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In the Matter of the Arbitration Between

FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL INSTITUTION,
Estill, South Carolina

and

FMCS Case No. 14-00928
Karen Signal
Suspension

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
Local 3976

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Before: Dennis R. Nolan, Arbitrator

Appearances:

For the Employer: Marie C. Clarke, Assistant General Counsel, Federal Bureau of Prisons, Washington, DC

For the Union: Denise Duarte Alves, Legal Rights Attorney, AFGE, Washington, DC

OPINION

I. Statement of the Case

The Union filed this Notice of Intent to file for arbitration on December 30, 2013 to challenge the Agency's suspension of the Grievant on December 2, 2013 for failure to safeguard sensitive information and failure to follow policy. The parties could not resolve the dispute in the grievance procedure, so the Union demanded arbitration. The arbitration hearing took place in Estill, SC on January 22 and March 31, 2015. Both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Both parties submitted lengthy post-hearing briefs.

II. Statement of the Facts

A. Background

This arbitration has its roots in an incident that occurred almost three years ago. The main element is an alleged violation of the institution's key control policy. As in other correctional institutions, control of keys is critical for safety and security. The key control policy at FCI Estill requires that all keys to rooms, storage areas, safes, and furniture are to be inventoried by the Lockshop. The Lockshop retains at least one copy of each key. Employees may obtain needed keys each day by exchanging chits for keys. The chits provide a clear record of the keys held by each employee. With rare exceptions, employees must return all keys at the end of their shift. They may not take keys home without authorization of the Captain. Keys that may be taken home with permission are known as 24-hour keys. Employees must keep all keys on an official key ring secured to the employee's waist for security. Employees may not use personal key rings because those may not be as secure.

The Agency trains all its employees on key security, both in their initial training and in annual refresher training. The Grievant admits that she received that training, although she suggested that it was not sufficiently detailed to cover her situation in this case.

A second issue in this case concerns the confidentiality of inmate and staff information. The Standards of Employee Conduct (Joint Exhibit 2) states that personal information to which employees have access must be kept confidential. Again, this is something all employees know or should know.

B. The September 2012 Events

At the time this case began and at the hearing dates, the Grievant, an employee of the Agency since 1987, was a vocational instructor at FCI Estill. Her responsibilities include administering, training, and testing for the National Center for Construction Education and Research (NCCER). In addition to her primary duties as a vocational instructor, she had performed collateral duties as an EEO Counselor for fourteen years. Those duties included speaking with employees who had EEO complaints, attempting to resolve those complaints, and completing reports. An incidental but important part of her duties is to protect NCCER and EEO documents. So far as the record shows, she was a fully satisfactory employee with consistently good evaluations and no active discipline.

The Grievant triggered this case on September 17, 2012 when she reported that she found normally locked drawers in an office file cabinet open. The cabinet was only about two years old at the time. She believed that the drawers may have been pried open. The cabinet was a piece of furniture in her office about which more will be said shortly. That cabinet contained confidential NCCER testing materials and staff information and confidential EEO reports. The Grievant testified that, after she reported the possible break-in, she took the files in the cabinet to the Human Resources Department for safekeeping. Her testimony was not refuted.

The Grievant's report of the open cabinet drawers led to investigations of various sorts. It is not necessary to spell out the details of those investigations of the cabinet. For the purposes of this case, it is enough to note that the Institution's investigators concluded that her cabinet had not been forced open, although it was worn and may not have been locking securely. Because the NCCER tests kept in the cabinet had been compromised, NCCER suspended FCI Estill's accreditation. That in turn led to suspension of several training courses for inmates.

When two security officers independently inspected the cabinet, they each asked her for a key; each time, she produced it from her personal key ring. Both officers informed her that the key was not registered with the Lockshop and that keeping it on her personal key ring was not authorized.

Four days later, on September 21, 2012, the Grievant sent a lengthy memo to the Bureau's Southeast Regional Director, Helen Marberry, in which she made allegations about several employees that have nothing to do with this case. Her memo reported the alleged break-in of her cabinet and described it as "a locked fireproof safe that I have the only key to."

On November 5, 2012, the Bureau's Office of Internal Affairs (OIA) referred the memorandum to FCI Estill's Acting Warden, Michael Robbins, for appropriate disposition and, if he found misconduct, referral back to OIA. That prompted a preliminary local investigation by FCI Captain Nathan Clark. He concluded on December 4 that the evidence suggested security violations by the Grievant because she admitted she had the only key to her office safe. He believed that violated Agency standards and instructions because the Lockshop was supposed to have the original key. Evidence presented later in the hearing showed that normally when lockable furniture was delivered to the institution, the Lockshop would get the keys from the person first receiving the furniture. For reasons that are not clear in this record, that normal procedure was not followed in this case. The evidence does not clearly establish who first received the cabinet at issue and was therefore responsible for making sure that the Lockshop had one of the keys.

