IN THE MATTER OF ARBITRATION

BETWEEN	)	
	)	
Federal Bureau of Prisons	)	
Federal Correctional Institution	)	
Florence, Colorado	)	
	)	
And	)	**AWARD**
	)	
AFGE Local 1112	)	
Federal Correctional Institution	)	
Florence, Colorado	)	
	)	
FMCS Case No. 150202-53190-3	)	
Suspension of Michelle Taylor	)	

STATEMENT OF THE CASE

On August 14, 2014, The American Federation of Government Employees, Local 1112 ("Union") invoked the arbitration clause option contained in the Master Agreement (CBA) in force between the Federal Bureau of Prisons ("Agency"), and the Council of Prison Locals of which Local 1112 is a party, alleging that its member, Michelle Taylor ("Grievant"), was improperly suspended. Hearings were held before the undersigned on August 11th and 12th , 2015, at the ADX of the Federal Correctional Complex in Florence, Colorado. The Agency was represented by Jennifer Spangler, Asst. General Counsel, Office of the General Counsel, Federal Bureau of Prisons, and the Union was represented by Hampton Stennis, Asst. General Counsel, Office of the General Counsel, AFGE.

Testimony on behalf of the Agency was provided by Debra Payne, Laura Patch, Ana Callahan-Knote, William Scott Pliler, Patricia Rangel and Davide Berkebile. Testimony on behalf of the Union was provided by the Grievant; Jenny Duval and Evan Engebretsen. All witnesses testified under oath administered by the Arbitrator.

The proceedings were recorded by a Certified Shorthand Reporter and post-hearing briefs were timely filed by the parties.

BACKGROUND

The ADX at Florence (commonly referred to as Super Max) houses some of the most dangerous, disruptive and violent inmates in the nation who, according to testimony, have assaulted staff and other inmates and cannot be housed at any other prison. According to retired Warden Berkebile, they are an extremely dangerous group and make up less than one quarter of one percent of the inmates incarcerated in the Bureau of Prisons.

Grievant was a Senior Officer Specialist at the time of the incident leading to her discipline and had been with the federal government since 2007, beginning with the FCI facility in Florence followed by a transfer to ADX in 2011.

On August 29, 2013 Grievant was involved in an automobile collision while still on the grounds of the prison. The impact resulted in her car being totaled and her suffering chest contusions and a whiplash. She was advised by her personal physician to refrain from returning to work until medically released. Following several follow-up appointments with the nurse practitioner she was seeing, Grievant contacted Lieutenant whitehouse, the officer who runs the roster program and does the scheduling, to let him know when she may be able to return to work. During this conversation Grievant was advised that the agency was short staffed and asked how much longer she would be out.

Grievant testified that she was concerned that her absence was placing a burden on others in her area and scheduled another appointment with her medical provider Nurse Bridget Lee to see if she could get a release to return to work. Because she was working inside Control, Grievant felt that she could do the work as she would not be working around inmates or be expected to respond to emergencies. According to Grievant, she requested a release without restrictions because her work would not involve physical excesses and Nurse Lee resisted but did provide her the release she requested. Grievant then contacted Lieutenant Whitehouse and advised him that she would be in to work that night for her regular morning watch shift that began at 11:00 p.m. and ends at 7:00 a.m. the following morning.

Grievant reported to work and was stationed at Inside Control as Officer No. 1. At around 3:00 a.m. she was not doing all that well physically and requested permission to leave. The request was not denied, but when advised that there was no one to relieve her, Grievant decided to complete her shift which she did and was properly relieved upon completion. She completed her shift and started to leave the facility. On her way out, Grievant stopped to speak to other staff members who, according to Grievant, were enquiring about her accident and recovery. At about this time, she noticed the Main Control Officer waving his hands indicating an emergency in the facility. Grievant testified that she put her pack down and filled in behind other staff members and started walking down the hall behind them. At this point, facts as to what then

transpired are in conflict and this will be discussed in detail later. However, Grievant contends that she was unable to run as others did because of the injuries she received from the accident and, furthermore, she heard over a radio allegedly carried by one of the supervisory personnel in that group that "enough staff" had arrived at the scene and, according to procedures, those not on scene of the incident were to resume normal duties. In that Grievant had previously been relieved, she picked up her pack and left the facility.

The incident that gave rise to the emergency involved an inmate being mistakenly allowed to leave his cell and subsequently attacking three staff members and seriously injuring one. He was returned to his cell when the initial responders arrived and the "enough staff" call was made. Records provided at the hearing indicated that the initial alarm was made at 6:54 am and the enough staff announcement was made at 6:58 am, a span of four minutes.

On or about September 19, Debra Payne, Special Investigative Agent initiated an investigation into this incident. This extensive process involved taking affidavits from several supervisory and staff members, including Grievant, and a comprehensive review of the Nice Vision Camera System that detailed staff activities and locations in the Grill 3 AW area and the Lobby. Specifically, SIA Payne was attempting to determine if Grievant, among others, violated two specific directives dealing with a failure to respond to an emergency and failure to obey the orders of a supervisor during this emergency. On December 18, 2013, Ms. Payne sustained the allegation that Grievant failed to respond to an emergency and also failed to follow the orders of a supervisor.

