that this bundling was done to benefit the grievant, otherwise the process could have taken longer and resulted in varying degrees of discipline. Given that the Warden waited for all the investigations to be completed, especially the unprofessional investigations which lasted months longer, and then took months to issue proposed discipline, it is unclear and at best speculative how the grievant benefited either time wise or in the amount of discipline.

[5] "Pending Personnel Action" is the last category of the investigation in the Agency's "Weekly Status Report" of investigations.

[6] The Agency contention that this is merely a guideline and nothing else is accepted for the first part. It is a guide and not a mandate. The very wording does not make it mandatory. But it is still a guide, as the Warden confirmed in his testimony that helps define more precisely the parties' language in 30.c, at least insofar as the investigation phase is concerned. It does not define the entire process from investigation to disciplinary action.

[7] And the period should have been even longer given that the Agency knew as early as June 9, 2007 about all three of the grievant's citations. Why it waited until August to investigate the remaining two is unknown. It is clear that in Program Statement 3420.09 all employees shall "[i]mmediately report to their CEO's or other appropriate authorities, such as the Office of Internal Affairs or the Inspector's General's Office, any violation or apparent violation of these standards." The grievant's affidavit given to the assistant Warden and Lt. Vaughn on June 9 about the traffic citations placed on them the responsibility to notify the Warden immediately about the alleged violation of the grievant. In turn the Warden then had the obligation under this PS to immediately notify the OIA for the approval of the investigation. ("Notification to OIA will be made within 24 hours....of the time management learns of the matter").

[8] The evidence is unclear as to how many opportunities were lost. Foremost appears to be lost opportunities to drive as a result of some action taken in August 2007 by a Captain. The defense that the grievant was barred from driving due to an accident involving an Agency vehicle lacks any reliable evidence. Lt. Vaughn's hearsay and that of another witness does not suffice. Vaughn testified: "It was my understanding after the traffic citations had came down Mr. Leichtman was in a government vehicle on an escorted trip downtown and he backed into something and wrecked the car. And to my knowledge that's why the Captain had issued him a memorandum for him not to no longer drive government vehicles was because of the accident." The Captain did not testify because he had retired since that time and was unavailable (i.e., one of the concerns raised by arbitrators about long delays – the unavailability of witnesses. This one affected the Agency). There is no documentation concerning an accident. Finally the notion of double jeopardy raised by the Union is not decided here in light of the determinations made above that otherwise determine the outcome of this grievance.

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