

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

BETWEEN

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL
BUREAU OF PRISONS, FCI WILLIAMSBURG, SC

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 525

FMCS CASE: 13-53435-8

GRIEVANT: TYRONE LIPSCOMB

ARBITRATOR: DOROTHY COWSER YANCY

FEBRUARY 17, 2015

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AGENCY

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 525
UNION

OPINION

THE ABOVE REFERENCED CASE WAS HEARD AUGUST 6, 2014 IN THE FCI WILLIAMSBURG, SOUTH CAROLINA TRAINING FACILITY. THE HEARING COMMENCED AT 9:00 A.M. UNDER THE RULES AN ADMINISTRATION OF THE FEDERAL MEDIATION AND CONCILIATION SERVICES BEFORE DOROTHY COWSER YANCY, IMPARTIAL ARBITRATOR. THE TRANSCRIPT FROM THE HEARING WAS RECEIVED SEPTEMBER 6, 2014. THE AGENCY AND UNION FILED THEIR BRIEFS ON NOVEMBER 17, 2014, AN EXTENSION OF THE DATE AGREED UPON AT THE HEARING. THE ARBITRATOR ALSO SOUGHT AND RECEIVED AN EXTENSION FOR THE RENDERING OF HER OPINION.

APPEARANCES:

UNION:

RYAN SAUNDERS, ESQUIRE - UNION ATTORNEY

AGENCY:

JENIFER GRUNDY-HOLLETT - AGENCY ATTORNEY

WITNESSES:

AGENCY:

L. TREVOR OUTLAW ALLENWOOD	- ASSOCIATE WARDEN, FCC
STEPHEN A. LANGFORD	- WARDEN, FCI RAY BROOK
VICTOR J. MORENO	- EMERGENCY PREPAREDNESS COORDINATOR FOR SE REGION BOP
JAMES A. PATTERSON	- OPERATIONS LIEUTENANT

RAMA OLIVER
MANAGER
MAUREEN CRUZ

- ACTING HUMAN RESOURCES
- WARDEN WILLIAMSBURG

UNION:

AIMEE BROWN - UNION PRESIDENT
TYRONE LIPSCOMB - GRIEVANT

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 3 - GOVERNING REGULATIONS

SECTION a. BOTH PARTIES MUTUALLY AGREE THAT THIS AGREEMENT TAKES PRECEDENCE OVER THE BUREAU POLICY, PROCEDURE, AND/OR REGULATION WHICH IS NOT DERIVED FROM HIGHER GOVERNMENT-WIDE LAWS, RULES AND REGULATIONS.

1. LOCAL SUPPLEMENTAL AGREEMENTS WILL TAKE PRECEDENCE OVER ANY AGENCY ISSUANCE DERIVED OR GENERATED AT THE LOCAL LEVEL.

SECTION b. IN THE ADMINISTRATION OF ALL MATTERS COVERED BY THIS AGREEMENT, AGENCY OFFICIALS, UNION OFFICIALS, AND EMPLOYEES ARE GOVERNED BY EXISTING AND/OR FUTURE LAWS, RULES, AND GOVERNMENT-WIDE REGULATIONS IN EXISTENCE AT THE TIME THIS AGREEMENT GOES INTO EFFECT.

SECTION c. THE UNION AND AGENCY REPRESENTATIVES, WHEN NOTIFIED BY THE OTHER PARTY, WILL MEET AND NEGOTIATE ON ANY AND ALL POLICIES, PRACTICES, AND PROCEDURES WHICH IMPACT CONDITIONS OF EMPLOYMENT, WHERE REQUIRED BY 5 USC 7106, 7114, AND 7117, AND OTHER APPLICABLE GOVERNMENT-WIDE LAWS AND REGULATIONS, PRIOR TO IMPLEMENTATION OF ANY POLICIES, PRACTICES, AND/OR PROCEDURES.

SECTION d. ALL PROPOSED NATIONAL POLICY ISSUANCES, INCLUDING POLICY MANUALS AND PROGRAM STATEMENTS, WILL BE PROVIDED TO THE UNION. IF THE PROVISIONS CONTAINED IN THE PROPOSED POLICY MANUAL AND/OR PROGRAM STATEMENT CHANGE OR AFFECT ANY PERSONNEL POLICIES, PRACTICES, OR CONDITIONS OF EMPLOYMENT, SUCH POLICY ISSUANCES WILL BE SUBJECT TO NEGOTIATION WITH THE UNION, PRIOR TO ISSUANCE AND IMPLEMENTATION.

1. WHEN NATIONAL POLICY ISSUANCES ARE PROPOSED, THE EMPLOYER WILL ENSURE THAT THE PRESIDENT, COUNCIL OF PRISON LOCALS, EACH MEMBER OF THE EXECUTIVE BOARD OF THE COUNCIL OF PRISON LOCALS, AND EACH

LOCAL PRESIDENT RECEIVES A COPY OF THE PROPOSED POLICY ISSUANCE WITHIN THIRTY (30) CALENDAR DAYS THAT THE PROPOSED POLICY ISSUANCE IS COMPLETED. THIS WILL BE ACCOMPLISHED BY THE POLICY ISSUANCE BEING SENT, BY CERTIFIED MAIL, TO THE APPROPRIATE UNION OFFICIAL AT THE INSTITUTION/LOCATION WHERE THE UNION IS EMPLOYED;

2. AFTER THE LAST COUNCIL PRISON LOCALS EXECUTIVE BOARD MEMBER RECEIVES THE PROPOSED POLICY ISSUANCE, THE UNION, AT THE NATIONAL LEVEL, WILL HAVE THIRTY (30) CALENDAR DAYS TO INVOKE NEGOTIATIONS REGARDING THE PROPOSED POLICY ISSUANCE. THE DATE ON THE SIGNED "RETURNED RECEIPT" CARD WILL SERVICE TO VERIFY THE DATE THAT THE LAST COUNCIL EXECUTIVE MEMBER WAS NOTIFIED;
3. SHOULD THE UNION INVOKE THEIR RIGHT TO NEGOTIATE THE PROPOSED POLICY ISSUANCE, ABSENT AN OVERRIDING EXIGENCY, THE ISSUANCE AND IMPLEMENTATION OF THE POLICY WILL BE POSTPONED, PENDING THE OUTCOME OF THE NEGOTIATIONS;
4. SHOULD THE UNION, AT THE NATIONAL LEVEL, FAIL TO INVOKE THE RIGHT TO NEGOTIATE THE PROPOSED POLICY ISSUANCE WITHIN THE TIME REQUIRED ABOVE, THE AGENCY MAY ISSUE AND IMPLEMENT THE PROPOSED POLICY ISSUANCE, AND;
5. WHEN THE LOCALLY-PROPOSED POLICY ISSUANCES ARE MADE, THE LOCAL UNION PRESIDENT WILL BE NOTIFIED AS PROVIDED FOR ABOVE, AND THE MANNER IN WHICH LOCAL NEGOTIATIONS ARE CONDUCTED WILL PARALLEL THIS ARTICLE.

SECTION e. NEGOTIATIONS UNDER THIS SECTION WILL TAKE PLACE WITHIN THIRTY (30) CALENDAR DAYS OF THE DATE THAT NEGOTIATIONS ARE INVOKED. NEGOTIATIONS WILL TAKE PLACE AT A LOCATION THAT IS MUTUALLY AGREEABLE TO THE PARTIES, AND THE AGENCY WILL PAY ALL EXPENSES RELATED TO THE NEGOTIATIONS.

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.

1. IN EXCEPTIONAL CIRCUMSTANCES, THE PRESIDENT, COUNCIL OF PRISON LOCALS, MAY IMMEDIATELY REQUEST THAT THE APPROPRIATE REGIONAL DIRECTOR OR DESIGNATED OFFICIAL CONSIDER A STAY OF A REMOVAL OR SUSPENSION IN EXCESS OF FOURTEEN (14) DAYS UNTIL A DECISION IS RENDERED BY AN ARBITRATOR UNDER ARTICLE 32, OR AN INITIAL

DECISION OF THE MERIT SYSTEMS PROTECTION BOARD IS ISSUED, SUCH REQUEST MUST BE MADE PRIOR TO THE EFFECTIVE DATE OF THE CONTESTED ACTION, STAY OF ACTIONS WILL NOT APPLY TO:

- a. PROBATIONARY ACTIONS; OR
- b. ACTIONS TAKEN UNDER 5 USC 7513, WHERE THERE IS REASONABLE CAUSE TO BELIEVE THAT THE EMPLOYEE HAS COMMITTED A CRIME FOR WHICH A SENTENCE OF IMPRISONMENT CAN BE IMPOSED.