On February 10, 2014, Complex Captain William Pliller issued Grievant a Proposal to Suspend her for twenty-five (25) days for failure to respond to an emergency and failure to follow the orders of a supervisor. On March 20, 2014, Grievant submitted her oral response to the Proposal to Suspend to Warden Berkebile at a meeting between herself, Warden Berkebile, Union representative Derrick Padilla and Human Resources Manager Tammy Childs.

On August 6, Warden Berkebile issued a decision letter to Grievant wherein he found the charges and specifications sustained and fully supported by the evidence in the adverse action file. Accordingly, he suspended Grievant for twenty-one (21) days for failure to respond to an emergency and failure to follow the orders of a supervisor.

On August 14, 2014, the Union exercised the provisions of the Master Agreement by going directly to arbitration alleging a violation of the "just and sufficient cause" provisions of Article 31,h (1) in addition to Article 33 d, and e.

ISSUE

By going directly to arbitration, the issue as set forth in Article 31(h)(1) is:

"Was the disciplinary/adverse action taken for just and sufficient cause, or if not what shall be the remedy."

POSITION OF THE PARTIES

The Agency – The Agency contends that Grievant's twenty-one day removal was based on just and sufficient cause because the evidence clearly shows that her failure to respond to an institution emergency and failure to follow a supervisor's instructions regarding the emergency in question is particularly egregious.

The Agency states that the population at ADX is made up of a dangerous group of inmates constituting less than one quarter of one percent of the inmates incarcerated in the Bureau of Prisons, and are a continuing threat to public safety, to each other and to staff members.

The Agency agrees that In responding to this grievance filed over an adverse action, it has the burden to establish by a preponderance of the evidence that: 1) the conduct occurred; 2) a nexus exists between the conduct and the efficiency of the service; and 3) the penalty imposed is reasonable under Article 31(h)(1) of the Master Agreement.

Contending that because the Master Agreement does not define "Just and Sufficient Cause," the Agency submits that the seven tests developed by Arbitrator Carroll Daugherty in Enterprise Wire Company, 46 LA 359 (1966), provide a framework for establishing the elements of just cause and have been used by numerous arbitrators as a guide to make that determination. The Agency submits that the seven tests established by Arbitrator Daugherty are:

1. Whether the Agency's rule is reasonably related to the orderly, safe and efficient running of the Agency.

2. Whether the Agency gave warning that possible discipline could result from misconduct.

3. Whether, prior to administering discipline, the Agency conducted an investigation to determine if the employee committed the misconduct.

4. Whether the investigation was fair.

5. Whether the investigation uncovered substantial proof of the employee's guilt.

6. Whether the Agency applied its rules without discrimination.

7. Whether the penalty is related to the seriousness of the offenses

Noting that this test is similar to the analysis the Merit Systems Protection Board, (MSPB), uses to determine the reasonableness of the penalty, (Douglas factors), the Agency contends that the application of Daugherty's just cause test to the facts of the instant case proves by a preponderance of the evidence that the action against Grievant was for good and sufficient cause and should not be rescinded and the grievance denied.

Furthermore, the Agency contends that consistency of the penalty is only one of the factors to be considered under Douglas when deciding the reasonableness of the remedy and where an imposed penalty is appropriate for the sustained charge. An allegation of disparate penalties is not the basis for reversal or mitigation of the penalty unless the agency knowingly and intentionally treated similarly situated employees differently. Again citing the MSPB decisions, the Agency contends that an arbitrator may not substitute his judgment for that of the deciding official but rather the penalty must be reviewed only to assure that it is within the tolerable limits of reasonableness and, more specifically, the penalty determination must not be disturbed unless the penalty is "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion." And finally, the Agency contends that mitigation is appropriate only where the agency failed to weigh the relevant factors or where the Agency's judgment clearly exceeded the limits of reasonableness.

Turning to the matter at hand, the Agency contends that Grievant's failure to respond to an institution emergency and failure to follow a supervisor's instructions regarding that emergency is particularly egregious given the nature of the attack and injuries suffered by staff. In making his decision to impose the suspension Warden Berkebile took into account the seriousness of the offense and the absolute critical nature that all staff members have to be there in full response to come to the aid of a co-worker who is being violently assaulted by a predatory dangerous inmate. Accordingly, the Agency contends that it has clearly met the requirements of Just Cause Test #1.

Concerning Just Cause Test #2, the Agency contends that it provided Grievant a copy of its "Standards of Employee Conduct" for which she signed. Among others, two standards clearly state, "Because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately and effectively to all emergency situations," and also, "Employees are to obey the orders of their superiors at all times. In an emergency situation, carrying out the orders of those in command is imperative to ensure the security of the institution." Furthermore, the

Agency argues that the range of penalties for failure to respond to an emergency and failure to follow instructions range from "Official Reprimand to Removal." Clearly, the Agency has met the requirements of Test #2.

