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In the Matter of Arbitration]
Between] **FMCS 14-55222-3**
Federal Bureau of Prisons] **Grievant Brian Gilmore**
And] **Untimely discipline just cause**
American Federation of]
Government Employees Local 1570]

Representing the Agency

Tiffany Lee, Esq
K. Tyson Shaw, Esq
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Representing the Union

Julie Yeagle, Esq
Manuel Poluto, Vice President Local 1570
Maurice Britt, President 1570

Introduction:

The Federal Bureau of Prisons [hereinafter the Agency] and the Council of Prison Locals American Federation of Government Employees [hereinafter the Union] have entered into a Labor Agreement between the Agency and the Union covering wages, benefits, hours of work, and working conditions covering the bargaining unit employees.

The incident occurred on November 17, 2011 and appealed to Arbitration on April 14, 2014, after a lengthy investigation period of time.

The undersigned was notified by letter dated April 18, 2014 from the Federal Mediation and Conciliation Service [FMCS] with the approval of the advocates, his selection as the arbitrator in this case.

Statement of the Grievance:

In a memorandum to Warden Flourney dated January 30, 2014 AFGE Local 1570 notified the agency that the suspension o Officer Brian Gilmore was in violation of the Collective Bargaining Agreement. The Agency violated Article 6 [b] [2] which states employees are to be treated fairly and equitable in all aspects of personal practice. Furthermore Article 30

[d] states Recognizing the circumstances and complexities of individual cases will vary; the parties endorse the concept of timely disposition of investigations and disciplinary adverse action. The Union and the agency endorse the concept and recognize that the employees are the most valuable resource of the Agency and are encouraged and shall be reasonably assisted to develop their potential as Bureau of Prisons employees to the fullest extent practicable. An investigation and final disposition of an adverse action which lasted twenty-nine [29] months was egregiously untimely, was not for just and sufficient cause, not in the best interest of the employee and not in the efficiency of the service. Furthermore the Union believes this action would serve no purpose other than to hinder the employee's opportunity for advancement the next two years [reckoning period].

ISSUE:

Was the disciplinary action of a one day suspension timely given and for just cause?

Remedy Sought:

The Agency reimburse the Local for expenses incurred while processing this case. In addition have the record removed from his file and all lost wages and benefits be restored to Brian Gilmore.

AGREEMENT PROVISIONS:

ARTICLE 5 Rights of the Employer:

Section 2 [a] To hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or to take other disciplinary action against such employees

ARTICLE 6 Rights of the Employee.

Section b [2] To be treated fairly and equitably in all aspects of personnel management.

ARTICLE 30 Disciplinary and Adverse Actions.

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.

ARTICLE 32 Arbitration.

Section d The arbitrator's fees and all expenses of the arbitration,.... shall be borne equally by the Employer and the Union.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement or published Federal Bureau of Prisons policies and regulations.

Section h The arbitrator's award shall be binding on the parties.

JOINT EXHIBITS:

Joint 1	Master Agreement
Joint 2	Fax dated 4/14/2014 from M. Britt to H.J. Marberry
Joint 3	Letter dated 4/3/14 from J. V. Flournoy to Brian Gilmore
Joint 4[a]	Memorandum dated 1/30/14 to J.V. Flournoy from B. Gilmore
[b]	Memorandum to J.V. Flournoy from M. Britt dated 1/30/14
[c]	Report of meeting B. Gilmore and J.V.Flournoy dated 2/24/14
Joint 5[a]	Memorandum to B. Gilmore from T.D. Fletcher dated 11/26/13
[b]	Confirmation signature, B. Gilmore dated 11/19/13
Joint 6 [a]	Memorandum of Investigation dated 11/17/2011 by E. Cornello
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[b]	Memorandum dated 1/7/13 from M. Wagner
[c]	Affidavit by B. Gilmore dated 1/9/13
[d]	Acknowledge of receiving copy of Employee Conduct standards
Joint 7	Letter from Captain, R. McCullough, to B. Gilmore dated 11/18/13 recommending a four[4] day suspension
Joint 8	Change Notice

AGENCY'S OPENING STATEMENT:

The grievant, Brian Gilmore, Senior Correctional Officer was assigned to the Special Housing Unit [SHU] on November 17, 2011 which is the area the most troublesome inmates are housed and as such special procedures are needed such as making rounds on a regular basis, escorting prisoners outside their cell walking them in the range, making certain the range doors are locked. On this date the grievant did not follow the official written procedures in completing

rounds, reported he did complete the rounds, failed to follow procedure for walking the inmates when outside their cell, and failed to follow procedure in locking the main range door in securing the wing. The grievant received a letter from captain Roan McCullough on November 18, 2013 listing the charges against him [J-7] and recommending a four [4] day suspension. The warden later decided it would be reduced to a one [1] day suspension. The Union invoked arbitration because of the time limit involved however, there is no time limit restraints, with respect to imposing discipline. The video on that day upholds the Agency's charges with respect to the grievant and he gave an affidavit admitting to the charges. The Agency understands that discipline to be the most efficient should be done as soon as possible after the event, but that does not always happen. The facts are not in dispute and the corrective one day suspension should be upheld.

