DECISION OF THE ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN Federal Bureau of Prisons Federal Correctional Institution, Florence, Colorado (the Employer) AND American Federation of Government Employees Local 1112 (the Union)	FMCS Case #15-52943 21 Day Suspension Grievant: Samantha Taylor

BEFORE:	Jon Numair, Arbitrator
APPEARANCES:	
For the Employer:	Jennifer A. Spangler, Assistant General Counsel Federal Bureau of Prisons
For the Union:	Hampton H. Stennis, Assistant General Counsel American Federation of Government Employees
Place of Hearing:	Florence, CO
Date of Hearing:	August 26, 2015
Briefs Postmarked/Transmitted Received:	October 16, 2015 October 22, 2015
Date of Award:	November 20, 2015

Witnesses called by the Employer

David Berkebile
Laura Patch
William Scott Pliler
Thomas Vialpando

Witnesses called by the Union

Evan Engebretsen
Samantha Taylor

ISSUE

The parties agreed to the following issue statement (as contained in Article 31, Section (h) of the Collective Bargaining Agreement) at the outset of the hearing. [1]

> *Was the disciplinary/adverse action taken for just and sufficient cause, if not, what shall be the remedy?*

BACKGROUND

The facts giving rise to the disciplinary action are largely uncontested and acknowledged as such by both parties. Grievant is a Senior Officer, who has worked at the Administrative Maximum Facility (ADX) in Florence, Colorado since July, 2000. According to former Warden David Berkebile,

> *"...the ADX houses the most predatory, violent and disruptive inmates in the entire profession of corrections, not just in the Bureau of Prisons, but around the country."* [2]

On September 11, 2013, Grievant was on duty, working a schedule of 11:00 pm (9-10-2013) to 7:00 am (9-11-2013), assigned to the Delta Control Unit. This assignment includes duties of electronically (and remotely) opening and closing inmate cell doors upon request/command of other officers who are actually in the corridor (or range) into which inmate doors open. [3]

Toward the end of her shift, she was opening and closing inner grill doors for other officers engaged in the feeding of the inmates. Procedure was that an officer would make visual contact with the inmate in a cell, identify the cell by radio to the co-worker at the Delta Control Unit and request the inner grill be opened. The food tray would be placed in/on the food tray slot of the solid door. The inmate would exit the inner cell into the sally port, retrieve the tray, retreat back into the inner cell and the officer would request a re-securing of the grill door once the inmate had returned to the inner cell.

On the day in question, Grievant testified the food arrived late and the three officers involved ignored the procedure in an attempt to complete the feeding as quickly as possible.

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[1] Transcript (TR) p 9: 9-25

[2] TR p. 27

[3] Two doors actually separate the inmate from the corridor. One is an "inner grill" or door of bars that is closest to the inmate. There is then a vestibule, or "sally port", of open space, and finally a solid steel door with slots to allow observation and/or the passing of food trays or other items.

She admitted to not following the protocol, in that, she did not receive, or act upon, direction from the two officers who were downrange to open and secure each grill door. Instead she relied upon auditory cues she picked up from cell intercoms during the feeding routine to open and close the grill doors. No information was relayed to the Delta Control Unit by the downrange officers. She assumedly knew which cell to open and close, and when, by listening to the tray distribution progress of the other officers. This assumption proved to be terribly mistaken.

With no one tracking the inmates and ensuring their retreat back inside the inner grill, one inmate, Ishmael Petty, took the opportunity to linger in the sally port after retrieving his food tray. When the grill door closed he remained in the sally port, now locked between the two doors, separated from the range by just the outer door. Later that morning, three other employees were performing work in the range, distributing educational material to inmates. Upon calling for the outer door to be opened these employees were immediately set upon by inmate Petty who used a crafted weapon and subsequently one of the employee's "*rapid rotation batons*" against them. The attack, captured on video, was quite brutal. These employees suffered injuries significant enough to be taken to a local hospital, and, in at least one case, severe enough for extended hospitalization and recuperation.

On February 10, 2014, Grievant was issued a Proposed Suspension of 30 days by Complex Captain William Pliler. This Notice was received by the Grievant on February 12; and on February 27 she provided a written response to the Proposed Suspension. Warden Berkebile issued his written decision on August 4, 2014, reducing the proposed 30 Day Suspension to 21 Days. On August 14, the Union filed a "Notice to Invoke Third Party Dispute Resolution", moving the case directly to Arbitration, in accordance with their options under Article 31. Accordingly, there are no grievance papers, filings, responses, etc., as we would normally have.

The parties stipulated the case was properly before the Arbitrator. [4] Each party had full and ample opportunity to present witnesses and evidence in support of their positions. A court reporter transcribed the proceedings and the parties elected to summarize by submitting post-hearing briefs. The briefs were exchanged as agreed by the parties and received by the Arbitrator on or before October 22, 2015.

[4] TR p. 9

RELEVANT CONTRACTUAL PROVISIONS

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 regulations, including the right:

. . . .

2. to be treated fairly and equitably 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 b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less.

Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions 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 a rising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and

. . . .

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.

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 j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days 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.

ARTICLE 31 - GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

. . . .

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

2. a grievance may only be pursued to arbitration by the Employer or the Union.

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or

2. through the conventional grievance procedures outlined in Article 31 and 32, w here the grieving party wishes to have the arbitrator decide other issues.

CONTENTIONS OF THE PARTIES

Position of the Employer

The Employer contends it had good and sufficient cause to discipline the Grievant, in accordance with established case law including Enterprise Wire – 46 LA (BNA) 359 (Carroll

Daugherty, Arb. 1966), and Douglas v. Veteran's Admin. – 5 , MSPB 31 (1981). They offered the following broad arguments to substantiate that contention, and provided detailed elaboration in support of those arguments.