Concerning Just Cause Tests #3, 4, and 5, The Agency contends that prior to administering discipline, it conducted a fair investigation that uncovered substantial proof of the Grievant's guilt. In support of this argument, the Agency states that Special Investigative Agent Debra Payne conducted an investigation into the allegations of misconduct against Grievant. In this process Ms. Payne interviewed Grievant and took an affidavit from her. Furthermore, she also interviewed and took affidavits from several other staff members including Patricia Rangel, Ana Callahan-Knote, Robert Giconi, Charles Alvarez, Raul Figueroa, Derek Carson, Daniel Parry and Frank Chavarria. In addition, she reviewed videotape from the front lobby, grill 3 and the actual staff assault.

The investigation revealed that a call for staff assistance came at 6:55 am. SIA Payne reviewed the video footage that showed that Grievant and Officer Figueroa did not attempt to respond until the second wave of responders. Furthermore, they walked toward the incident instead of running and the videotape footage also shows that both walked away from the emergency at the same time Unit Managfer Patricia Rangel continued to run toward the emergency. Finally, the investigation revealed that Officer Figueroa heard Ms. Rangel order him and Grievant to respond to the emergency. SIA Payne sustained the charges of Failure to Respond to an Emergency and Failure to Follow a Supervisor's Instructions.

Concerning Just Cause Test #6, the Agency contends that it applied its rules without discrimination. According to the Agency, the Table of Penalties in the Standards of Employee Conduct states that for the offenses of Failure to Respond to an Emergency and Failure to Follow a Supervisor's Instructions, the range of penalties is from Official Reprimand to Removal. In addition, the standards also states, "While the principles of progressive discipline will normally be applied, it is understood that there are some offenses so egregious as to warrant severe sanctions for the first offense up to including removal. Furthermore, this is especially true in cases where there is no indication that the employee would be corrected by a lesser penalty, or if the offense is of such a nature that reoccurrence of the conduct could jeopardize the security or bring disrepute on the Bureau of Prisons.

The Agency's penalty is also consistent with penalties issued for the same offense as stated by Warden Berkebile, in that Officer Figueroa was proposed removal for failing to respond to an emergency and failure to follow a supervisor's instruction for the incident. Human Resources Manager Laura Patch also testified that the penalty of a 21 day suspension was consistent with the same or similar cases.

The Union's argument that the victims of the inmate attack should have been disciplined for failure to follow policy lacks merit. The MSPB has held that the circumstances surrounding the charged offense must be substantially similar. Mr. Smith, Ms. Smith and Ms. McEvoy were all victims of the inmate attack and as such they cannot be charged with failure to respond to an emergency and failure to follow policy and are not comparable to the Grievant. Furthermore, Warden Berkebile testified that he reviewed the videotape of the assault and found that the three had not engaged in misconduct. Thus, Grievant's penalty was consistent with same or similar offenses.

Concerning Just Cause Test #7, the Agency contends that it has proved by a preponderance of evidence that the penalty of a 21 day suspension was within the bounds of reasonableness. In support of this argument the Agency states that in making penalty determinations, arbitrators are required to apply the same rules the MSPB applies, and when an arbitrator does not apply those rules, the arbitrator's penalty determination is not entitled to deference.

In deciding to suspend Grievant for twenty-one days, Warden Berkebile properly considered the relevant factors established in Douglas v. Veteran's Administration, 5 MSPB 280 (1981). According to the Agency, the deciding official need not show that he considered all mitigating factors but only that consideration was given to the specific, relevant factors in the case. Most importantly, Warden Berkebile considered the serious nature of the offense. He testified that Grievant's failure to follow a supervisor's instruction and respond to an emergency was particularly egregious given that a staff member, Ralph Smith, almost lost his life in the inmate assault. Warden Berkebile also considered whether Grievant's penalty was consistent with the Bureau's Employee Standards of Conduct and whether it was consistent with other cases of the same or similar offense. Warden Berkebile also noted that there was some media coverage of the assault and that he no longer had confidence in Grievant's ability to respond to emergencies or follow a supervisor's instructions. Grievant also asserted that she heard a radio transmission of "enough staff" but Warden Berkebile noted that the videotape of Grille 3 contradicted this assertion in that it showed that Patricia Rangel continued to run toward the emergency as Grievant and Officer Figueroa walked away.

In sum, Warden Berkebile considered Grievant's failure to respond and failure to follow a supervisor's instructions during a serious staff assault to be an offense that warranted a twenty-one day suspension.

The Grievant engaged in the misconduct as charged, the evidence supports that the charged misconduct occurred, and there is a nexus between the Agency's action and the efficiency of the service. The Agency has also carried its burden of proof and demonstrated that the penalty was reasonable based on Grievant's misconduct. The Agency's disciplinary decision should not be overturned unless the decision is clearly excessive, disproportionate, or arbitrary, capricious

or unreasonable. In this case, the deciding official made the correct and appropriate decision after reviewing the facts of the case, the Grievant's work history, the Table of Penalties, the Douglas Factors, Officer Taylor's written and oral response. The decision was carefully considered and was not excessive or disproportionate to Grievant's misconduct, nor was it arbitrary, capricious or unreasonable. Based on the foregoing, the Agency respectfully requests that the grievance be denied.