Captain Clark's report caused the new warden, Steve Mora, to refer the matter back to OIA on February 7, 2013. OIA bounced it back on March 12, 2013 for a full local investigation. Special Investigations Lt. Timothy Geier performed that investigation. He interviewed several witnesses and obtained affidavits in April and May. During his investigation, Brenda Shell, one of the Grievant's co-workers, found confidential EEO reports out and unsecured in the Grievant's office. The Grievant provided a memorandum in response.

Lt. Geier interviewed the Grievant in the presence of her Union representative on May 30, 2013. She provided an affidavit (Joint Exhibit 4A) and later provided another (Joint Exhibit 4B) during a second interview on June 3. The May 30 affidavit addressed the key issue. She stated that the Supervisor of Education, Katheryn Mack, arranged for purchase of the safe for the Grievant's NCCER and EEO files; that the safe came with two keys; she kept one of them on her personal key ring, which she thought was acceptable, and did not know what became of the other. She also said

that three supervisors including the former warden knew that she had a key for the safe and kept it on her personal key ring.[1]

Lt. Geier submitted a report on July 3. He was directed to eliminate one charge against the Grievant and submitted his amended report (Agency Exhibit 14) on July 25, 2013, some ten months after the initial events. His final report concluded that the Grievant had breached security by failing secure the safe, that she was responsible for the confidential folders that Ms. Shell found on her bookshelf, and she had violated policy by maintaining the only key to the safe on her personal key ring. His first conclusion rests solely on his assumption that, absent proof the safe was broken into, the only other explanation for it being open and additional files being fund outside the safe was that Grievant had left the safe unlocked. His second conclusion was an assumption based on the first: if the file cabinet was unsecured, the Grievant was responsible for the fate of files contained in it. His third conclusion rests on the observations of employees who saw the Grievant's key on her own key chain and on the Grievant's admissions.

C. The Discipline

The Agency approved the report and sustained the finding of misconduct. Human Resources Manager Gillian Casstevens reviewed the materials and, after obtaining one more sworn statement, prepared the proposal letter dated August 28, 2013. The proposal and final discipline included two charges. The first, failure to safeguard sensitive information, listed two specifications, one for leaving her file cabinet unsecured and one for leaving EEO files unsecured on a bookshelf in her office. The second charge, failure to follow policy, referred to her maintaining the key to the safe on her personal key ring.

The Grievant received the Agency's permission to wait until a new warden was in place to submit her response. The meeting finally took place on November 21, 2013, almost three months after she received the proposal. She and her Union representative submitted substantial documentation rather than an oral reply. The new warden sustained the charges on December 2, 2013 but reduced the suspension from ten to seven days. The Union invoked arbitration on December 30, 2013.

D. Timeliness

As this summary indicates, the investigation and disciplinary process took an unusual amount of time. Almost every step took longer than one would expect. For example, it took seven weeks from the date of the Grievant's first report to OIA's referral for investigation. There was no explanation for that delay. It took another month for Captain Clark to conclude that there might be

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[1]The May 30 affidavit added one new item, a statement that a person she identified only by nickname and who does not work for the Bureau of Prisons told her that Brenda Shell had written in a memo that she was "going to get me now." The supposed memo was never discovered and the person making the allegation did not testify. I give this double hearsay from an unknown person no weight.

a violation of security rules and two more months for FCI Estill to refer the matter back to OIA. There was no explanation for that delay, although a new warden was coming in around that time. It took another unexplained month for OIA to send the matter back again to the Institution for a full local investigation. Lt. Geier, who performed that investigation, did not even interview the Grievant for another month and a half. It took him another month after twice interviewing her to produce his preliminary report and another three weeks to produce his final report. The Agency did not issue the proposed discipline for another month after that. There followed another three-month delay, apparently at the Grievant's request, before she and her Union representative met with the new warden to delivery written responses. Only the final step, the new warden's sustaining of the charges, was prompt.

From start to finish, it took the Agency almost fifteen months to impose the suspension involved in this arbitration. Some of the delay was due to personnel changes, some was due to the Grievant's request to delay her reply to the proposed discipline, and some was due to the normal process of investigations. Other parts, probably accounting for a substantial majority of the total time, were simply unexplained. Cumulatively, the time from initiation to completion was extraordinary even by the standards of Federal sector labor relations.

III. The Issue

Did the Agency have just and sufficient cause to suspend the Grievant? If not, what shall the remedy be?

IV. Pertinent Contractual Provisions

ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just 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.

