FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION

Between

AFGE, LOCAL # 3690
Vs.
The Department of Justice,
Federal Bureau of Prisons
Federal Corrections Institution (Miami)

ARBITRATOR'S OPINION AND AWARD

MARVELL BURGESS SUSPENSION GREIVANCE
FMCS #09-00543

This grievance was submitted to binding arbitration pursuant to the terms and conditions of the Master Agreement [1] between the parties and the regulations of the Federal Mediation and Conciliation Service. Pursuant thereto the parties jointly selected the undersigned, **LAWRENCE I. HAMMER,** to serve as the arbitrator.

The hearings were held on February 10, 11, July 13 and July 14, 2011, at the Federal Institution located at 15801 SW 117 Avenue, in the City of Miami, Florida (Miami-Dade County), at which time the parties were afforded a full opportunity to present testimony, offer evidence and arguments to support their respective positions and to cross-examine each other's witnesses.

1 The Master Agreement, submitted in to evidence at the initial hearing consisted of some 42 articles comprising some 91 pages.

1

At the conclusion of the hearing the parties sought an opportunity to submit post-hearing briefs in further support of their respective positions. Said requests were granted with the briefs to be submitted on or before October 20, 2011. The time for submission was ultimately extended through the end of the month. Same were received timely post-marked.

APPEARANCES

FOR THE AGENCY (GOVERNMENT)

GAIL L. ELKINS, ESQ.
Labor Relations Specialist
United States Department of Justice
Federal Bureau of Prisons

EMMA FERNANDEZ, Human Resources Manager
JACK JENKINS, Executive Assistant

FOR THE UNION AND GRIEVANT
EVAN S. GREENSTEIN, ESQ.
OFFICE OF GENERAL COUNSEL (AFGE)

THE ISSUE

Was the disciplinary adverse action taken for just and sufficient cause? If not, what should be the remedy?

BACKGROUND

The Grievant Marvell Burgess, Jr. has been employed by the Federal Bureau of Prisons since January, 1991, and was employed on the date of the incident which led

to the discipline in question, namely November 7, 2006. The Grievant was a (seven year) member, of long standing, in an elite Disturbance Control Team (DCT).[2]

On November 7, 2006, the DCT members were involved in a training session. Amongst them was the Grievant, one Marvell Burgess, as well as a new Corrections Officer (CO),Rebecca Mendez.

At the conclusion of such session, the team leader announced a planned "social" event, a cookout, and called upon the two female members of the team to prepare the food.

Whereupon Ms. Mendez responded that she would not participate in the preparations.

At this point there is some confusion and disagreement as to what transpired. Undisputed however, was the fact that tension erupted. Angry words were exchanged. Equally undisputed was the fact than an object belonging to the Grievant struck CO Mendez on the back, neck and shoulder.

---

2. A DCT is mandated for each institution within the Bureau of Prisons. The number of Teams depends upon the security level of the particular institution. Miami is a medium security facility and is required to have at least one such team. The DCT acts to quell serious disturbances such as inmate riots and can be deployed to other institutions in time of need. Team embers receive extensive training in disturbance control.

Mendez initially contended it was a green duffle bag containing training equipment, but was subsequently ascertained to have been a black protective vest (which weighed between 15 and 30 pounds). The vest belonged to the Grievant.

It could not be established with certainty who threw (if it was thrown) the vest, though the Grievant acknowledged that it was his vest. Only three of the team members either witnessed the vest in flight or saw Burgess throw it. Only Correction Officer (CO) Irrizary, who has since disappeared, could not be located and thus, did not appear at the hearings, though he did, during the investigation submit a sworn statement. The investigation officer questioned Irrizary's credibility.

Only two of the 21-22 DST members other than Irrizary, allegedly saw the missile in flight. Carlos Nardo felt that the vest was tossed but "without malice" in an underhand manner, while only Eugenio Martinez contended he saw the Grievant actually "throw" the vest.