The Union – The Union contends that it is the golden standard in public sector disciplinary actions that the Agency cannot discipline an employee without just cause and that the parties codified this standard in their CBA which mandates, in Article 30(a), that disciplinary and adverse actions can be taken only for "just and sufficient cause." Furthermore, the Agency has the burden of proving its case and must do so by a preponderance of the evidence, and when an agency fails to prove that its chosen penalty is reasonable then it is appropriate for an arbitrator to rescind or mitigate that penalty. And while an arbitrator adjudicates an adverse action he is bound by the substantive law of the Merit Systems Protection Board, arbitrators have far broader authority to review and mitigate agency penalty decisions than does the MSPR or its administrative judges.

Contending that the suspension of Grievant was not taken for just and sufficient cause, the Union relies, in part, on the seven tests set forth by Arbitrator Carroll Daugherty (also cited by the Agency in support of its position), in addition to certain requirements contained in the Douglas factors, (also cited by the Agency). Concerning the Daugherty seven tests, the Union states that prongs five, six, and seven are the focus of its argument.

Concerning the charge that Grievant failed to respond to an emergency, the Union argues that Grievant did not fail to respond as alleged, as she testified that her first indication that something was amiss came from Officer Chavarria waving at her through the glass at Main Control. She saw that he was either waving at her to go back into the unit or throwing deuces, which was a two fingered code previously used to indicate an emergency. Grievant put down her pack that she was carrying and filed in behind the staff that were moving back into the facility. Grievant recalls Lieutenant Callahan-Knote being present but does not recall her giving any instructions to respond. Furthermore, Grievant did not hear or did not recall Unit Manager Rangel giving her instructions to respond nor did she notice Rangel banging on the door. The Union contends that regardless of who alerted Grievant of the incident, she responded as soon as she was made aware of it.

The Agency further alleged that had Grievant run, she would have been among the first to respond and could have provided that meaningful assistance. That claim, however, is not borne

out by testimony and the video as Grievant arrived at the grill at the same time as Unit Manager Rangel and before this grill opened up she heard the call for enough staff over Rangel's radio and, in accordance with policy, returned back toward the main control area.

Further, the Agency failed to produce any documentation that stated that running to an emergency is required in all circumstances as the closest instruction is that "employees respond immediately and effectively to all emergency situations." As soon as Grievant was made aware of the emergency, she dropped her pack and moved into the institution towards Delta Unit, navigating a series of hallways and grills, some of which were locked and required standing in place until opened. Grievant arrived at the closed grill before Unit Manager Rangel and the entire group had to wait. Once the call for enough staff sounded Grievant followed that order and returned to her activity of leaving the facility.

Concerning the issue of failure to follow a supervisor's instructions, the Union contends that she did not fail to do so. In order to sustain a charge of failure to follow or comply with orders or instructions, an agency must prove: 1) proper instructions were given to an employee; and 2) the employee failed to follow them without regard to whether the failure was intentional or unintentional, and the Agency has failed to prove either and therefore the charge cannot stand.

Grievant testified that she did not hear Unit Manager Rangel tell her to go to the emergency as she was already headed that way due to Chavarria's alert and his sworn testimony supports her affidavit, response and testimony. Rangel's order, whether it actually happened or not, is immaterial because Grievant was already responding to Chavarria's notice of an emergency. Furthermore, the Agency attempted to extrapolate that Grievant should have known by the way staff were moving that there was an emergency. However, Grievant testified that nothing struck her as odd as to how the staff were moving as it looked like a group moving at shift change.

Lt. Callahan-Knote stated that she told Grievant and Officer Figueroa as part of a group at Main Control to the effect that we have an emergency, you need to respond. She further stated that she did not know if they responded. On this, the Union contends that had Grievant not responded to the emergency, she would have either remained at Main Control or she would have been further on her way out of the institution. The video clearly shows her arriving at Grill 3, moving back into the institution and arriving there before Unit Manager Rangel and regardless of what Rangel allegedly said at Grill 3, as the grill was opened by control, Grievant heard a male voice call "enough staff" over the radio and there was a radio on Rangel's hip. Lt. Giconi stated in his affidavit that he called enough staff over the radio, and his call for enough staff was a countermanding order from an equal rank supervisor.

In the Agency's proposal to suspend, Grievant was charged with Failure to Follow a Supervisor's Instructions because she "failed to report to D Unit as instructed." Both Rangel and Callahan-Knote's indicate that Grievant's absence from the D-Unit is proof that she did not respond and did not follow orders. These are false conclusions as Grievant did respond and she was issued a corresponding order to resume her post which in her case was to resume her way out of the institution. Lt. Callahan-Knote heard the "enough staff" call over the radio and stated that it was a directive to staff to go back to what they were doing before the alarm. In his affidavit, Lt. Robert Giconi, who made the call for enough staff stated that when a Lieutenant calls "enough staff" the additional staff responding should stop running and go back to their work areas. It is logical to expect that staff may miss a radio transmission in an emergency, however, it is not logical to dismiss the sworn affidavits of two officers because Unit Manager Rangel missed a radio transmission, and then to assume that Grievant was lying about when the call for enough staff came through.