SECTION b. DISCIPLINARY ACTIONS ARE DEFINED AS WRITTEN REPRIMANDS OR SUSPENSIONS OF FOURTEEN (14) DAYS OR LESS. ADVERSE ACTIONS ARE DEFINED AS REMOVALS, SUSPENSIONS OR MORE THAN FOURTEEN (14) DAYS, REDUCTION 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 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 ARISING FROM THE INVESTIGATION WILL NOT BE PROPOSED UNTIL THE INVESTIGATION HAS BEEN COMPLETED AND REVIEWED BY THE CHIEF EXECUTIVE OFFICER OR DESIGNEE; AND
2. EMPLOYEES WHO ARE THE SUBJECT OF AN INVESTIGATION WHERE NO DISCIPLINARY OR ADVERSE ACTION WILL BE PROPOSED WILL BE NOTIFIED OF THIS DECISION WITHIN SEVERN (7) WORKING DAYS AFTER THE REVIEW OF THE INVESTIGATION BY THE CHIEF EXECUTIVE OFFICER OR DESIGNEE. THIS PERIOD OF TIME MAY BE ADJUSTED TO ACCOUNT FOR PERIODS OF LEAVE.

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.

1. ANY NOTICE OF PROPOSED DISCIPLINARY OR ADVERSE ACTION WILL ADVISE THE EMPLOYEE OF HIS/HER RIGHT TO RECEIVE THE MATERIAL WHICH IS RELIED UPON TO SUPPORT THE REASONS FOR THE ACTION GIVEN IN THE NOTICE.

SECTION f. EMPLOYEE REPRESENTATIONAL RIGHTS ARE ADDRESSED IN ARTICLE 6.

SECTION g. THE EMPLOYER RETAINS THE RIGHT TO RESPOND TO THE ALLEGED OFFENSE BY AN EMPLOYEE WHICH MAY ADVERSELY AFFECT THE EMPLOYER'S CONFIDENCE IN THE EMPLOYEE OR THE SECURITY OR ORDERLY OPERATION OF THE INSTITUTION. THE EMPLOYEE MAY ELECT TO REASSIGN THE EMPLOYEE TO ANOTHER JOB WITHIN THE INSTITUTION OR REMOVE THE EMPLOYEE FROM THE INSTITUTION PENDING THE INVESTIGATION AND RESOLUTION OF THE MATTER, IN ACCORDANCE WITH APPLICABLE LAWS, RULES, AND REGULATIONS.

SECTION h. WHEN AN EMPLOYEE EXERCISES HIS/HER RIGHT TO ORALLY RESPOND TO A PROPOSED DISCIPLINARY OR ADVERSE ACTION, THE REPLY OFFICIAL WILL ALLOW AMPLE TIME FOR THE EMPLOYEE TO RESPOND AT THE MEETING. ALTHOUGH THE REPLY OFFICIAL MAY ASK FOLLOW-UP QUESTIONS, NOTHING REQUIRES THE EMPLOYEE TO ANSWER SUCH QUESTIONS DURING THE MEETING.

SECTION i. SUPERVISORS ARE REQUIRED TO ANNOTATE ORAL COUNSELING SESSIONS IN AN EMPLOYEE'S PERFORMANCE LOG.

SECTION j. WHEN DISCIPLINARY ACTION IS PROPOSED AGAINST AN EMPLOYEE, THE EMPLOYEE WILL HAVE TEN (10) WORKING DAY TO RESPOND ORALLY OR IN WRITING. WHEN ADVERSE ACTION IS PROPOSED, HE/SHE WILL HAVE FIFTEEN (15) WORKING DAYS TO RESPOND ORALLY OR IN WRITING. APPROVAL OR DENIAL OF EXTENSION REQUESTS MUST BE PROVIDED WITHIN TWO (2) WORKING DAYS. THESE TIME FRAMES DO NOT APPLY TO PROBATIONARY EMPLOYEES OR ACTIONS TAKEN UNDER THE CRIME PROVISION.

SECTION k. EMPLOYEES MAKING FALSE COMPLAINT AND/OR STATEMENTS AGAINST OTHER STAFF MAY BE SUBJECT TO DISCIPLINARY ACTION.

MATTER IN DISPUTE

THE GRIEVANT, MR. TYRONE LIPSCOMB, IS A SENIOR CORRECTIONAL OFFICER AT FEDERAL CORRECTIONAL INSTITUTION (FCI) WILLIAMSBURG, SOUTH CAROLINA. THE GRIEVANT HAS BEEN EMPLOYED AT THE FACILITY SINCE JULY 2007.

FCI WILLIAMSBURG CONSIST OF A MEDIUM SECURITY FACILITY, HOUSING APPROXIMATELY 1600 MEDIUM SECURITY MALE INMATES AND A PRISON CAMP, HOUSING APPROXIMATELY 200 MINIMUM SECURITY MALE INMATES.

ON NOVEMBER 30, 2010 IT IS ALLEGED THAT SEVERAL STAFF MEMBER SAW THE GRIEVANT TAKE A MEAL FROM THE STAFF DINNING HALL WITHOUT PAYING. FURTHER IT WAS ALLEGED THAT ON SEPTEMBER 12, 2011, THE GRIEVANT WHEN WORKING IN THE 2B-UPPER HOUSING UNIT ON EVENING WATCH, FAILED TO STAND NEAR THE DOOR AND MONITOR THE MENTAL DETECTOR DURING THE TEN MINUTE MOVE FROM 7:30 P.M., TO 7:40 P.M. IT WAS ALLEGED IN TESTIMONIES AT THE HEARING, THAT THE GRIEVANT STOOD OUTSIDE OF THE DOOR FOR APPROXIMATELY 13 MINUTES DURING WHICH TIME AN INMATE WAS ASSAULTED IN THE UNIT AT APPROXIMATELY 7:29.

AN INVESTIGATION WAS INITIATED TO INVESTIGATE THE ABOVE TWO INCIDENTS NOVEMBER 30, 2011 BY SPECIAL INVESTIGATIVE SUPERVISOR (SIS) LIEUTENANT JAMES PATTERSON (AGENCY 5). IT IS NOTED THAT THE ALLEGED THEFT OCCURRED IN 2010. ON DECEMBER 15, 2011 THE GRIEVANT, WITH REPRESENTATION FROM THE UNION, WAS INTERVIEWED ABOUT BOTH INCIDENTS. STEVE LANGFORD AND LESLIE OUTLAW, AGENCY EXECUTIVES, WERE INTERVIEWED ON DECEMBER 19, 2011 ABOUT THE ALLEGED THEFT OF PROPERTY (AGENCY 1 AND 2). FURTHER, LT. VICTOR MORENO, THE GRIEVANT'S SUPERVISOR WAS INTERVIEWED JANUARY 19, 2012 (SEE AGENCY EXHIBIT 4) REGARDING THE CHARGE OF "FAILURE TO PROPERLY SUPERVISE INMATE/FAILURE TO FOLLOW POLICY/BREACH OF SECURITY."

ON DECEMBER 20, 2011, LT. JAMES PATTERSON SUSTAINED THE CHARGE OF "THEFT OF GOVERNMENT PROPERTY" AGAINST THE GRIEVANT. (AGENCY 7). ON FEBRUARY 7, 2012, LT. PATTERSON SUSTAINED THE CHARGES "FAILURE TO FOLLOW POLICY/BREACH OF SECURITY/FAILURE TO PROPERLY SUPERVISE INMATES." (SEE AGENCY EXHIBIT 11). ON JUNE 22, 2012, THE AGENCY CHARGED THE GRIEVANT WITH "FAILURE TO FOLLOW MEAL PROCEDURES" AND "INATTENTION TO DUTY" (SEE JOINT EXHIBIT 4) AND PROPOSED A SUSPENSION FOR FIVE (5) DAYS. THE GRIEVANT RESPONDED TO THE CHARGES JULY 31, 2012 DENYING THAT HE HAD TAKEN A MEAL WITHOUT PAYING AND INDICATED THAT HE WAS REMORSEFUL ABOUT THE "INATTENTION TO DUTY CHARGE" BUT WAS FOLLOWING INSTRUCTIONS FROM HIS SUPERVISOR TO CLEAR THE STAIRWELL (SEE JOINT EXHIBIT 5). ON NOVEMBER 5, 2012, THE AGENCY ISSUED A FINAL DECISION SUSPENDING THE GRIEVANT FOR ONE (1) DAY (SEE JOINT EXHIBIT 6).

A GRIEVANCE WAS FILED BY THE UNION DECEMBER 17, 2012. THE GRIEVANCE CLAIMED VIOLATION OF ARTICLES 1, 3, 4, 7, 9, 22, 36 AS WELL AS 5 USC 7102; 5 USC 7116; 5 USC 7114; TITLE 5 USC 2302; TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, HUMAN RESOURCES MANAGEMENT MANUAL; PROGRAM STATEMENT 3713.23 AND PROGRAM STATEMENT 3713.21. THE AGENCY (SEE EXHIBIT JOINT 4) DENIED THE GRIEVANCE AND THE UNION INVOKED ARBITRATION.