After a prolonged investigation the original discipline imposed was a 14 day suspension, but which, when the profanity charge was, on review dropped, reduced to seven days.

It is these seven days that is the subject of the instant grievance.

POSITIONS AND ARGUMENTS

The Agency (Government) contended pain and simple, that the Grievant's conduct on November 7, 2006 was "unprofessional conduct based upon a contention that he assaulted a co-worker." Specifically CO Rebecca Mendez alleged as a result of his throwing the protective vest at her it caused her physical injuries and necessitated her seeking medical attention.

The position of the Union and the Grievant was equally simple. That initially, the allegation, that CO Burgess threw an object, a protective vest was untrue, that it never happened. Secondly, that the Agency took more than the 120 calendar days to investigate the allegations of misconduct and to impose discipline. Specifically it took from November 7, 2006 to June 26, 2008 for a decision imposing a 14 day suspension. It was not until November 10, 2008 is the reduced seven day suspension imposed. Far too long a period argued the Grievant.

It was also the position of the Grievant that the Agency violated its "Douglas Factors" a document promulgated by the Agency on October 31, 2006, only days before the incident in question.

The "Douglas Factors" is a checklist made by the Board to make a distinction between the determination whether any action should or should not be taken and the determination of what is the appropriate penalty. In short, it was intended to

ascertain whether or not "just cause" for discipline existed. To support taking any action there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. To determine what penalty would then be appropriate the agency must consider all relevant factors (Douglas Factors) both mitigating and aggravating.[3]

She, CO Mendez also acknowledged that she declined to participate in the planned DCT picnic, and contended that the Grievant interjected himself and told her, in front of the entire group, that if she was a part of the DCT, she should participate, and that it was then that something hit her on the neck, shoulders and back, and that two Lieutenants took her for medical attention.

Mendez reported the incident to the local police, but the matter never went to court, disposition????

The Grievant conjectured that the vest must have fallen from his locker, that he did not throw the vest or anything else. He did acknowledge that he was agitated by the overall conduct of CO Mendez regarding her refusal to participate and her rudeness by being engaged in a telephone conversation during team training.

[3] The checklist contained a dozen items to be considered and contains a certification by the investigating officer that all twelve items have been considered. It also contains a statement to the effect that the formal decision should be completed within 120 calendar days. This is a result of the Kenny Memorandum.

The Grievant also contended that he, because of the "cease and desist: order imposed by the prison system, and immediately implemented by the agency, he was severely limited in selecting "overtime" assignments as he could not work in the same part of the prison as did CO Mendez, if there shifts overlapped.

DISCUSSION AND OPINION

Nearly a dozen and a half DST members did not see the incident occur.

One can only estimate and not state precisely how far the vest would have had to be tossed by the Grievant to have struck CO Mendez, if it was tossed. Maybe 6-7 feet? Eight perhaps?

Though CO Burgess is a former professional football player, and stands about six feet, four inches tall and weighs in at about 275 pounds, it seems difficult to visualize him or anyone tossing a 15-30 pound weighted object some six – eight feet.

The vest did however, traverse the 6-7-8 feet, and did strike Mendez. There is no question about this.

One can take Judicial Notice of the fact that an inanimate weighted object cannot fly, unless propelled for any distance, no matter how short the distance may be. Thus it must be concluded that CO Burgess was in some manner, willfully or not, responsible

For the vest traveling from his control to CO Mendez's back.

Justification becomes secondary. Whether she was right or wrong in opting out of participating in a DST social event is entirely immaterial. It simply matters not.

Now it comes down to the justification, or not, for the penalty imposed. A seven day suspension.

One simply cannot overlook or ignore the fact that the Agency on October 31, 2006, only days before the incident in question, issued a directive that stated "For Classification one and two allegations, local investigations should be completed and the investigative packet be forwarded to the OIA within 120 calendar days of the date a local investigation was authorized by the OIA." The word "should" is mandatory, not discressional!