The Union also contends that the Agency applied its policies in a discriminatory manner in violation of the just cause requirement and Article 6 of the Master Agreement that states in Section b(2) that employees have the right "to be treated fairly and equitably in all aspects of personnel management." In this case, Grievant was not treated fairly and equitably as the Agency cannot apply its policies against Grievant in a discriminatory manner. Grievant was one of a mere handful of employees who were investigated and disciplined for this incident.

Former Warden Berkebile could only recall three employees who were disciplined as a result of this incident. He testified that the failures to follow policy and procedure by Ralph Smith, Brianne Smith, and DeeDee McdEvoy were not actionable as "they should and could have done a better job to protect themselves, but it was not an issue of misconduct" despite the fact that these employees failed to follow the orders they were given regarding ensuring an inmate was, in fact, inside the cell before calling for that door to be opened. He testified that while "unfortunate," their failure to be "sharp" was not misconduct because the "bar for discipline is, do you willfully disregard the instructions, the obligations and the duties of our positions." However, a willful disregard of instructions, obligations and duties is exactly what the unfortunate victims engaged in, with neither investigation nor discipline imposed.

Special Investigative Agent Payne was asked if the three followed procedure when they were making rounds that day and her response was, "doesn't look like it." She further testified that if Warden Berkebile had wanted her to investigate this issue she would have done so. This failure led to their own terrible assaults at the hands of the inmate and placed other staff at risk. The Agency failed to treat all employees fairly and equitably in this manner. Some were singled out for investigation and discipline, while the policy and procedure failures of others

went completely ignored. Therefore, Article 6 of the Master Agreement and the basic principles of equitable treatment and logical consistent discipline were violated.

The Union also contends that if this Arbitrator finds that discipline was appropriate, the suspension is unreasonable because it fails to comport with requirements of the Master Agreement, particularly the doctrine of corrective and progressive discipline and because the Agency failed to appropriately address the Douglas factors. The discipline was punitive in nature and it failed to properly consider the Douglas factors and, furthermore, it failed to apply progressive discipline. Likewise, the Agency should have properly considered the Douglas factors, sometimes known as mitigating factors rather than inserting boilerplate language into the decision that does not comport with Grievant's record, potential for rehabilitation, and comparable offenses.

The Agency failed to apply progressive discipline in deciding to suspend Grievant. Progressive discipline generally involves the Agency applying the lowest discipline possible to correct an employee's behavior unless the actions are so egregious as to warrant a more severe penalty. At the time of this incident, Grievant had no prior disciplinary actions, and a twenty-one day suspension for a first offense is greatly outside the bounds of progressive discipline and it shows that the Agency was more concerned with punitive, rather than corrective, action. The totality of the circumstances make it clear that the suspension levied against Grievant was inappropriate, excessive, and unsupported. The Agency's failure to apply progressive discipline in this case warrants overturning, or at the very least, mitigation of Grievant's suspension.

In citing the twelve Douglas factors as being relevant in considering the appropriateness of an agency's penalty, the Union contends that the Agency failed to consider the following as being significant:

> Consistency of the penalty with those imposed on other employees for the same or similar offenses.
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> The employee's past work record and disciplinary record
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> The potential for the employee's rehabilitation and impact upon the employee's ability to perform at a satisfactory level.
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> The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
>
> The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
>
> Notoriety of the incident.

Mitigating circumstances surrounding the event.

The Agency has repeatedly claimed that the discipline imposed on Grievant was in line with other similar disciplinary actions while at the same time utterly failing to produce any evidence or testimony demonstrating the veracity of that claim. The Agency attempted to correlate the proposed removal of Officer Figueroa with the actions and discipline of Grievant. However, Officer Figueroa was involved in the initial breakfast feeding of inmate Petty and his failure to make a visual check on the inmate (the same mistake the victims made when the called for the cell to be opened) directly contributed to the attack. Further, Officer Figueroa was not at his post; he was not properly relieved; and he did not properly exchange equipment.

Further, the Agency stated repeatedly that it relied on similar cases and charges when determining the discipline for Grievant. None were ever produced to the Union, and the Agency denied that any existed in its response to the Union's information request. Human Resources Manager Laura Patch referenced other similar cases and charges in her testimony, but she was unable to recall which cases she used as comparators. Former Warden Berkebile estimated in his testimony that he made between 25-30 disciplinary decisions during his tenure as warden. However, his decision makes no reference to any comparable cases, and he testified that he did not recall any cases which dealt with failure to respond or failure to follow an order. Therefore, it is without question that the Agency's unfair and severe discipline of Grievant did not comport with prior disciplines, despite repeated claims to the contrary, as the agency witness testimony offered no comparable cases from the proposing official, the deciding official, or the human resources manager.

Concerning the employee's past work and disciplinary record, the Agency failed to give appropriate weight to the significant factor of Grievant's past work record, including length of service, performance on the job, ability to get along with coworkers, as well as her past disciplinary record. Former Warden Berkebile mischaracterized Grievant as a merely acceptable employee in his decision when, in fact, she has always received excellent and outstanding evaluations.