IT IS NOTED THAT THERE IS NOT DISPUTE ABOUT WHETHER OR NOT THE GRIEVANCE IS PROPERLY BEFORE THE ARBITRATOR. THE PARTIES AGREED AT THE HEARING THAT ARTICLE 30 OF THE MASTER AGREEMENT APPLIES IN THE INSTANT CASE. THUS, THE ISSUE TO BE DETERMINED IS AS FOLLOWS: "DID THE AGENCY VIOLATE ARTICLE 30 OF THE MASTER AGREEMENT WHEN IT SUSPENDED MR. TYRONE LIPSCOMB? IF THE SUSPENSION VIOLATES ARTICLE 30 OF THE MASTER AGREEMENT AND WAS NOT FOR JUST AND SUFFICIENT CAUSE, WHAT SHALL THE REMEDY BE?"

POSITIONS OF THE PARTIES

AGENCY

IT IS THE AGENCY'S POSITION THAT IT IS NOT IN VIOLATION OF ARTICLE 30. IN FACT, THE AGENCY ASSERTS THAT IT DISCIPLINED THE GRIEVANT FOR JUST AND SUFFICIENT CAUSE. THE AGENCY MAINTAINS THAT THE GRIEVANT IS GUILTY OF TAKING A MEAL WITHOUT PAYING AND OF INATTENTION TO DUTY.

THE AGENCY ASSERTS THAT THE GRIEVANT WAS OBSERVED BY SEVERAL MANAGEMENT STAFF MEMBERS NOT PAYING FOR HIS MEAL. THE AGENCY ASSERTS THAT EMPLOYEES ARE SUPPOSE TO ENTER THEIR DEBITEK CARD INTO A MACHINE WHICH CHARGES FOR THE MEAL AND DEDUCTS THE COST FROM THE CARD. THE MACHINE PRINTS OUT A RECEIPT WHICH THE EMPLOYEE SIGNS AND DROPS INTO A SECURE BOX. THE STAFF CLAIMED THAT THEY HAD BEEN IN THE DINNING FACILITY FOR APPROXIMATELY 20 MINUTES WHEN THEY SAW THE GRIEVANT ENTER AND LEAVE WITH FOOD AND NOT PAY.

FURTHER, THE COMPANY ARGUES THAT THE VIDEO TAPE OF 2B-UPPER HOUSING UNIT, WHICH WAS REVIEWED ON SEPTEMBER 13, 2011, TO GET DETAILS ABOUT AN INMATE'S ASSAULT AND INJURY WHICH OCCURRED ON SEPT12, 2011, INDICATED THAT THE GRIEVANT WAS NEGLIGENT AND ABSENT FROM THE INSIDE OF THE HOUSING SECTION FOR 13 MINUTES. WHILE HE WAS AWAY, CLEARING THE STAIRWAY, AN INMATE WAS ASSAULTED. THE INMATES HAD TIME TO CLEAN UP THE BLOOD AND CHANGE THEIR CLOTHES WITHOUT HIS KNOWLEDGE.

THE AGENCY CITES ENTERPRISE WIRE, CO., 46 LA 359, 362-65 (1966) WHERE ARBITRATOR CARROLL R. DAUGHERTY IDENTIFIED WHAT HE CONSIDERED TO BE THE SEVEN CRITERIA TO BE USED TO DETERMINE "JUST CAUSE." FURTHER IT CITES THE DOUGLAS FACTORS FOR JUST CAUSE WHICH APPLY TO THE FEDERAL SECTOR SET OUT IN DOUGLAS V. VETERANS ADMINISTRATION, 5 MSPR 280, 303, (1981). THE AGENCY ASSERTS THAT IN LIGHT OF THE JUST CAUSE REQUIREMENTS FOUND IN THE DOUGLAS FACTORS, WARDEN CRUZ HAD CAUSE TO TAKE ACTION AND SUSPEND THE GRIEVANT FOR ONE DAY. THE AGENCY ASSERTS THAT IT HAS THE RESPONSIBILITY TO USE DISCIPLINE TO MANAGE AND CONTROL THE CONDUCT OF EMPLOYEES. HOWEVER, IT MAINTAINS THAT THE AGENCY MUST HAVE JUST AND SUFFICIENT CAUSE TO TAKE DISCIPLINE AS IT HAD IN THE INSTANT CASE. THE

AGENCY ASSERTS THAT THE PENALTY WAS IMPOSED AFTER A CONSIDERATION OF ALL RELEVANT DOUGLAS FACTORS AND THAT THE PENALTY WAS REASONABLE.

THE AGENCY NOTES THAT THE UNION ARGUED THAT THERE IS A TIME LIMITATION WITHIN WHICH INVESTIGATIONS MUST BE COMPLETED OR DISCIPLINE ADMINISTERED. THE AGENCY CITES AFGE LOCAL 2001 V. BOP, FCI FT. DIX, FMCS CASE NO.11-53658 (2012); MCC CHICAGO V. AFGE LOCAL 3642, FMCS CASE NO. 12-55359 (2013); AFGE LOCAL 506 V. DOJ, FEDERAL CORRECTIONAL COMPLEX, COLEMAN, FL, FMCS CASE NO. 10-59428, (2013) P. 10, TO SUPPORT IT'S CLAIM THAT THERE IS NOTHING IN THE BUREAU POLICY WHICH SETS TIME LIMITS ON THE INVESTIGATION OR ADMINISTERING OF DISCIPLINE. FURTHER, THE AGENCY ARGUES THAT THE GRIEVANT WAS NOT HARMED BY THE LENGTH OF THE "INVESTIGATION OR ADJUDICATORY PROCESS" (AGENCY BRIEF P. 24).

THUS, THE AGENCY ARGUE THAT THE REMOVAL WAS CONSISTENT WITH THE AGENCY'S TABLE OF PENALTIES, THAT THE RELEVANT FACTORS WERE CONSIDERED AND THAT THE DISCIPLINE SHOULD BE UPHELD.

THE AGENCY REQUESTS THAT THE GRIEVANCE BE DENIED.

UNION:

IT IS THE UNION'S POSITION THAT THE AGENCY VIOLATED ARTICLE 30 OF THE MASTER AGREEMENT WHEN IT SUSPENDED THE GRIEVANT FOR ONE DAY WITH OUT JUST CAUSE. THE UNION CHARGES THAT THE AGENCY DID NOT CARRY ITS BURDEN OF PROOF BY THE PREPONDERANCE OF THE EVIDENCE. THE UNION NOTES THAT THE AGENCY IS REQUIRED TO PROVE THE CHARGES AS SET OUT IN THE NOTICE. FURTHER THE UNION NOTES THAT WHEN THE CHOSEN PENALTY IS UNREASONABLE, THE ARBITRATOR MAY RESCIND OR MITIGATE THE PENALTY. THE UNION CITES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS AND AFGE, LOCAL 1286, 48 F.L.R.A. 908 (1993). FURTHER, THE UNION ASSERTS THAT THE AGENCY DID NOT FOLLOW THE DOUGLASS FACTORS AND THAT IT FAILED TO PROVE A NEXUS BETWEEN THE DISCIPLINE ADMINISTERED AND THE EFFICIENCY OF THE SERVICE.

FURTHER, THE UNION CHARGES THAT THE AGENCY FAILED TO PROVE THAT THE GRIEVANT DID NOT FOLLOW THE MEAL PROCEDURE AND IT FAILED TO SHOW THAT THE GRIEVANT WAS NOT PERFORMING ORDERS WHEN CLEARING THE STAIRWELL DURING WHICH TIME AN INMATE IN 2B- UPPER WAS ASSAULTED.

FURTHER, THE UNION CLAIMS THAT INVESTIGATIONS AND DISCIPLINE IS UNTIMELY. THE MEAL INCIDENT OCCURRED NOVEMBER 3, 2010, THE INVESTIGATION COMMENCED NOVEMBER 30, 2011 AND THE GRIEVANT AND AGENCY WITNESSES WERE INTERVIEWED DURING THE MONTH OF DECEMBER. THE DISCIPLINE WAS ADMINISTERED NOVEMBER 12, 2012 TWO YEARS LATER. THE UNION CHARGES THAT THE DEPARTMENT OF JUSTICE, OFFICE OF INSPECTOR GENERAL REVIEWED THE AGENCIES PRACTICES AND PROCEDURES IN 2004 AND SET

A GUIDELINE THAT LOCAL INVESTIGATIONS OF DISCIPLINARY MATTERS SHOULD NOT EXCEED 120 DAYS AND AN ON-SITE INVESTIGATION SHOULD NOT SURPASS 180 DAYS. THE AGENCY ALSO ESTABLISHED GENERAL GUIDELINES OF NOT MORE THAN 120 DAYS TO COMPLETE THE ADJUDICATION PHASE. THE UNION ASSERTS THAT THE AGENCY VIOLATED ITS OWN POLICY AND THEREFORE THE DISCIPLINE SHOULD BE VOIDED.

FURTHER, THE UNION ASSERT THAT MITIGATING FACTORS SUCH AS THE GRIEVANT'S WORK RECORD ETC. WERE NOT CONSIDERED BY THE AGENCY WHEN IT APPLIED THE DOUGLASS FACTORS.