Now, let us look at the time involved in this matter.

The Burgess-Mendez incident took place on November 7, 2006. On the same date, prison officials issued a "cease and desist" order against Burgess.

The Agency commenced its investigation of the fact on November 15, 2006 by interviewing David Elms, the Unit's head.

The complainant was interviewed on May 1, 2007, while Grievant Burgess was not interviewed until August 9, 2007, almost nine months to the day after the incident in question.

More interviews, or re-interviews were conducted through June 26, 2008.

On June 26, 2008 a decision imposing a 14 day suspension is handed down for "unprofessional conduct" committed on November 7, 2006.

On July 17, 2008 the Union filed the first of its responses appealing the 14 day discipline imposed.

A second response was filed by the Union on July 25, 2008.

Not until November 10, 2008 does Warden Pastrana officially suspended the Grievant for seven days, dismissing the profanity charges, while sustaining the "tossing of the vest" charge.

Thus, if arbitration had not been promptly sought, the Grievant could not have commenced serving his suspension until more then two years had elapsed since the incident for which it was imposed.

Certainly the objectives of the Agency's October 2006 directive cannot be totally ignored, which would be the end result of the suspension was to be sustained in total.

The arbitrator acknowledges that he has no right to change, alter or modify the terms negotiated by the parties under the Master Agreement by establishing a specific time within which an investigation must be completed for discipline to be administered.

But involved herein is a lapse of time in excess of two years. Let us not forget about the 120 days referred to. But involved herein is a much longer period of time, specifically a period in excess of two years or 730 days, more than six (6) times the Agency's self-administered time limitation.

The "cease and desist" order which remained in effect for the entire investigation, prevented the Grievant from seeking certain available overtime employment appointments in the same area of the facility in which Mendez was working on a particular shift. Thus for some 20 plus months the Grievant's overtime opportunities were severely limited.

The 120 days which the Kenney memorandum (Douglas Factor Checklist) sets forth is or was not intended to alter, modify or change a no-time limitation period to one of 120 days. The Master Agreement still contains no time reduction or restriction but 730 plus days?? By any stretch of one's imagination can that be considered

reasonable? In at least the Arbitrator's opinion the answer is a resounding "NO". Two years is not only "unreasonable" it is obscene. Justice delayed is Justice denied.

The Union is pursuing the grievance sought that the Grievant "be made whole through back pay with interest and any other benefits that he would be entitled to through reversal of the suspension including expungment of the discipline from his official personnel file...."

As stated earlier herein, an inanimate weighted object cannot take flight and fly by itself. It must be propelled by the aid of human hands.

While the right of the Grievant, by means of the unreasonable delay involved herein, a delay which was in no way caused by the Grievant, have been denied, he cannot be totally absolved from a punishment.

NOW THEREFORE as the duly selected Arbitrator I make the following:

AWARD

1. That the Grievance is sustained not withstanding that the Grievant's conduct warrants some punishment.

2. That the Grievant have his personnel file cleaned of any and all references to the November 7, 2006 incident, and that same be replaced by a copy of this Award. Said documents should be returned personally to the Grievant.

3. That the Grievant be awarded restoration of any and all, if any, wages and benefits heretofore withheld or denied as a result of these proceedings.

4. Precisely what, if any, overdue appointments were denied him as a result of this incident, and the "cease and desist" order the parties should discuss and negotiate a settlement figure, not to exceed 35% of what he had actually earned between January 1, 2006 and November 7, 2006.

5. That no attorney's fees or interest is awarded herein.

6. That if the parties cannot agree upon a figure concerning "overtime" within 90 days, the matter be returned to the undersigned for disposition, for which purpose jurisdiction is hereby retained.

Boynton Beach, Florida
December 13, 2011

LAWRENCE I. HAMMER

The undersigned affirms that he did duly execute the aforesaid Arbitration Award on the 13th day of December, 2011.

LAWRENCE I. HAMMER