Concerning the potential for the employee's rehabilitation and impact upon the employee's ability to perform at a satisfactory level, the Agency did not adequately address Grievant's potential for rehabilitation in his decision. Former Warden Berkebile unfairly characterized her "refusal to come to the aid of an injured staff member, during a violent assault." This is not what Grievant did, according to the Union. First, she did respond. Second, she had no idea what was happening, so she cannot be said to be intentionally refusing to aid an injured staff member. Berkebile also testified that he had "no confidence in Grievant's ability or willingness to follow orders" ... because "she has disregarded them previously." However, this does not

comport with his utter confidence and forgiveness of the staff members who directly contributed (by not being "sharp") to the incident to which Grievant was responding. Grievant's record to this point was flawless and her record since has been flawless.

It is undisputed that as an outstanding correctional officer, Grievant knew the policies, procedures and the post orders. Her performance evaluations reflect her knowledge and dedication. Grievant acted in full accord with the post orders and Agency policies; she responded as soon as she was made aware of the call for assistance, and she followed all orders.

Concerning the adequacy and effectiveness of alternative sanctions, the Union alleges that the Agency failed to adequately examine whether a lesser action than a twenty-one day suspension would have been more effective. Specifically, the deciding official did not discuss whether a counseling or letter of reprimand would better serve the purpose of corrective rather than punitive action. The Agency's draconian discipline in this matter indicates an attempt to scapegoat and punish, rather than to correct and improve.

Considering the issue of notoriety, Former Warden Berkebile testified that the incident received negative attention in the press. He also testified that he received numerous complaints that staff had made, quite a bit of outrage, that there were a number of staff members who did not respond to the emergency. However, Berkebile could not identify these staff who made these complaints orally and the Agency provided no written complaints or evidence of these complaints at any process in the proceeding. Agency witnesses also testified to media attention garnered by the attack; however, none was presented as evidence and no evidence or testimony indicated that the media attention had anything to do with staff failure to respond or failure to follow orders of a supervisor.

Concerning mitigating circumstances surrounding the event, the Agency utterly disregarded Grievant's consistent and proven motivation to assist her fellow officers. She was off-duty for several weeks prior to the September 10 shift because of an injury from a head-on collision sustained while off-duty but still on the Agency premises. Grievant returned to work because her lieutenant advised her that they were short staffed and she did not want her fellow officers to have to take up the additional work her absence would entail. Grievant explained this in her response to the proposed suspension, she elected to return to work as she wanted to assist her fellow workers and to do her job. She remained at work despite her realization that she had returned too soon and was in pain, because her request to leave early was met with staffing concerns by her supervisor. She was properly relieved and was on her way out when she was alerted to the alarm. She turned around and went back into the institution, not out of it, and did not turn to leave until the all-clear/enough staff call was made.

Based on the foregoing facts and argument, the suspension was not taken for just and sufficient cause. Therefore, the Union asks that the arbitrator rescind the suspension and make Officer Taylor whole, including the restoration of her back pay and all other lost compensation with interest for the period she was affected by the Agency's action, as well as any other relief the arbitrator deems appropriate. Should the Union prevail, we ask that the arbitrator retain jurisdiction for the purposes of implementation and for the determination of appropriate and warranted attorney's fees.

DISCUSSION

A threshold issue to be resolved in the overwhelming number of discipline/discharge cases is the standard of cause, just cause, good and sufficient cause and the plethora of related standards that apply to any matter before an arbitrator. There are many definitions of just or proper cause in use by arbitrators. Some are relatively detailed while others rely more heavily on a few basic principles. On one extreme are the seven tests articulated by Arbitrator Carroll Daugherty in Enterprise Wire Company, 46 LA 356 (1966), and later more thoroughly discussed in Just Cause, The Seven Tests, Koven & Smith, BNA Books, (1992). At the other extreme is the concept that each arbitrator must determine the question of what constitutes just and sufficient cause.

In its most basic form, just cause or just and sufficient cause (as is the standard now before me), requires that the rule allegedly to have been violated must be reasonable and based on sound business necessity; the employee must be aware of or have sufficient notice of the rule; the company must establish that the employee did, in fact, violate the rule; and the level of discipline must be free of an arbitrary, capricious or discriminatory intent.

In the instant case, both parties have clearly referred to the Daugherty seven tests of just cause to support their positions, with additional measures articulated by the Merit Systems Protection Board (MSPB) commonly known as the Douglas Factors that lists twelve mitigation factors, some of which must be considered by a supervisor taking adverse or disciplinary action.

When considering the Daugherty tests, it should be noted that the specific language of each test has been modified to reflect the reality of the Agency environment. Each test will be set forth below and an analysis, where needed, will be provided.

Is the Agency's rule reasonably related to the orderly, safe and efficient operation of its facility?

As it relates to each rule in question, the answer is a clear yes. Because of the kinds of inmates housed in ADX, and the potential danger they pose to staff, other inmates or the general public,

the need for immediate and full assistance in an emergency is clear. Furthermore, failure to obey the orders of supervisors is the gold standard of insubordination and this rule exists in virtually every organization, public or private.

Did the Agency give warning that possible discipline could result from misconduct?

Again, the answer is in the affirmative. Grievant, upon being hired in 2007, signed for receipt of the Standards of Employee Conduct and clearly stated during her testimony that she understood the requirement for emergency response as well as for obeying orders of supervisors.