THE UNION MAINTAINS THAT THE GRIEVANCE SHOULD BE SUSTAINED. THAT THE GRIEVANT BE GIVEN BACK PAY AND OTHER LOST BENEFITS AND THE SUSPENSION EXPUNGED FROM HIS RECORD.

DISCUSSION

IN THE INSTANT CASE, THE ISSUE PROPERLY BEFORE THE ARBITRATOR IS AS FOLLOWS "DID THE AGENCY VIOLATE ARTICLE 30 OF THE MASTER AGREEMENT WHEN IT SUSPENDED MR. TYRONE LIPSCOMB? IF THE SUSPENSION VIOLATES ARTICLE 30 OF THE MASTER AGREEMENT AND WAS NOT FOR JUST AND SUFFICIENT CAUSE, WHAT SHALL THE REMEDY BE?"

THE FIRST QUESTION TO BE DETERMINED IS AS FOLLOWS: WAS THE INVESTIGATION AND DISCIPLINE TIMELY? DID THE AGENCY VIOLATE ARTICLE 30 OF THE MASTER AGREEMENT?

THE RECORD CLEARLY SHOWS THAT THE FIRST INCIDENT REGARDING "FAILURE TO FOLLOW MEAL PROCEDURES" OCCURRED NOVEMBER 3, 2010. AUTHORIZATION TO CONDUCT A LOCAL INVESTIGATION INTO ALLEGED MISCONDUCT OF STAFF WAS ISSUED BY THE US DEPARTMENT OF JUSTICE ON NOVEMBER 30, 2010 (SEE AGENCY EXHIBIT 5). THE REPORT WAS TO BE FORWARDED IN 10 DAYS. THE GRIEVANT WAS INTERVIEWED DECEMBER 15, 2011 (SEE AGENCY EXHIBIT 6) AND THE TWO AGENCY WITNESSES STEVE LANGFORD, ASSOCIATE WARDEN (SEE AGENCY EXHIBIT 2) AND LESLIE OUTLAW, SUPERVISOR OF INDUSTRIES (SEE AGENCY EXHIBIT 1) WERE INTERVIEWED DECEMBER 19, 2011. THE ALLEGED MISCONDUCT WAS SUSTAINED BY BRIAN BARRICK, SPECIAL AGENT IN THE OFFICE OF INTERNAL AFFAIRS (OIA), JANUARY 3, 2012 (SEE AGENCY EXHIBIT 8) APPROXIMATELY TWO YEARS AFTER THE INCIDENT.

THE SECOND EVENT "FAILURE TO PROPERLY SUPERVISE INMATES; FAILURE TO FOLLOW POLICY; BREACH OF SECURITY" OCCURRED SEPTEMBER 12, 2011. THE GRIEVANT WAS INTERVIEWED ON DECEMBER 15, 2012 AND HIS SUPERVISOR, LT. VICTOR MORENO, WAS INTERVIEWED JANUARY 19, 2012. IT MUST BE NOTED THAT

THE GRIEVANT WAS INTERVIEWED FOR BOTH INCIDENTS ON THE SAME DAY, DECEMBER 15, 2011. THE ALLEGED MISCONDUCT WAS SUSTAINED BY BRIAN BARRACK, SPECIAL AGENT AT OIA ON FEBRUARY 3, 2012.

THE INVESTIGATIONS WERE COMPLETED BY JAMES PATTERSON, SIS LIEUTENANT ON FEBRUARY 2, 2012 AND FORWARDED TO UPPER LEVEL SUPERVISORS. LT. PATTERSON TESTIFIED THAT IT TOOK HIM MORE THAN A YEAR TO ATTEND TO THE INVESTIGATION BECAUSE HE WAS THE ONLY SIS AGENT ON STAFF AT WILLIAMSBURG AND HE HAD A FULL PLATE ALONG WITH SOME ILLNESS DURING THIS TIME PERIOD. HE STATED THAT HE WAS OUT FOR FIVE WEEKS ANNUAL LEAVE, HOSPITALIZED TWICE, HAD TWO SINUS SURGERIES, WAS ON TDY TO MARIANNA FOR ASSISTANCE, PROCESSED TWO INTRODUCTORY CASES AND TWO STAFF MEMBERS WERE REMOVED (TRANSCRIPT P. 106).

ON JUNE 22, 2012, THE AGENCY INFORMED MR. LIPSCOMB THAT IT WAS PROPOSING A FIVE (5) DAY SUSPENSION (SEE JOINT EXHIBIT4). THE GRIEVANT RESPONDED OCTOBER 23, 2012 AND A DECISION LETTER WAS ISSUED BY WARDEN CRUZ NOVEMBER 5, 2012. THE DISCIPLINE WAS CHANGED TO ONE DAY SUSPENSION. THE UNION FILED A GRIEVANCE ON NOVEMBER 15, 2012.

THE AGENCY NOTED THAT DURING THIS PERIOD THERE WAS ONLY ONE SIS AGENT AND THERE WERE SEVERAL CHANGES IN THE POSITION OF WARDEN. WARDEN CRUZ ARRIVED OCTOBER 2012 AND ISSUED DISCIPLINE NOVEMBER 2012.

NO MATTER HOW YOU VIEW THE AFOREMENTIONED EVENTS, THERE IS A SERIOUS TIME LAPSE FROM THE TIME BOTH INCIDENTS OCCURRED, PARTICULARLY THE "MEAL" INCIDENT, TO THE TIME OF THE ISSUANCE OF DISCIPLINE. IN TERMS OF THE MEAL INCIDENT THERE IS MORE THAN A YEAR BEFORE THE INVESTIGATION BEGAN. THE QUESTION IS THIS A VIOLATION OF ARTICLE 30 MUST BE ANSWERED. OFFICER PATTERSON TESTIFIED THAT THEY (SIS) TRY TO MEET THE 120 DAY TURNAROUND BUT HE THEN STATED THAT THERE IS NO DISCIPLINE OR ADVERSE ACTION IF THEY DON'T (SEE TRANSCRIPT P. 139).

THE ARBITRATOR IS FAMILIAR WITH AND HAS READ THE REVIEW OF THE FEDERAL BUREAU OF PRISONS' DISCIPLINARY SYSTEM, REPORT NUMBER 1-2004-008. THE UNION ASSERTS THAT THE AGENCY ESTABLISHED GENERAL GUIDELINES FOR THE TIME FRAME OF LOCAL INVESTIGATIONS AND THAT THEY SHOULD NOT EXCEED 120 DAYS AND AN OIA ON-SITE INVESTIGATIONS SHOULD NOT EXCEED 180 DAYS. IT IS ALSO NOTED THAT THE AGENCY ESTABLISHED A GENERAL GUIDELINE OF NO MORE THAN 120 DAYS FOR COMPLETION OF THE ADJUDICATION PROCESS. MR. HARLEY LAPPIN, ASSISTANT INSPECTOR GENERAL'S IN A MEMORANDUM DATED SEPTEMBER 15, 2004, STATED IN RECOMMENDATION #9, P. 55, THAT "120 DAYS FOR LOCAL INVESTIGATIONS AND 180 DAYS FOR OIA ON-SITE INVESTIGATIONS AS UPPER-LIMIT PARAMETERS" WERE GOALS. FURTHER IT WAS STATED "WE WILL ESTABLISH A GENERAL GUIDELINE OF 120 DAYS AS THE UPPER PARAMETER FOR COMPLETING THE ADJUDICATION PHASE OF THE PROCESS." P. 55 (SEE EXHIBIT JOINT 9).

IT IS THIS ARBITRATOR'S OPINION THAT THE AGENCY HAS NOT ADOPTED ANY POLICIES OR GUIDELINES THAT IMPOSES LIMITATIONS FOR INVESTIGATIONS OR THE ISSUANCE OF DISCIPLINE. THIS THINKING IS IN STEP AND CONSISTENT WITH MY PREVIOUS RULING IN AFGE LOCAL 506 V. DOJ, FEDERAL CORRECTIONAL

COMPLEX, COLEMAN, FL, FMCS CASE NUMBER 10-59428 (2013). THE POSITION IS ALSO CONSISTENT WITH THAT TAKEN BY ARBITRATOR CARL F. JENKS IN MCC CHICAGO V. AGE LOCAL 3642, FMCS CASE NO. 12-55359; ARBITRATOR JOHN NAGY IN AFGE LOCAL 2001 V. BOP, FCI FT. DIX, FCS CASE NO 11-53638 (2012); AND JAMES S. DARBY IN AFGE LOCAL 2001 AND FCI FT. DIX V. BOP, FMCS CASE NO. 12-55984-1. IN ALL OF THE ABOVE CASES, THE ARBITRATORS HAVE AGREED THAT THE AGENCY HAS ESTABLISHED "GUIDELINE EXPECTATIONS" FOR INVESTIGATIONS AND ADJUDICATORY ACTIONS. THIS ARBITRATOR NOTES THAT THESE "EXPECTATIONS" WERE CLEARLY NOT MET IN THE INSTANT CASE. HOWEVER, THE ARBITRATOR CAN'T IMPOSE UPON THE AGENCY SUGGESTED RESTRICTIONS WHEN THEY HAVE NOT BEEN CODIFIED IN THE CONTRACTUAL AGREEMENT BETWEEN THE PARTIES. SPECIFICALLY, ARTICLE 30 SECTION d. IS THE A APPLICABLE LANGUAGE REGARDING THE TIMELINESS OF INVESTIGATIONS AND ADJUDICATORY ACTION IN THE INSTANT CASE. SPECIFICALLY THE LANGUAGE STATES THE FOLLOWING:

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 TAKE 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.