UNION'S OPENING STATEMENT:

The grievant Brian Gilmore is an exemplary employee who has received numerous awards for his outstanding work. On the day in question November 17, 2011 he admitted responsibility for his action of not following post procedures as confirmed by the video. Captain Cornelio noted in a memorandum dated 11/17/11 the grievant's failure to follow post procedures. He was notified in January 2013, for the first time he was under investigation for his action of November 17, 2011 some 14 months later. After watching the video he admitted to the violations and in his affidavit dated January 9, 2013, he apologized for violating the post procedure. On November 19, 2013 some two [2] years later he was issued a notice by Captain R. McCullough recommending he be suspended for four [4] days for his failure to follow post procedures. In a letter from the Warden to B. Gilmore dated April 4, 2014 the four [4] day suspension [J-3], was reduced to a one [1] day suspension. The Union alleges the 867 days between the day of the incident until the grievant was notified by the Warden of the final decision is grossly untimely by any reasonable standards and violates the Change Notice Policies Number 32 which calls for an official reprimand for a first offense. The untimely suspension is without just cause pursuant to the provisions of Article 30 of the Agreement

Agency Witness, J.V. Flournoy, Warden

Testified the Office of Internal Affairs in Washington is responsible for investigating serious allegations and at the local level the Supervisor of Intelligent Analyses {SIA} is responsible and consults with Human Resources to determine the action needed. The proposed action is in writing [J-7] and a copy is given to the employee who can respond to the Warden about the proposed action The investigation and the proposed action takes into consideration the overall record of the employee, the seriousness of the charge against him, any mitigating factors, such as short staffing, lack of proper training etc, The [SHU] officer is accountable for the safety

and security of the inmates in the cells He stated Mr. Gilmore readily admitted to the charges [J-4a] and has learned from this experience, because of his overall record of being an above average officer, he decided to reduce the four [4] day suspension to a one [1] day suspension for the desired corrective effect. The post orders for the SHU unit are very specific with respect to the range door and very important, that the range doors are always locked. An employee can receive good evaluations even if charged with misconduct as the two are treated separately.

Cross-examination:

He stated specification [b] in [J-7] the securing of the range doors is the responsibility of the #1 officer and B. Gilmore was the #2 officer on that shift, but even so he also had some responsibility for securing the range door even though he did not have the key. He agreed that over 2 years elapsed between the incident on November 17, 2011 and his letter of April 3, 2014 suspending B. Gilmore for one day effective April 16, 2014. He agreed in that period of time B. Gilmore received two [2] performance evaluation [U-1 and U- 2] both of them giving him an overall rating of "exceeds" and an Incentive award [U-3] for working critical posts exceptionally well. He stated a violation of Policy would not affect his performance evaluation. He agreed the grievant admitted to the charges [J-4a], and the video taken on that day verify the charges against him and the grievant was suspended for one [1] day 867 days later. He stated there are no time limits for discipline cases, but would prefer to make the decision as soon as possible after the charges were made and assessed. He is aware the agreement under Article 30 Section [d] states the parties endorses the concept of the timely disposition of disciplinary actions. The present time limits they try to follow is 120 days in staff misconduct cases, pursuant to [U-8] P. Bradely's memorandum to A. Flournoy dated May 1, 2014. He stated no action is taken if the 120 days is not followed by the investigators and is aware it took over 300 days from the time of the grievant's admission of his actions until he decided on the one [1] day suspension.

Union Witness, Brian Gilmore, Senior Correctional Officer and the grievant

Testified he watched the video and determined the charges were true and apologized and he said so in the affidavit he submitted [U-6c] on January 9th 2013. He stated that was the date he first became aware he was under investigation for the incident that occurred on November 17th 2011 and during the time between the incident and the request for the affidavit he was not questioned with respect to the incident. The performance evaluation [U-5] covering a period from 4/1/2013 to 3/31/2014 rated his performance as outstanding, the top rate. Knowing he was under investigation and not knowing the final results was always on his mind and believes it affected his work, his eagerness to do his job as best he could, and his chance for promotion were affected to some extent, however the Agency has not changed their attitude towards him as far as he can tell.

Cross-examination

Testified he has received [SHU] training that is given every year and knows how important it is to follow the proper policies especially in the [SHU] unit and admitted on November 17th 2013 he failed to follow the proper policies. After the Institution Training he received on being hired, he has attended 4 days of annual training that includes SHU training. He has received good evaluations and won an award since then and is mindful of his duties and fulfills all the responsibilities of the job he is assigned day to day.