Prior to administering discipline, did the Agency conduct an investigation to determine if Grievant committed the misconduct?

Almost immediately following the incident in Unit D, an investigation was initiated primarily by Investigative Agent Debra Payne into allegations of misconduct against Grievant among others. The investigation involved obtaining from Grievant, in addition to several others, affidavits concerning the incident in Unit D. Furthermore, Agent Payne conducted a review of the Nice Vision Camera System photographic images from the Grill 3 AW and Lobby locations. Following her efforts Ms. Payne submitted her Investigative Report on December 18, 2013 sustaining the allegation against Grievant of Failure to Follow a Supervisor's Instructions and also Failure to respond to an Emergency.

On February 10, 2014, and pursuant to the provisions of the CBA, Grievant was given a notice of Proposed Suspension of twenty-five days for both charges by Complex Captain William Pliler. On March 20, 2014, Grievant submitted her response to the Proposed Suspension to ADX Warden D. Berkebile explaining her position relative to this matter in addition to attending a meeting with him along with Union representation and the ADX Personnel Manager. On August 6, 2014, Warden Berkebile issued his decision to Grievant sustaining and fully supporting the charges against her and suspending her for 21 calendar days.

From a purely procedural perspective, and in spite of the fact that the entire process took nearly one year from start to finish, I conclude that it fully met the just cause requirement of this test.

Was the investigation fair?

The investigation was fair from a procedural perspective in that Grievant was provided ample opportunity to tell her side of the story and seek assistance from her Union and others she may have wanted to provide her with support.

Did the investigation uncover substantial proof of Grievant's guilt?

The answer to this question depends on what specifically establishes guilt. It is clear from the record that Grievant did not run to D Unit as both Lieutenant Callahan-Knote and Unit Manager Patricia Rangel claimed to have ordered her to do. Furthermore, videos taken by the Grill 3 Camera AW show Grievant and Officer Figueroa standing at the grill while Rangel runs through the inner grill. Grievant did not enter the grill and immediately walked toward the exit and left the ADX. It must be noted that prior to this specific instant, Grievant had been talking to other officers out near Main Control as she was leaving ADX. She testified that upon learning from Officer Chavarria that there was an emergency in D Unit, she removed her pack and moved toward the incident walking, not running, as she was unable to run due to her injuries. As she and others waited for the grill to open and then as it did and Patricia Rangel began running out toward the emergency, Grievant claims to have heard "enough staff" come over a radio and that Patricia Rangel had the only radio in that immediate area. Upon hearing this, Grievant and Figueroa ceased any response to the emergency and resumed the process of leaving ADX.

With the exception of Warden Berkebile who stated that a call of "enough staff" only means that you stop running and continue walking to the incident, all testimony and documents clearly indicate that the procedure calls for a responding individual to stop going to the incident and to return to what they were doing prior to the alarm which, in the case of Grievant was to continue leaving the ADX.

At issue relative to the "enough staff" radio transmission is the statement of Rangel that she did not hear that transmission even though she was carrying a radio. It is uncontroverted, however, that, in fact, the call was made. Lt. Giconi was assigned as Operations Lieutenant from 6 a.m. until 2 p.m on the date in question. Upon receiving a call for assistance in D Unit, he responded and upon arrival noticed there was enough staff so he called the Control Center to announce that fact. And, according to his Daily Lt. Log for that day, it was notated that this was done at 6:58 a.m. Furthermore, Ana Callahan-Knote testified that she also heard the " enough staff" radio transmission.

The apparent confusion about the alleged "enough staff" radio transmission that Unit Manager claims to not have heard may have been cleared up by the testimony of former Warden Berkebils when he stated during his testimony; ..."if I'm responding to an emergency, or any other co-worker is responding to an emergency, and were in a situation which requires our attention, it's not uncommon that a person would miss a radio transmission. It's actually kind of expected. One of the things we train our staff members has to do with focus, tunnel vision, auditory exclusion during an emergency."

Quite possibly, based on this statement by former Warden Berkebils, Grievant could well have heard the "enough staff" report over the radio carried by Unit Manager Rangel and, according to established procedure, she immediately returned to what she had been doing which was

leaving the facility. If that was in fact the case, she legitimately terminated any response she was making and exited the facility. This fact would also remove the failure to follow the orders of a supervisor as the "enough staff" announcement negates the directions of her supervisor to continue on to D Unit. It should be noted that the Grill 3 camera noted Grievant not entering the inner grill and leaving toward the exit at 6:57:25 followed by the Lobby Camera showing Grievant entering the inner door of the front lobby walking out of the institution.

Did the Agency apply its rules without discrimination?

This issue was raised by the Union based on the fact that Grievant, among others, was disciplined for activities associated with failure to respond and/or failure to obey the orders of a supervisor. On the other hand, the three staff members in Unit D whose apparent failure to follow procedure when calling for a cell door to be opened, created a situation where an inmate was able to escape from his cell and seriously injure one of them. However, they received no discipline for this policy violation that put other staff members at risk.