V. The Employer's Position

The Agency begins by stating the standard of review as established in federal courts and the MSPB. Most importantly, the MSPB requires that the Agency justify an adverse action by proving that the employee committed the charged offense, that there is a nexus between the proven conduct

and the efficiency of the service, and the penalty imposed was based on the relevant circumstances and was reasonable. MSPB standards bind arbitrators, according to the Supreme Court in Cornelius v. Nutt, 105 S.Ct. 2882 (1985).

In this case the Grievant was aware of the Agency's expectations and the potential penalties for misconduct. The Standards of Employee Conduct (Joint Exhibit 2) define the range of penalties in wide bands, from a three-day suspension to removal for "release of information" and from reprimand to removal for a first offense of breach of facility security. In addition to her initial training and her annual refresher training, the Grievant received specialized training on maintaining the confidentiality of EEO documents. Her training indisputably covered key control.

She engaged in the charged misconduct. First, she failed to ensure that her safe was properly secured; contrary to her believe that the lock had been forced, it appears that she simply failed to lock her safe. As a result, EEO files were found unsecured and the Agency lost NCCER accreditation. Second, she wrongly maintained the only key to the cabinet herself, and she kept it on a personal key ring rather than the required official key ring. She knew that keys had to be checked out daily, but she nevertheless kept this one permanently.

There is sufficient nexus between her misconduct and her law enforcement position to warrant discipline. As a law enforcement officer, she is held to a higher standard than other federal employees. Safety and security are critical in a prison environment. She did not deny those points. An agency has considerable discretion in determining a reasonable penalty.

The Agency followed all contractual procedures and provided due process in a timely manner. She claimed that she did not have complete information but did not identify anything that would have affected the outcome. In fact, she provided much of the information herself in her response to the Warden's proposed discipline. She also claimed the investigation was incomplete because Lt. Geier did not ask her about the EEO files found by Ms. Shell in April 2013, but she clearly knew about the allegations and even claimed that she was being set up. The Grievant had ample time to present her case to the Agency.

The penalty selected by the Agency was completely reasonable. In fact, the Agency even reduced the length of her suspension because this was her first offense.

The Union claims that the discipline was untimely, but there is no statute of limitations in the Agreement or in Agency policies on completing investigations or imposing discipline. Article 30, Section d merely contains a general endorsement of the concept of timely disposition. The OIA report relied on by the Union merely states that investigators "should strive" to complete investigations of classification 3 cases within 120 days. The MSPB held in 2010 that an OIG report in another agency was merely a recommendation. If there were any procedural errors, they were not harmful. The Union failed to show how a faster investigation would have changed the result.

The Agency's corrective action was therefore imposed for just and sufficient cause and should therefore be sustained.

VI. The Union's Position

The Union argues that the discipline was not for just and sufficient cause. The Agency (1) failed to prove the charges by a preponderance of the evidence; (2) did not conduct a complete investigation; (3) failed to issue a timely decision, and (4) did not impose a reasonable penalty under the *Douglas* factors.

It did not prove the first charge of failing to safeguard sensitive information because Officer Amason, who found no pry marks, was not an expert. An employee whose office was next door believed that the cabinet had not been in worn condition before. There is no evidence that the Grievant falsely claimed the cabinet had been broken into. As to the folders found by Ms. Shell, a single affidavit is insufficient to constitute a preponderance of the evidence and Lt. Geier did not even question the Grievant about them.

Nor did the agency prove the second charge of failing to follow policy. The Grievant did keep the key to the file cabinet on her personal key ring but the Agency did not show that violated Agency policy. She had carried the key on her own key ring for many years, which she disclosed in 2011 and was never told to stop. She did not know that the lockshop had never received the other key to the cabinet. There was no proof that the Grievant ever received both keys to the cabinet, so it was not her responsibility to make sure the lockshop had one.

Even if the Agency did prove a violation, the penalty it imposed was not reasonable. The Agency failed to apply progressive discipline. This was the Grievant's first offense, and a seven day suspension is not progressive. It should simply have retrained her. The penalty is also unreasonable under the *Douglas* factors because the Agency failed to properly consider several of those factors.

The Agency's eleven-month delay in proposing discipline violated Section 30.d of the Agreement. That section requires "timely disposition" of discipline. The Agency offered no explanation of why the investigation and discipline proposal took so long in this case. OIG guidelines call for action within four to six months.

The Union asks that the suspension be overturned or mitigated and that she be made whole in all respects. The Back Pay Act also entitles her to interest on back pay plus reasonable attorney fees.

VII. Discussion

A. The Appropriate Standards of Review

The parties discussed various standards of review of the discipline here. The Agency naturally points to the relatively easy MSPB standard, which merely requires the Agency to prove a violation, show a nexus with the efficiency of the service, and establish that the penalty imposed was reasonable in the circumstances. The Union emphasizes the just cause standard in Section 30.a of the Agreement.