Union Witness, Manuel Pulido, Correctional Officer and Vice President, AFGE Local 1570

Testified he helped the grievant prepare his oral and written response to the Agency on four issues [1]. His responsibilities for his action that day, [2]. Wanted the Warden to know and understand that B. Gilmore was an excellent employee both before and after the incident. [3]. To remind the Warden it was 26 months between the incident and the suspension. [4]. The guidelines set by the Agency [U-4] for discipline investigations and serving the discipline be accomplished in 120 days as the upper parameter. The 26 months taken to suspend B. Gilmore was far outside the time limits therefore, was unjust and does not meet the "just cause" or timely given criteria in this case. The document [U-6] dated July 31 2009 of a Labor Management meeting, from David Monds, Employment Services Manager established guidelines for 3 categories of misconduct by staff. This was a category 3 non-criminal offense [U-6] and requires cases of misconduct to be reviewed weekly and the Agency failed to follow this procedure. The suspension to B. Gilmore after 26 months is not progressive discipline and it is not corrective. The OIG report [U-8] recommended the time needed to investigate and finalize discipline cases be 120 days. He agrees it is important employees follow the post procedures. The Captain could have chosen in this case either the conduct or the performance route of investigation. If the conduct route in this case was followed the grievant would have the incident logged in and it would reflect on his next evaluation. The performance route as outlined in OIG [U-8] gives the time needed to investigate and to finalize the decision on discipline cases that could result in a reprimand or suspension. In this case the Captain could have corrected B. Gilmore at the time as soon as he was aware of the violation of post procedures and enter the breach of procedure in the log book. The memorandum of Investigation is dated November 11, 2011 and nothing further occurred and the grievant was unaware of any further development until he was advised on January 9, 2013 to prepare and affidavit of the event. The labor/ Management meeting of April 8, 2014 [U-8] we discussed untimely discipline cases and the parties agreed to timely disposition of such cases.

Cross-examination:

He stated on most occasions he helps the employee to prepare both written and oral presentations to the Warden and also supplies information to the Warden when necessary. At the

present time he stated it takes from an 11 to 32 months for final disposition of discipline cases and it is important the discipline to employees be finalized as quickly as possible. Following the post procedures in the SHU unit is especially important and failure to do so should be considered as very serious breach of post procedure. He stated every Department is important and it is necessary for the employees to follow post procedures. Joint exhibit 8 defines the reckoning period, as the date management becomes aware of the incident, but does not establish time limits on awarding discipline.

CONCLUSION:

The facts of this case are not in dispute, Brian Gilmore; the grievant was assigned as the 2nd officer on November 17, 2011 in the Special Housing Unit [SHU] area in the Prison. The posted procedure for this area requires the number one officer [1] make sure the security range door is locked, and has the keys. Second have two [2] officers present when an inmate is released from his cell. Third, pat the inmate down when he emerges from his cell. Fourth, make the rounds every 30 minutes. The Captain on shift looking at the video noticed the grievant violated the post procedure as he did not lock the security range door, did not have another officer present when he opened a cell door and did not pat the inmate down. The grievant was notified 14 months later he was under investigation for this incident. After reviewing the video, he freely admits he did not follow all the post procedures on November 17, 2011. The affidavit he prepared on January 9, 2013, noted his failure to follow post procedures.

The Union argues awarding a one [1] disciplinary suspension to the grievant to be taken on April 16, 2014 for an incident occurring in 2011 is not timely given or for "just cause." In that period of time the grievant has been given two performance evaluations, one of which states exceeds standards and the other one states outstanding performance as well as being awarded an award praising his service as a correctional officer.

The Agency argues not following the post procedures especially in the SHU unit is a serious breach that could have jeopardized the safety and security of the prison, its operations and its personnel both staff and the inmates. The four day suspension reduced to a one day suspension is warranted and in the interest of the efficiency of the operations and to make sure every officer is aware of how important it is to follow the post procedure.

It is well established that management has the right to establish reasonable rules governing employee conduct, and a violation resulting in discipline can be imposed for just cause. An important principal in just cause determination is the concept of progressive and corrective discipline. The Agency has an obligation to follow the principals of corrective discipline based on fairness. Corrective disciplines should be viewed as a policy mutually beneficial to both the Agency and the Union. The Agency followed the principle a good record

over a long period of time is one of the most mitigating factors in determining the type and severity of the discipline and reduced the suspension from four [4] days to one [1] day.

The breach of post procedures in the SHU unit on November 17, 2011 and suspending him for one [1] day in April 16, 2014 for this serious breach of the post procedures and having the pending discipline for his actions on his mind this length of time does not meet the fairness concept of corrective discipline. The process requires Management to investigate and decide the action to be taken in a reasonable length of time. The length of time taken in this case does not meet the reasonable length of time criteria. The one [1] day suspension 14 months after the incident becomes punitive not corrective. The grievant has been an above average employee according to his performance evaluations and the award he receive during the intervening time since the incident and proves he does not need a one [1] day suspension to correct his attitude.

AWARD:

The grievance is granted with respect to Brian Gilmore's request, but is denied with respect to the Union's request for pay for their expenses.

Signed The 14th of May 2015


Douglas F. Coleman
Arbitrator