To the undersigned, I believe that the failure of the Agency to at least engage in a thorough investigation of the circumstances surrounding the policy failure that allowed the inmate to escape constituted a form of discrimination. The fact that the staff members were injured does not, as a general rule in labor relations, relieve them of culpability. They engaged in an omission that led to severe injuries of one and less severe injuries to another. Furthermore, if this mistake had not taken place, there would be no associated issues with Grievant and others who received discipline growing out of this event.

In addition, I do not believe that the involvement of the Federal Bureau of Investigation was a justifiable reason to refrain from investigating this matter. The FBI is a criminal investigative agency. They are not party to the CBA and have no interest in employee discipline under the CBA. No evidence was produced showing that the Agency was specifically precluded from investigating the activities of the three staff members for the purpose of determining what discipline, if any, was warranted.

I would also note that the Agency was somewhat vague and inconsistent when addressing the question of whether the discipline administered to Grievant was in line with other similar disciplinary actions. The Agency repeatedly stated that it relied on similar charges when determining discipline for Grievant but as the Union argued, none were ever produced in response to its information request. Furthermore, Human Resources Manager Laura Patch referenced other similar cases in her testimony but could not recall which cases were used or if they were from incidents other than the one involving Grievant. To claim consistency without providing some associated proof raises serious concerns relative to this issue.

The Agency contends that in deciding to suspend Grievant for twenty-one days, Warden Berkebile properly considered the relevant elements established by the Douglas Factors. As it relates to the Factor involving her past work and disciplinary record I cannot agree. In his decision to suspend her, he characterized her as merely acceptable when, in fact, Grievant had always received excellent and outstanding ratings and had no discipline before or since. Since transferring to ADX, Grievant received a total of fourteen Excellent and six outstanding ratings through the end of March, 2015. In addition, her Final Review Comments were consistently favorable.

It is clear that Warden Berkebile ignored or even rejected her performance appraisals when assessing her discipline. Furthermore, he stated in his decision that she had no discipline during the reckoning period but, as the Union argued, he acknowledged during his testimony that she had no discipline at all.

Another Douglas Factor concerns the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties. During his testimony, Former Warden Berkebile stated, "I had no confidence in her ability or willingness to follow those orders. She had disregarded them previously." However, he provided no evidence or examples to support this statement and, accordingly, I can give it little weight

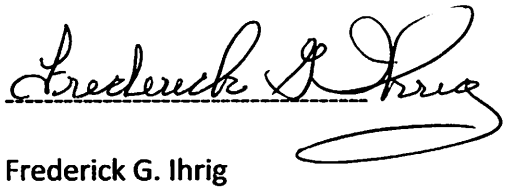
Another Douglas Factor Warden Berkebile alluded to in his disciplinary letter to Grievant was the notoriety of the offense or its impact upon the reputation of the agency. The subtlety of that statement is that Grievant's alleged conduct impacted the reputation of the Agency. However, any adverse impact on the Agency's reputation as the result of this incident was the fact that a dangerous inmate was allowed to escape his cell and seriously attack staff members of ADX. Neither the public nor the media could have cared less about one employee of the institution who allegedly failed to respond to an emergency or allegedly failed to obey the orders of a supervisor. If any staff activity adversely impacted the reputation of the Agency, it was a failure to take the necessary steps to ensure that the inmate was in his cell when the order to open his door was given. There simply was no connection between the conduct of Grievant and any adverse impact on the reputation of the Agency.

Former Warden Berkebile also testified that he received numerous complaints from staff expressing "outrage" over the fact some staff did not respond to the emergency. However, he was unable to provide specifics or documentation relative to that statement. Regardless, there is no evidence testimonial or otherwise that the "outrage" was specifically directed at Grievant who, based on testimonial and camera records, did at least make an initial attempt to respond to the emergency while others allegedly did not.

Based on the above it is my opinion that the twenty-one day suspension of Grievant did not meet the standards of just and sufficient cause as set forth in the CBA. In doing so, however, I do not fully exonerate Grievant from personal liability for her actions regarding this incident. She secured a return to work notice from her medical provider that she clearly understood was not correct and she should have known it opened her to work related responsibilities that were beyond her physical ability to fulfill. Furthermore, she made no attempt to advise her superiors of her inability to "run" to the incident. That effort, could possibly have excused her from an immediate requirement to respond as ordered. Instead, she worked the circumstances of the time to her take advantage of a legitimate excuse to not respond as previously ordered.

Accordingly, the twenty-one day suspension is to be reduced to a suspension of seven calendar days. Grievant is to be made whole for lost wages, plus interest, and all associated benefits she lost for the fourteen day reduction in the original suspension. This award does not, and should not be so interpreted to be a negative reflection on the seriousness of emergency responses or acts of insubordination, but rather a statement that the Agency failed by its actions and decisions in this matter, to meet the requirements of just and sufficient cause as set forth in the CBA and the provisions of certain requirements set forth in the Douglas Factors.

Relative to the request by the Union that consideration be given to the award of attorney fees, I have considered this issue carefully and based on the facts of this case do not feel that such an award is appropriate. Accordingly, I reject this request. Furthermore, and in spite of the doctrine of *functus officio*, I will retain jurisdiction for purposes of implementation of this award if so requested by the parties.



11-6-15

Frederick G. Ihrig

Date