

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulation, including the right:

2. to be treated fairly and equitable in all aspects of personnel management;

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.

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.

FACTS

Local 919 represents a unit of employees at the federal penitentiary in Leavenworth, Kansas including the Grievant, James Bertrand. Grievant is a Senior Officer Specialist with sixteen years seniority at the prison. Prior to this position, he served as a military policeman in various locations throughout the world and as a correctional officer at the U.S. Army correctional barracks at Fort Leavenworth. Prior to the incident in question, Grievant had no disciplinary record and routinely received excellent or outstanding ratings on his quarterly performance appraisals. On May 21, 2009, Grievant received a Letter of Commendation from Warden C. Chester for his participation in the ACA re-accreditation process. On December 6, 2009, Grievant received an individual cash award for emergency aid rendered to an inmate who had injured himself.

On March 13, 2009 at approximately 12:30 am, Grievant was engaged in counting prisoners in the center hall. Also present were Senior Officer Specialist J. Jones and Senior Officer O. Orellana. Grievant and Officer Orellana were discussing inmates outgoing mail. Voices were raised. Grievant approached Orellana and shoved him at his chest with both open hands. Officer Jones grabbed Grievant in an attempt to thwart any further physical confrontation. He told Grievant, "Don't do this" and instructed him to walk away. Grievant and Orellana continued to argue and Grievant again pushed Orellana with open hands on his chest. Orellana did not at any time strike back or push Grievant. The incident was substantiated by others present and by Grievant who acknowledged that he shoved Officer Orellana. No injuries resulted from this confrontation. Grievant indicated that he felt Orellana was being disrespectful toward him and

related that he was having issues at home over custody of his son.

Statements from all concerned were obtained within two days. The statements were consistent. Grievant raised his voice and shoved Officer Orellana with open hands two times on May 13. In accordance with Agency policy in matters of allegations of workplace violence, a Threat Assessment Committee met to consider the incident on March 18 and 20, 2009. The committee issued its findings on March 25, 2009. It concluded that no physical harm resulted from the incident, that threats to other staff was minimal, that Grievant lost control of his emotions and pushed Officer Orellana during a heated discussion over inmate mail, that the original situation had been resolved, that Grievant and Orellana had resolved their differences and that further violence was not likely. The committee found this to be an isolated incident, that Grievant took responsibility for his behavior and had successfully resolved any differences that he might have had with his coworker.

During this period, the Agency had a significant backlog of investigations. It had only one investigator, SIA Buser. To speed up the process, the Agency trained and assigned additional staff to assist SIA Buser with the investigations. Sometime between December 2009 and February 2010 Grievant's case was assigned to Lieutenant Michael Newell to investigate. In February and April of 2010, affidavits were obtained from the witnesses and principals who had earlier provided statements concerning March 13, 2009 incident. These affidavits were factually consistent with the statements obtained immediately after the incident in March of 2009 except that they established specifically that Officer Orellana had not directed an obscenity toward Grievant.

A letter dated May 17, 2010 to Grievant from Captain S.D. Niles informed him that he was to be placed on a 14 day suspension for workplace violence, a violation of Program Statement 3420.09, Standards of employee conduct. This resulted from Lt. Newell's investigation.. The letter was drafted by Human Resources Manager, Michelle Cottingham. The letter indicated that Warden Chester would make the final decision on the proposed suspension and that Grievant could reply to the letter. In a meeting with the Warden on June 11, 2010, Grievant made an oral statement acknowledging his mistake in shoving Officer Orallana. Grievant indicated that March 13, 2009 was a bad day and bad time for him. He acknowledged that he had some anger issues. He was struggling personally with the loss of custody of his son. He demonstrated remorse for his conduct and hoped it would not happen again. In a letter dated July 15, 2010, again drafted by Michelle Cottingham, Warden Chester found the evidence fo fully support the charge of workplace violence against Grievant. The Warden considered how extremely serious the charge was in light of Grievant's position as a federal law enforcement officer and correctional worker. He imposed a 7 day suspension on Grievant. Among other factors considered was that Grievant had been employed by the Agency for over 14 years . Warden Chester indicated that a 7 day suspension should have the desired corrective effect. Grievant was suspended for the period July 19-July 25, 2010. (A 7 calendar day suspension results in the actual loss of pay for 5 days insofar as an Officer's work schedule consists of a 5 day on 2 day off rotation.)

A grievance was timely filed on August 24, 2010 which alleged that the Agency violated Article 6 b.2., Article 30 c. and d., bureau policy and any and all other applicable law or regulation in its 7 day suspension of Grievant. The Agency denied the grievance and the matter proceeded to arbitration.

POSITIONS OF THE PARTIES

The Agency argues that there was just cause for the 7 day suspension of Grievant. The Grievant was on notice as to the Agency's expectations through the Standards of Employee Conduct and mandatory training. The rule against physical violence, threats or intimidation toward fellow employees is reasonable and essential to the running of a prison. The investigation of the incident was fair. Grievant was provided an opportunity to respond to the charges against him. There was substantial proof to support a finding of Grievant's misconduct. Grievant was not harmed by the length of time of the disciplinary process. The penalty imposed was reasonable and had the desired corrective effect. The discipline of Grievant was for just and sufficient cause. The grievance should be denied.