The Supreme Court held in *Cornelius v. Nutt* that federal sector arbitrators had to follow MSPB standards in adverse action cases. Because the suspension here was for less than fourteen days, it did not amount to an "adverse action" under federal law. Nevertheless, MSPB precedent deserves some respect in other sorts of disciplinary cases. In this case, however, I find no difference between the two standards. To constitute just cause, the Agency would have to prove the same things as under MSPB precedent.

B. The Alleged Violations

The amount of detail presented by the parties during the hearing was probably necessary for a full understanding of the case. Even so, the relevant questions are simple and the evidence bearing on them is relatively clear.

The first question is whether the Agency proved the three violations it charged.

1. The first charge was that the Grievant failed to safeguard sensitive information by leaving her file cabinet unsecured. The Agency concluded that she did mainly by process of elimination. Even though there were originally two keys to the cabinet and no one knows where the second one is, the Grievant had the remaining key. The Agency found that the cabinet was not broken into but that the locking mechanism was worn and might not have latched securely. Because it was not broken into and because the Grievant had the only known key, the Agency argues, she must have simply left it open.

Process of elimination is an effective argument only of it actually eliminates all alternative explanations. In this case it does not. The Agency's witnesses believed there was no break in but conceded that the locking mechanism seemed worn and might not have been functioning as well as it should. The evidence does not clearly distinguish between the two possibilities of a forced lock and a worn lock. Even accepting for sake of argument the Agency's position that the file cabinet was simply unlocked when the Grievant first found it open, the lack of any direct evidence that the Grievant left it unlocked makes for a weaker case. When the unaccounted-for second lock is added to the equation, the Agency's assumption that the Grievant's error was the only explanation for the opened drawer becomes even harder to maintain.

The evidence makes this a close call. Because the Agency had the burden of proof, however, close calls go to the Grievant. I therefore find that the Agency failed to conclusively prove that the Grievant left her file cabinet open.

2. The second charge was also for failure to safeguard sensitive information, this specification for the EEO files found by a coworker in the Grievant's bookcase some time after the Grievant found her cabinet drawer open. The Grievant testified persuasively that she had immediately moved the sensitive files to the Human Resources office for safekeeping. The Agency did not demonstrate that she was wrong or that she retained any of those files. It therefore could not prove that she was responsible for the files that turned up months after the September 17, 2013 discovery of the open file cabinet.

3. The final charge was for failure to follow policy by maintaining the key to her file cabinet on her personal key ring rather than checking it out daily and keeping it on her official key ring.

I find the evidence on this charge unequivocal. The Grievant received ample training on key control policies and was well aware that keys to locked cabinets were to be maintained by the Lockshop, checked out by employees daily, and kept on a secure official key ring. Despite that training, and for no good reason, the Grievant violated each of those policies. Her only defense was that she had done so for a long time and that her supervisors were aware of her practice. A long-standing violation is still a violation, and a supervisor's failure to enforce a rule — if that is in fact what happened — is a supervisory error, not a free pass for the employee's violation.

C. The Appropriate Penalty

The Agency proved that the Grievant was guilty of one serious procedural violation. That violation had an obvious nexus with the Agency's efficiency. The remaining question is whether the penalty imposed by the Agency was reasonable. If it was not, a necessary follow-up question is what penalty would have been reasonable.

The Agency's decision to suspend the Grievant for seven days obviously rested on its assumption that she committed three very serious offenses. That was the only apparent reason it could have chosen to jump to a suspension for a first offense rather than initially trying nondisciplinary remedies or less serious disciplinary remedies. Section 30.c. endorses the concept of progressive discipline with one exception, "offenses so egregious as to warrant severe sanctions for the first offense." It was also the only apparent reason why it could have interpreted the *Douglas* factors — assuming it really considered those factors at all — as justifying so severe a penalty for a first offense.

Taking away two of those three alleged offenses necessarily reduces the need for a severe penalty. Nothing in the record suggests that a lengthy suspension is necessary to deter the Grievant from committing another key violation. To the contrary, her spotless record before this incident

shows that she knows how to follow rules and generally does so. With that background and the parties' adoption of progressive discipline except for "egregious" offenses, I find that a written warning would have been the appropriate penalty for the sole offense the Grievant committed. I will therefore direct that the suspension be reduced to a warning and that the Grievant be made whole in back pay, benefits, and all other respects.

The parties did not fully brief the application of the Back Pay Act should the penalty be reduced. I will therefore remand the details of the new penalty to the parties for further negotiations but will retain jurisdiction in case they are unable to agree.

AWARD

The grievance is sustained in part as explained above. The Grievant's suspension is reduced to a written warning and she is to be made whole in all respects. Should the parties not be able to agree on the interpretation or application of this Award, they are directed to present their differences to me as soon as possible for a final decision.

Dennis R. Nolan

Dennis R. Nolan, Arbitrator

September 7, 2015
Date