WHAT HAPPENED IN THE INSTANT CASE IS WHAT IS SPELLED OUT IN THE CONTRACTUAL LANGUAGE. FOR THIS ARBITRATOR TO DIFFER WITH WHAT THE PARTIES HAVE AGREED TO MEANS THAT THE ARBITRATOR HAS TO POWER TO WRITE THE PARTIES CONTRACT WHICH SHE DOES NOT. FURTHER, IT IS A FACT THAT IF THE PARTIES HAD AGREED TO THE 120 AND 180 DAYS RESPECTIVELY, THEY WOULD BE INCLUDED IN THE AGREEMENT. FOR THE ARBITRATOR TO UNILATERALLY IMPOSE THIS CHANGE WOULD BE A VIOLATIONS OF ARTICLE 32 h. WHICH STATES THAT THE "ARBITRATOR SHALL HAVE NO POWER TO ADD TO, SUBTRACT FROM, DISREGARD, ALTER, OR MODIFY ANY OF THE TERMS OF THIS AGREEMENT."

IN LIGHT OF THE ABOVE, THE ARBITRATOR CANNOT OPINE ABOUT THE TIMELINESS OF THE DISCIPLINE OR THE INVESTIGATION.

THE ARBITRATOR WILL FIRST CONSIDER THE CHARGE OF "FAILURE TO FOLLOW POLICY/BREACH OF SECURITY/FAILURE TO PROPERLY SUPERVISE INMATES."

THE AGENCY NOTES THAT ON SEPTEMBER 12, 2011 THE GRIEVANT WAS ASSIGNED TO 2B-UPPER HOUSING. DURING A TEN MINUTE MOVE FROM 7:30-7:40 AN INMATE WAS ASSAULTED IN THE COMMON AREA OF HIS UNIT. THE TAPE FROM THE CAMERA FOR THE AREA WERE REVIEWED ON SEPTEMBER 13, AND DURING THIS PROCESS IT WAS DETERMINED THAT THE GRIEVANT WAS NOT AT HIS ASSIGNED POST. THE GRIEVANT ACCORDING TO THE CAMERA FOOTAGE LEFT THE UNIT AT APPROXIMATELY 7:28, THE ASSAULT TOOK PLACE AT 7:29, AND OFFICER LIPSCOMB RETURNED AT 7:40 (SEE AGENCY EXHIBIT 11 AND DVD ENTERED AS EVIDENCE). THE GRIEVANT IS SHOWN ON CAMERA STANDING OUTSIDE HIS UNIT

FOR A TOTAL OF 13 MINUTES WITH THE UNIT DOOR UNSECURED. ACCORDING TO LT. JAMES PATTERSON'S REPORT, THE GRIEVANT WAS SUPPOSE TO BE POSTED AT THE DOOR TO MONITOR THE FLOW OF INMATE TRAFFIC. THE UNIT HAS A METAL DETECTOR FOR INMATES TO PASS THROUGH AND THIS ALLOWS THE OFFICER TO MONITOR THE TRANSFER OF WEAPONS AND CONTRABAND INTO THE HOUSING UNIT.

AS A RESULT OF THE INVESTIGATION, WHICH INCLUDED THE REVIEW OF THE CAMERA FOOTAGE, INTERVIEWS WITH THE GRIEVANT, AND OFFICER MORENO, HIS SUPERVISOR, LT. PATTERSON SIS DETERMINED THAT THE GRIEVANT WAS IN VIOLATION OF HIS POST ORDERS.

THE APPLICABLE SPECIAL POST ORDERS, WHICH THE GRIEVANT SIGNED FOR WHEN HIRED, ARE AS FOLLOWS:

MOVEMENTS/PASSES & METAL DETECTORS

ALL INMATE MOVEMENTS ON THE COMPOUND WILL BE CONTROLLED WITH ANNOUNCED PERIODS OF MOVEMENT CALLED CONTROLLED MOVEMENT. THESE MOVEMENTS WILL USUALLY BE CONDUCTED BETWEEN 6:00 A.M. AND 8:30 P.M. WITH THE EXCEPTION OF COUNT TIMES AND MEAL PERIODS. ALL INMATES WILL BE GIVEN A 10 MINUTE TIME LIMIT TO MOVE FROM ONE AREA TO ANOTHER.

DURING ALL CONTROLLED MOVEMENTS, OFFICERS WILL POSITION THEMSELVES AT THE APPROPRIATE OUTER ENTRANCE DOOR OF THE UNIT TO PAT SEARCH/METAL DETECT INMATES IN ORDER TO CONTROL CONTRABAND AND TO SUPERVISE THE INMATES ENTERING AND LEAVING THE UNIT TO ENSURE INMATES ENTERING AND LEAVING ARE ASSIGNED TO THAT SPECIFIC UNIT. IF A STAFF MEMBER HAS TO LEAVE THE UNIT ENTRANCE DOOR DURING A 10 MINUTE CONTROLLED MOVEMENT THEY WILL SECURE THE UNIT ENTRANCE DOOR UNTIL THEY RETURN. STAFF MEMBERS WILL NOT MONITOR INMATES' MOVEMENT GOING THROUGH MEATAL DETECTORS WHICH ARE LOCATED INSIDE THE HOUSING UNITS WHILE SITTING AT THE CENTER OFFICE'S STATION. MAINTAINING HIGH VISIBILITY AT THE FRONT DOOR WILL TEND TO DISRUPT INMATE'S CHANCES OF BRINGING CONTRABAND INTO THE UNIT (SEE AGENCY EXHIBIT 9, P. 10).

AT THE HEARING, THE GRIEVANT TESTIFIED THAT HE WAS INSTRUCTED TO CLEAR THE STAIRWELL DURING THE MOVE BY SUPERVISOR MORENO. IN HIS AFFIDAVIT, THE GRIEVANT STATED "I DID GET AN OPPORTUNITY TO WATCH THE VIDEO OF THE DATE IN QUESTION. I SEEN MYSELF OUTSIDE THE DOOR OF THE UNIT FOR 13 MINUTES. I WAS CALLED BY MY LIEUTENANT MORENO, TO STEP OUTSIDE THE DOORWAY TO CLEAR THE STAIRS AND GET THE INMATES MOVING. IF YOU DO NOT PHYSICALLY GO DOWN THE STAIRS, THE INMATES WILL NOT MOVE (SEE AGENCY EXHIBIT 10). FURTHER IN HIS JULY 13, 2012 RESPONSE TO THE PROPOSED DISCIPLINE THE GRIEVANT NOTED THAT HE STEPPED AWAY FROM THE DOOR TO CLEAR THE STAIRWAY AS ORDERED BY HIS SUPERVISOR, AND THEN HE STATED: "HOWEVER, I BARE THE RESPONSIBILITY FOR MY ACTIONS ON THAT DAY IN QUESTION. AS THE 2B UPPER HOUSING UNIT OFFICER I AM CHARGED WITH THE RESPONSIBILITY OF THE OVERALL OPERATION OF THE UNIT AND, THE SAFETY OF THE INMATE IN MY CARE. I HAVE NO EXCUSES AND, AGAIN TAKE RESPONSIBILITY FOR MY ACTIONS" (SEE JOINT EXHIBIT 5). THE ARBITRATOR

ALSO NOTES THAT THE GRIEVANT KNEW THE RULES AND THE PROCESS FOR SECURING HIS UNIT.

DURING HIS TESTIMONY, OFFICER MORENO STATED THAT WHEN AN OFFICER IS ORDERED TO CLEAR THE STAIRWELL, "THE DOORS ARE SUPPOSED TO BE SECURED ANY TIME THEY LEAVE THE VICINITY OF THE DOORWAY. HE WENT ON TO STATE THAT AFTER VIEWING THE VIDEO HE DID NOT SEE OFFICER LIPSCOMB SECURE THE DOOR (TRANSCRIPT. P. 77). WHEN ASKED BY UNION COUNSEL IF HE ORDERED THE GRIEVANT TO CLEAR THE STAIRS HE STATED "THE CHANCES ARE HIGHLY LIKELY, YES" (TRANSCRIPT P. 78). WHEN ASKED BY AGENCY COUNSEL WHEN AN ORDER IS GIVEN FOR A PERSON TO CLEAR A STAIRWAY AND THE OFFICER GOES OUT INTO THE STAIRWAY WOULD THEY STAY IN THE STAIRWAY UNTIL IT IS CLEAR? THE RESPONSE WAS "ORDINARILY NOT, NO. I MEAN, ORDINARILY THEY COME OUT, THEY CLEAR THE STAIRWELL, AND THEN GO BACK INSIDE THE HOUSING UNIT, MONITOR THEIR METAL DETECTOR, DO WHATEVER IT IS THEY'VE GOT TO DO, SOMETIMES EVEN MAKE A ROUND WITHIN THE HOUSING UNIT AND THEN THEY COME BACK OUT, YOU KNOW, IF WE CALL THEM BACK OUT. BUT NORMALLY TO BE OUT THERE FOR A FULL TEN MINUTE MOVE, NO, WE DON'T NORMALLY DO THAT" (TRANSCRIPT. P. 80).