The Union asserts that the contract language is clear and unambiguous. *Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely dispositions of investigations and disciplinary/adverse actions.* Staffing or budget issues are not an excuse to the timely disposition of disciplinary cases. This case was not complex. Statements of all concerned parties and witnesses were obtained within two days of the incident. The Threat Assessment Committee met within a week and issued its findings within two weeks. Still, the Agency was somehow unable to move forward with Grievant's case for another 11 months. After the Agency assigned Lt. Newell to investigate the case in February of 2010, no new evidence came to light and no new leads were pursued. Although the Agency indicated that there was a substantial number of investigations going on at this time, there exists no substantial justification for the length of time between the incident and the imposition of discipline. Such a delay works against the corrective effect intended by the use of such discipline. It is rendered punitive rather than corrective. Other arbitrators have held such delays to be unreasonable and have sustained grievances where they have occurred. Further, the 7 day suspension was too harsh under the circumstances and failed to properly consider mitigating factors, namely Grievant's strong performance evaluations, his awards and his complete lack of a disciplinary record. Grievant's work performance following the incident was excellent. He worked out his differences with Officer Orellana and they became friends. If any discipline was warranted, it would have been a verbal or written reprimand, however, due to the unnecessary and unwarranted delay, the entire discipline should be thrown out. The discipline was not for just cause. It was not timely, progressive or corrective. It was not consistent with Grievant's performance and disciplinary record. The discipline should be overturned in its entirety and Grievant should be made whole. Jurisdiction should be retained by the arbitrator for the determination of appropriate and warranted attorney fees.

DISCUSSION

There are no significant factual issues surrounding the incident of March 13, 2012. The statements of the witnesses and parties confirm that Grievant while on duty became angry and with open hands twice shoved Officer Orellana on his chest. Officer Orellana did not retaliate and the matter was quickly over. There were no subsequent ramifications. Grievant and Officer Orellana made up and became friends. Grievant acknowledged his mistake in shoving his fellow officer and admitted to some anger management issues. He continued his service with the Agency and subsequently received excellent performance evaluations.

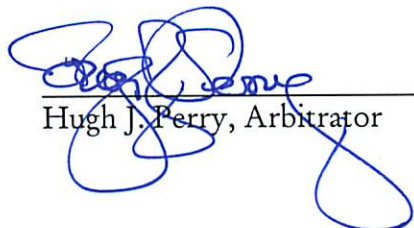
Some discipline of Grievant because of his conduct on March 13, 2009 would have been justified. The assault of a fellow Officer constitutes serious misconduct. The issue that must be resolved is whether a 7 day suspension imposed upon Grievant nearly 16 months after the incident should stand. As stated above, the facts upon which the discipline is based are relatively simple and straightforward. They were established through witness and party statements gathered within two days of March 13, 2009. The incident triggered the involvement of the Threat Assessment Committee which issued its findings on March 25, 2009. No substantial evidence was later uncovered through an investigation initiated in February 2010. The discipline imposed on Grievant was based on the facts as initially established. The parties agreed to place in their contract the requirement that disciplinary investigations and actions be timely completed. They recognized that under certain circumstances more complex investigations and resulting discipline could take longer. This case was not complex. I fail to find circumstances which would justify such a delay in the completion of the investigation and the imposition of discipline upon Grievant. Such a delay works against the intended corrective nature of such discipline. Here, in fact, it appears that Grievant corrected his own behavior. He readily acknowledged his mistake, obviously learned from it and avoided any subsequent similar conduct. His subsequent job performance did not suffer. He and the other Officer involved became friends. A delay in investigation places an employee under a cloud of uncertainty. It has the potential to adversely affect a transfer or promotion. That the Agency had multiple investigations in progress during this time and with only one staff person assigned to perform them does not excuse its contractual obligation to timely investigate and dispose of disciplinary matters concerning bargaining unit members. While the Agency did take positive steps to expedite investigations by training and assigning additional investigators to its backlog of cases, it did not assign Lt. Newell to Grievant's case until nearly a year later. This subsequent investigation added nothing of import to the case.

I find that the Agency's delay in the completion of the investigation and the imposition of the discipline upon Grievant was in violation of Article 30 of the parties' contract requiring timely disposition of disciplinary matters and of imposing discipline for just and sufficient cause. While some discipline would have been justified had it been timely imposed, the delay in this case leads me to conclude that the grievance should be sustained in its entirety. The following Award is entered accordingly.

AWARD

The grievance is sustained. The suspension imposed upon Grievant should be expunged from his record and he should be made whole for any earnings lost as the result of such suspension. I will retain jurisdiction to resolve any issues which may arise regarding the implementation of this award.

Signed this 24th day of August, 2012.



Hugh J. Perry, Arbitrator

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GENERAL COUNSEL