LT. MORENO STATED THAT WHILE THE GRIEVANT WAS IN THE STAIRWAY, THERE WAS AN ASSAULT ON INMATE CAMPBELL BY TWO OTHER INMATES. THE FIGHT WAS GANG RELATED. ALTHOUGH HE ADMITTED IN HIS TESTIMONY THAT THE FIGHT PROBABLY COULD NOT HAVE BEEN PREVENTED BY THE GRIEVANT, BOTH HE AND INVESTIGATOR PATTERSON FELT THAT IF HE HAD BEEN PRESENT HE COULD HAVE SEEN THE INCIDENT UNFOLD. IT APPEARS THAT HE FOUND OUT ABOUT THE INCIDENT WHEN HE RETURNED AND BY THEN THE INMATES HAD CLEANED UP THE BLOOD AND CHANGED CLOTHES. IN HIS FEBRUARY 2, 2012 REPORT, OFFICER PATTERSON ALSO STATED HE "CONCLUDED OFFICER LIPSCOMB WAS ABSENCE FROM HIS ASSIGNED POST AND UNABLE TO PROPERLY SUPERVISE INMATES ENTERING AND EXITING HIS UNIT, AS WELL AS THOSE INMATES IN THE UNIT. HAD OFFICER LIPSCOMB BEEN AT HIS ASSIGNED POST, HE COULD HAVE ALTERED THE OUTCOME OF THE ASSAULT, OR AT A MINIMUM, SOUNDED THE ALARM." HE WENT ON TO SAY "ALTHOUGH IT IS DOUBTFUL LIPSCOMB'S, PRESENCE IN THE UNIT WOULD HAVE PREVENTED THE ASSAULT, HE WOULD HAVE BEEN PRESENT TO WITNESS THE INCIDENT AS IT UNFOLDED." (SEE AGENCY EXHIBIT 11, P.5).

A REVIEW OF THE TAPE SHOWS INMATES ENTERING THE HOUSING UNIT THROUGH THE UNSECURED DOOR WHERE POSSIBLY CONTRABAND AND WEAPONS COULD HAVE BEEN TRANSPORTED INSIDE. IT IS UNDISPUTED THAT THE GRIEVANT WAS OUTSIDE THE UNIT FOR 13 MINUTES AND THIS IS CLEARLY A VIOLATION OF POSTED ORDERS.

IN THE INSTANT CASE, ALTHOUGH THE GRIEVANT FOLLOWED ORDERS TO CLEAR THE STAIRWAY, COMMON SENSE WOULD HAVE INDICATED THAT HE HAD A DUTY TO PROPERLY SUPERVISE THE INMATES AND HE COULD NOT SECURE HIS SECTION BY STANDING IN THE STAIRWAY. YET, HE LEFT THE UNIT FOR APPROXIMATELY 13 MINUTES WITH THE DOORS TO 2B - UPPER UNSECURED. WITHOUT DOUBT LIPSCOMB VIOLATED THE RULES BY FAILING TO PROPERLY SECURE THE INMATES. ALTHOUGH THERE WERE CLAIMS MADE IN TESTIMONY BY THE UNION THAT HE COULD SEE

INSIDE THE UNIT FROM THE STAIRWAY, THE ARBITRATOR, AFTER VIEWING THE VIDEO, AND LISTENING TO ALL OF THE TESTIMONIES FIND THE ASSERTION WITHOUT MERIT.

DID THE AGENCY FOLLOW THE DOUGLAS FACTOR? THE ANSWER IN THIS CASE IS "YES." THE CASE WAS REFERRED TO OIA AFTER THE VIDEO WAS REVIEWED ON SEPTEMBER 13 ONE DAY AFTER THE INCIDENT. WHEN APPROVED FOR INVESTIGATION, OFFICER PATTERSON INTERVIEWED THE GRIEVANT WITH HIS UNION REPRESENTATION PRESENT AND TOOK AN AFFIDAVIT THAT THE GRIEVANT SIGNED. HE ALSO INTERVIEWED OFFICER MORENO. THE INVESTIGATION WAS COMPLETED SHORTLY AFTER THE EVENT AND FORWARDED TO OIA. WHEN THE INVESTIGATION WAS APPROVED, IT WAS SUBMITTED TO THE SUPERVISORS OF WILLIAMSBURG. ACCORDING TO UNDISPUTED I 2012, THERE WAS NO FULL-TIME WARDEN AT WILLIAMSBURG. DISCIPLINE WAS PROPOSED IN JUNE AND WHEN WARDEN CRUZ ARRIVED IN OCTOBER, SHE ISSUED DISCIPLINE IN NOVEMBER. SHE CHANGED THE PROPOSED FIVE DAY SUSPENSION TO A ONE (1) DAY SUSPENSION. HER TESTIMONY INDICATED THAT SHE CONSIDER THE FACT THAT THE GRIEVANT HAS NO PRIOR DISCIPLINE AND OTHER MITIGATING CIRCUMSTANCES.

WARDEN CRUZ CONSIDERED THE FACT THAT ONLY THE GRIEVANT WAS PRESENT AND ON DUTY IN 2B-UPPER. SHE SAID THAT HIS POSITION WAS IMPORTANT AND THAT SHE CONSIDERED THE SERIOUSNESS OF AREA BEING UNMANNED. THE FACILITY WAS NOT LOCKED AND THE GRIEVANT IS RESPONSIBLE FOR KEEPING A SAFE ENVIRONMENT AND MONITORING AND OVERSIGHT OF THE INMATES IN HIS AREA. SHE TESTIFIED THAT SHE LOOKED AT HIS WORK HISTORY AND IT WAS "SOLID." WITH NO PROBLEMS. SHE NOTED THAT HE KNEW THE RULES AND THE PENALTIES BECAUSE OF THE REFRESHER YEARLY TRAINING AND SHE REVIEWED THE TABLE OF PENALTIES NOTING THAT THE RANGE WAS FROM A WRITTEN REPRIMAND TO DISMISSAL.

HOWEVER, SHE TESTIFIED THAT THE INCIDENT THAT HE WAS CHARGED WITH HAD AN IMPACT ON HER CONFIDENCE IN HIS ABILITY "TO PROPERLY CARRY OUT HIS DUTIES" (TRANSCRIPT. 195-209). SHE STATED THAT HE WAS RESPONSIBLE OR CONTROLLING THE INMATES AND THERE WAS AN ASSAULT IN HIS ABSENCE. THE ARBITRATOR NOTES, THAT IF MANAGEMENT TRULY HAD NO CONFIDENCE IN THE GRIEVANT, ONE HAS TO QUESTION WHY HE WAS LEFT AT HIS POST FROM THE TIME OF THE INCIDENT, WHEN THERE WAS A PERMANENT WARDEN, TO THE HEARING, ALMOST TWO YEARS LATER. ACCORDING TO ARTICLE 30, SECTION 9. THE AGENCY CAN REASSIGN AN EMPLOYEE, OR REMOVE AN EMPLOYEE, PENDING RESOLUTION OF THE MATTER. SINCE THIS DID NOT HAPPEN, THE ARBITRATOR QUESTIONS THE WARDEN'S CLAIM. THE RECORD INDICATES THAT THERE WERE NO COMPARABLE EVENTS, THUS THE WARDEN STATED THAT SHE LUMPED THE TWO INCIDENTS INTO ONE AND CHANGED THE PROPOSED FIVE(5) DAY SUSPENSION TO A ONE (1) DAY SUSPENSION BECAUSE SHE BELIEVED THAT THE GRIEVANT COULD BE REHABILITATED.

NOW TO THE ACCUSATION "THEFT/MISUSE OF GOVERNMENT PROPERTY."

ON OR AROUND NOVEMBER 3, 2010, THE GRIEVANT WAS ALLEGEDLY OBSERVED BY STEVE LANGFORD, LESLIE T. OUTLAW AND WARDEN OWEN TAKING A MEAL FROM THE STAFF DINNING ROOM WITHOUT PAYING FOR SAME. THIS WAS REPORTED TO THOSE HIGHER UP AND ON NOVEMBER 30, 2010, OIA AUTHORIZED A LOCAL INVESTIGATION. THE RECORD INDICATES THAT THE GRIEVANT WAS NOT MADE AWARE OF THESE ALLEGATION UNTIL HE WAS CALLED INTO THE OFFICE BY LT. JAMES PATTERSON, SIS TO BE INTERVIEWED REGARDING THE CHARGES. A UNION REPRESENTATIVE WAS PRESENT. IN THE AFFIDAVIT, THE GRIEVANT STATED THE FOLLOWING: "I DO NOT RECALL THE INCIDENT. I NORMALLY PAY FOR THE MEAL WHEN I GO IN TO EAT LUNCH WHEN I AM ON DAY WATCH. I USUALLY PAY FOR THE MEAL, LOOK TO SEE WHAT IS ON THE MENU AND THEN WASH MY HANDS. I LOOKED AT THE ROSTER AND SEE I WAS ON DAY WATCH WORKING OVERTIME ON NOVEMBER 3, 2010, THE DATE OF THE ALLEGED INCIDENT. IT WAS YEAR AND A MONTH AGO, AND I DO NOT RECALL THE PARTICULAR DAY. I DO KNOW THAT I NORMALLY PAY FOR MY LUNCH WHEN I EAT IN THE DINNING HALL" (SEE AGENCY EXHIBIT 6).

STEVE LANGFORD STATED IN HIS AFFIDAVIT THAT HE REMEMBERED THE FOLLOWING: ON NOVEMBER 3, 2010, AT APPROXIMATELY 12:15 P.M., OFFICER LIPSCOMB WAS OBSERVED BY ME, RETRIEVING A FOOD SERVICE MEAL IN THE STAFF DINNING HALL WITHOUT PAYING. I, WARDEN OWEN, EXECUTIVE ASSISTANT OUTLAW, AND ACA AUDITOR ROGERS WERE IN THE STAFF DINNING HALL EATING AT THE TIME. LIPSCOMB ENTERED THE STAFF DINNING ROOM AND ENTERED THE REST ROOM. UPON HIS EXIT FROM THE RESTROOM, LIPSCOMB WENT TO THE SERVING LINE AND ORDERED A TAKEOUT TRAY. UPON RECEIVING HIS TRAY, LIPSCOMB PLACED SEVERAL COOKIES INTO THE TRAY, CLOSED THE LID, AND THEN EXITED THE STAFF DINNING HALL WITH THE ITEMS." AT NO TIME DID I OBSERVE OFFICER LIPSCOMB PLACE A DEBIT CARD-READER TO RETRIEVE A MEAL TICKET. NOR DID I SEE LIPSCOMB PLACE A MEAL TICKET IN THE BOX FOR MEAL TICKETS" (SEE AGENCY EXHIBIT 2). HE ALSO STATES THAT AUDITOR ROGERS FROM ACA WAS PRESENT BECAUSE THE AGENCY WAS UNDERGOING A REVIEW. FURTHER, LESLIE T. OUTLAW IN HIS AFFIDAVIT STATED: "ALTHOUGH I DO NOT RECALL THE EXACT DATE, I DO RECALL A DAY IN WHICH OFFICER LIPSCOMB WAS OBSERVED BY MYSELF, AW LANGFORD, AND WARDEN OWEN ENTERING THE STAFF DINNING HALL AND OBTAINING A MEAL WITHOUT PAYING FOR IT. I RECALL THE INCIDENT BECAUSE IT WAS DURING AN ACA ACCREDITATION AND WE WERE HAVING LUNCH IN THE STAFF LOUNGE WITH THE AUDITOR (SEE AGENCY EXHIBIT 1). BOTH OF THESE AFFIDAVITS WERE TAKEN ON SEPTEMBER 19 2011, ONE YEAR AFTER THE EVENT.

AT THE HEARING, BOTH AGENCY WITNESSES STATED THAT THEY DID NOT SEE THE GRIEVANT PLACE THE DEBITIK CARD IN THE READER, SIGN A RECEIPT OR PUT IT IN THE BOX. MR. OUTLAW'S MEMORY WAS RATHER VAGUE AT THE HEARING. HE RECALLED BEING IN THE DINNING HALL 15, OR 20, OR 30 OR 40 MINUTES NOTING THAT THIS WAS THREE OR FOUR YEARS AGO. THEN TESTIFIED THAT IT IS POSSIBLE FOR AN EMPLOYEE TO PURCHASE HIS MEAL BEFOREHAND AND THEN PICK IT UP LATER (TRANSCRIPT P. 36). WHEN ASKED TO DESCRIBE THE CAFETERIA, MR. OUTLAW COULD NOT. HE STATED "I CAN'T REMEMBER EXACTLY HOW THE PLACE WAS LAID OUT OFF THE TOP OF MY HEAD" (TRANSCRIPT P. 37).

HOWEVER, HE WAS SURE HE SAW THE GRIEVANT PICK UP A MEAL AND NOT PAY (TRANSCRIPT P. 39).

ON THE OTHER HAND MR. LANGFORD AT THE HEARING TESTIFIED WHEN REFERRING TO THE GRIEVANT STATED "HE ENTERED THE STAFF DINNING LOUNGE, STAFF DINNING AREA, WENT TO THE REST ROOM, CAME OUT, RETRIEVED A TRAY, PUT SOME COOKIES IN A TO- GO TRAY, A STYROFOAM, LIKE A CLAM SHELL, RECEIVED HIS TRAY, PUT SOME COOKIES IN IT AND LEFT WITHOUT PAYING" (TRANSCRIPT P.42).

IT IS WORTH NOTING THAT BOTH WITNESSES INDICATE THAT THE GRIEVANT DID NOT PAY. HOWEVER, THE GRIEVANT IN HIS TESTIMONY ASSERTED THAT WHEN HE CAME INTO THE DINNING HALL HE NOTED THAT THERE WERE SANDWICHES THAT LOOKED OLD AND THE INMATE PREPARING THE FOOD INDICATED THAT THERE WAS MORE MEAT ON THE GRILL AND THAT THEY WERE GOING TO MAKE SOME MORE SANDWICHES. THE GRIEVANT STATED THAT HE SAID "MAKE ME ONE, GIVE ME SOME RICE, AN I THINK SOME KIND OF VEGETABLE. I'M GOING TO GO OVER HERE AND HOLLER AT MR. TURNER IN THE LAUNDRY, AND I'LL BE RIGHT BACK." THE GRIEVANT STATED THAT WHEN HE CAME INTO THE DINNING AREA, NEITHER THE WARDEN NOR THE OTHER TWO WITNESSES WERE PRESENT. THE GRIEVANT STATED "I PAID FOR MY FOOD, I TOLD THE INMATE WHAT I WANTED, AND I LEFT" HE INDICATED THAT MR. TURNER WAS A UNION STEWARD AND HE HAD SOME UNION ISSUES TO DISCUSS WITH HIM. THE GRIEVANT STATED THAT THAT WHEN HE CAME BACK INTO THE DINNING AREA, THE WARDEN, LANGFORD AND OUTLAW WERE THERE. HE STATED THAT HE THEN WENT TO THE BATHROOM TO WASH HIS HANDS" I GOT MY TRAY FROM THE INMATE, STOPPED TO PUT SOME COOKIES IN IT, WALKED OUT THE DOOR...I GUESS IF I WERE ON THE OTHER SIDE LOOKING AT IT, I WOULD ASSUME THAT I DIDN'T PAY EITHER" (TRANSCRIPT PP. 222-224).

THE ARBITRATOR NOTES IN THE RESPONSE TO THE PROPOSED DISCIPLINE, THE GRIEVANT DENIED TAKING A MEAL WITHOUT PAYING. IN HIS AFFIDAVIT HE DENIED TAKING A MEAL WITH OUT PAYING. HOWEVER, HE DID SAY IN HIS AFFIDAVIT "I USUALLY PAY FOR MY MEAL LOOK TO SEE WHAT IS ON THE MENU AND THEN WASH MY HANDS." THIS SEEMS TO BE EXACTLY WHAT THE GRIEVANT DID ON THE DAY IN QUESTION. NEITHER MR. OUTLAW OR LANGFORD TESTIFIED THAT THE GRIEVANT HAD NOT BEEN IN THE FACILITY EARLIER TO ORDER HIS SANDWICH, FURTHER THE ARBITRATOR NOTES THAT THE ONLY WAY TO BE CERTAIN THAT THE GRIEVANT DID NOT PAY WOULD HAVE BEEN TO LOOK AT THE SIGNED RECEIPTS IN THE RECEIPT BOX.

WHEN GIVING TESTIMONY, LT. PATTERSON WAS ASKED "WHY DIDN'T YOU CHECK THE RECEIPT?" HE STATED THE FOLLOWING: "AS I RECALL, I DIDN'T HAVE ACCESS TO IT AT THE TIME. I MEAN, IT'S A BUSINESS OFFICE ITEM AND SO THEREFORE THE BUSINESS OFFICE HAS ACCESS. IT IS LOCKED UP IN A PADLOCK, SO NO, I DIDN'T HAVE ACCESS TO THAT" (TRANSCRIPT P. 152). WHEN ASKED IF HE SHOULD HAVE VERIFIED THROUGH THE RECEIPTS IF THE GRIEVANT PAID FOR THE MEAL, HE STATED: "I PROBABLY COULD HAVE, PROBABLY SHOULD HAVE, BUT I DIDN'T" (TRANSCRIPT 153).

THE ARBITRATOR IS AT A LOST AS TO WHY THE INVESTIGATION DID NOT TAKE INTO ACCOUNT THE RECEIPT BOX SINCE ALL OF THE AGENCY WITNESS WERE SURE THAT THE GRIEVANT DID NOT PAY BECAUSE THEY DID NOT SEE HIM PLACE A RECEIPT IN SAME. CLEARLY IT IS A SECURED BOX AND ONE WOULD SURMISE THAT THE BUSINESS OFFICE HAS A RECORD OF THEM. IN THE INSTANT CASE, THE AGENCY RELIED ON WITNESSES WHO COULDN'T DESCRIBE THE FACILITY AND HAD A VAGUE MEMORY OF THE TIME FRAME. ONE WITNESS THOUGHT THEY WERE THERE FROM 15-49 MINUTES. FURTHER HE COULD NOT DESCRIBE THE FACILITY. THIS IS WHAT HAPPENS WHEN ONE IS ASKED TO RECALL SOMETHING THAT HAPPENED FOUR YEARS AGO. HOWEVER, THEY DID AGREE WITH THE GRIEVANT IN THAT HE GOT HIS MEAL, PUT COOKIES IN HIS TAKEOUT AND LEFT THE FACILITY. THERE IS NO REASON FOR THIS ARBITRATOR TO NOT BELIEVE THE GRIEVANT STOLE A MEAL. HE, HAD AN IMPECCABLE RECORD AND HIS INTEGRITY HAS NEVER BEEN QUESTIONED. FURTHER, THE AGENCY WITNESS TESTIFIED THAT ONE DID NOT HAVE TO WAIT TO PAY FOR A MEAL WHEN LEAVING. THEFT IS A SERIOUS ACCUSATION AND SHOULD BE PROVEN BEYOND A REASONABLE DOUBT OR AT LEAST BY THE PREPONDERANCE OF THE EVIDENCE. TO BE FOUND GUILTY OF THEFT IS LIKE A SCARLET LETTER. LEFT UNCHALLENGED, THE WIDER COMMUNITY WILL FOREVER QUESTION THE PERSONS CHARACTER AND INTEGRITY. IF MANAGEMENT REALLY WANTED TO PROVE IT'S CASE, THEY HAD ACCESS TO HARD EVIDENCE, I.E. THE RECEIPT BOX, VERSES, WITNESSES RECOLLECTIONS OF YEARS PAST. FURTHER, THE ARBITRATOR NOTES THAT MANAGEMENT NEVER SAID THAT THE RECEIPTS WERE NOT ACCESSIBLE.

IN THIS ARBITRATOR'S OPINION, THE AGENCY FAILED TO ROVE THAT THE GRIEVANT IS GUILTY OF "THEFT OF GOVERNMENT PROPERTY." IN THIS CASE STEALING A MEAL WHICH COST ABOUT APPROXIMATELY \$2.25

IN BOTH OF THE ABOVE INCIDENTS THE WARDEN LOOKED AT THE CODE OF CONDUCT AND CONSIDERED THE TABLE OF PENALTIES (SEE JOINT EXHIBIT 7). THE PENALTY FOR BOTH INCIDENTS RANGED FROM REPRIMAND TO REMOVAL, ALL AT THE WILL OF THE DECIDING OFFICIAL. IN THE INSTANT CASE, THE WARDEN IN THIS ARBITRATORS OPINION FOLLOWED THE DOUGLAS FACTORS AND DISCIPLINED THE GRIEVANT ACCORDINGLY AFTER CONSIDERING MITIGATING CIRCUMSTANCES, UNDERSTANDING THAT THE GRIEVANT KNEW THE RULES AS A RESULT OF SUBSTANTIAL TRAINING, AND CONSIDERATION WAS GIVEN TO THE GRIEVANT'S WORK RECORD OF NO DISCIPLINE. SHE NOTICED THAT THERE WERE NO COMPARABLES TO CONSIDER AND THE FACT THAT HE ACCEPTED RESPONSIBILITY AND AS A RESULT SHE DOWNGRADES THE PROPOSED DISCIPLINE. HOWEVER, THE DISCIPLINE DID NOT FIT THE ALLEGED CRIME, IN THIS ARBITRATOR'S OPINION.

IN THE CASE OF THE "THEFT OF PROPERTY, THE ARBITRATOR WAS NOT PRESENTED HARD CONVINCING AND UNCONTROVERTED EVIDENCE, WHICH THE AGENCY DID NOT DENY HAVING, THAT COULD HAVE PROVEN THE GRIEVANT GUILTY. IN LIGHT OF THIS, THE ARBITRATOR SUSTAINS THIS PART OF THE GRIEVANT.

WHAT SHALL BE THE PENALTY? IN THE INSTANCE CASE, THERE IS NO QUESTION THAT THE GRIEVANT NEGLECTED HIS DUTY TO SUPERVISE THE INMATES WHEN HE LEFT HIS AREA TO CLEAR THE STAIRWAY, ALTHOUGH ORDERED TO CLEAR THE STAIRWAY, HE STAYED THERE AND INORDINATE AMOUNT OF TIME, I.E. 13 MINUTES. THE ARBITRATOR NOTES THAT WHEN THE WARDEN WAS ASKED WHETHER

OR NOT SHE CONSIDERED GIVING THE GRIEVANT A LETTER OF REPRIMAND FOR THE TWO INCIDENTS AFTER SHE CONSIDERED ALL OF THE FACTORS, SHE STATED THE FOLLOWING: "WELL A LETTER OF REPRIMAND WOULD HAVE BEEN APPROPRIATE HAD IT BEEN FOR ONE CHARGE..."TRANSCRIPT P. 206).

IN THE INSTANT CASE THE AGENCY DID NOT PROVE EVERY ELEMENT OF ITS CHARGE WITH THE PREPONDERANCE OF THE EVIDENCE. THUS, AS IN DEFENSE CONTRACT AUDIT AGENCY AND AFGE, LOCAL 3529, 51 F.L.R.A. (1996) I AM MITIGATING THE AGENCY'S DECISION. THE CHARGE OF "FAILURE TO PROPERLY SUPERVISE INMATE/FAILURE TO FOLLOW POLICY/BREACH OF SECURITY" IS A SERIOUS MATTER. THE CHARGE IS SUSTAINED AND DISCIPLINE IS REQUIRED.

HOWEVER, AFTER CAREFUL CONSIDERATION OF THE EVIDENCE PRESENTED AT THE HEARING, INCLUDING TESTIMONIES, AS WELL AS ARGUMENTS PRESENTED IN THE PARTIES' BRIEFS, AND IN LIGHT OF ALL OF THE AFOREMENTIONED THE ARBITRATOR FINDS THAT THE DISCIPLINE FOR ALLEGED "THEFT OF GOVERNMENT PROPERTY" IS NOT FOR "JUST CAUSE" AND IS A VIOLATION OF THE CONTRACT AND WORK RULES. THE AGENCY DID NOT PROVE A NEXUS BETWEEN THE DISCIPLINE ADMINISTERED AND THE EFFICIENCY OF THE SERVICE. HOWEVER, THE CHARGE OF "FAILURE TO PROPERLY SUPERVISE INMATE/FAILURE TO FOLLOW POLICY/BREACH OF SECURITY" IS SUSTAINED. TESTIMONIES FROM THE WARDEN, AND DOCUMENTS CLEARLY INDICATED A NEXUS BETWEEN THE DISCIPLINE ADMINISTERED AND THE EFFICIENCY OF THE AGENCY.

AWARD

THE ARBITRATOR WILL RETAIN JURISDICTION IN THE INSTANT CASE. THE GRIEVANT'S GRIEVANCE IS SUSTAINED IN THE CHARGE OF "THEFT OF GOVERNMENT PROPERTY." THE CHARGE OF FAILURE TO PROPERLY SUPERVISE INMATE/FAILURE TO FOLLOW POLICY/BREACH OF SECURITY" IS UPHELD. AFTER CONSIDERATION OF THE GRIEVANT PAST RECORD AND OTHER DOUGLAS FACTORS, AS WELL AS THE GRIEVANT'S WILLINGNESS TO ACCEPT RESPONSIBILITY, THE DISCIPLINE FOR "INATTENTION TO DUTY" WILL BE MITIGATED FROM A ONE DAY SUSPENSION TO A WRITTEN WARNING. THE ONE DAY SUSPENSION WILL BE REMOVED FROM THE GRIEVANT'S PERSONNEL FILE AND HE IS TO BE MADE WHOLE FOR THE SUSPENSION. THIS INCLUDES PAY AS WELL AS BENEFITS.

FEBRUARY 17, 2015

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DOROTHY COWSER YANCY

ARBITRATOR