- The Agency had reasonable rules in place related to the orderly, safe and efficient running of the Agency. [5]
- The Grievant was on notice that possible discipline could result from the misconduct.
- Prior to administering discipline, the Agency conducted a fair investigation that uncovered substantial proof of the employee's guilt.
- The Agency applied its rules without discrimination.
- The Agency proved by a preponderance of evidence that the penalty was within the bounds of reasonableness.

The Employer argues Grievant was aware of the proper procedures for opening and closing cell doors; a policy well-founded to prevent just the type of assault which resulted when she ignored these procedures. [6] She was also aware that penalties, up to, and including, discharge could result from a failure to abide by established rules and procedures.

They further contend the Agency conducted a fair and impartial investigation into the events of September 11, 2013, concluding the Grievant did, in fact, violate established rules. In fact, she admitted to not following the procedure for opening and closing cell doors.

They maintain they were within their rights to suspend the Grievant for 21 days, despite the fact this was her first disciplinary action due to the brutal assault resulting from the security breach, and that they applied their rules and penalties without discrimination. They quote from the Standards of Employee Conduct [7]

> *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. 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 Employer reasons the outcome of the violation is a valid factor in determining whether an offense was "egregious".

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[5] Each bullet is a quote or paraphrase from the Employer's Post-Hearing brief

[6] These procedures are found in multiple instructions included as part of the JE#2 investigation packet

[7] JE #10

> *The Grievant's breach of security is particularly egregious inasmuch as it contributed to the September 11, 2013, incident where a staff member was severely injured in an inmate assault.* [8]

They claim the penalty is consistent with penalties issued for the same offense, offering testimony that Officer Cox, one of the officers involved in the feeding of inmates that morning, also received a 21 day suspension.[9] There were few comparative disciplines since there were no previous incidents "*which involved a violent attack and a complete disregard of how the institution feeds inmates.*" [10]

The Employer dismisses Union contentions that the victims of the attack should also have been disciplined; citing MSPB findings that circumstances surrounding the charged offenses must be "*substantially similar*", and that the Employer must have "*knowingly and intentionally treated similarly situated employees differently*". [11] They offered the following to defend their decision not to discipline the victims and distinguish them as not being substantially similar to the Grievant:

> *Mr. Smith, Ms. Smith and Ms. McEvoy were all victims of the inmate attack on September 11, 2013. As such they cannot be charged with breach of security and are not comparable to the Grievant. Further Warden Berkebile testified that he did (not) receive any reports that the victims, Ms. McEvoy, Mr. Smith, and Ms. Smith violated policy.* [12]

In conclusion, the Employer argues a disciplinary decision

> *...should not be overturned unless the decision is clearly excessive, disproportionate, or arbitrary, capricious or unreasonable. The deciding official's decision must be given due deference and the arbitrator must consider the Agency's primary discretion in exercising the managerial function of maintain employee discipline and efficiency of the Agency.* [13]

They go on to summarize how the discipline was not excessive, disproportionate, arbitrary, capricious or unreasonable, and request the Arbitrator to deny the grievance.

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[8] Post-Hearing Brief of the Employer p. 8

[9] There was mention in brief that the same discipline was directed at the third employee involved in the feeding, Officer Figueroa, but no evidence of this discipline was proffered.

[10] Post-Hearing Brief of the Employer p. 8

[11] Ibid p. 5

[12] Ibid p. 9

[13] Ibid p. 16

In anticipation of the Union's request for attorney's fees, the Employer makes an extensive defense as to why these fees should not be awarded, even if the Arbitrator decides for the Union on the merits of the case.

Position of the Union

The Union counters the Employer lacked good and sufficient cause for the disciplinary action. This challenge largely relates to the Union's charge of disparate treatment in that:

> *The Agency applied its policies in a discriminatory manner in violation of the just cause requirement and Article 6 of the Master Agreement.* [14]

They further contend the action fails "*the doctrine of corrective and progressive discipline*", alleging an excessive penalty; and finally argue the Employer failed to appropriately address certain *Douglas Factors* which they highlight (in large part, they relate to the same disparity and excessive penalty contentions).

The disparity argument centers on the lack of discipline (or investigation) for those officers who were injured in the attack on September 11. The Union alleges the victims engaged in willful disregard of instructions, obligations and duties by failing to establish visual confirmation of the inmate's whereabouts prior to radioing the control center to open the outer door. This breach, they contend

> "*...had an even more proximate causal relationship to the assault (*and went*) uninvestigated and undisciplined.* [15]

They also contend general statements regarding similar offenses and the outcomes of those offenses made by those investigating or justifying the penalty should be ignored. There were no prior disciplines to which this action needed to comport. When pressed on comparables, the Employer's witnesses could not identify comparable cases (other than one of the officers disciplined for this same incident).

They also argue the outcome of an event should not be a determinant of a more severe penalty, essentially arguing a violation should stand on its own, regardless of the aftermath. And on outcome, they point out Grievant also suffered from the assault in the form of mental anguish and a diagnosis of Post-Traumatic Stress Disorder. [16]

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[14] Post-Hearing Brief of the Union p. 6
[15] Ibid p. 11
[16] Ibid pp. 18-19

They insist the Grievant's long-term record and performance, including no prior discipline and consistent "*exceeds/excellent*" ratings on her formal evaluations, belie the Employer's characterization of her work as merely "*acceptable*". In addition, her consistent forthrightness in owning up to the policy violation, throughout the investigation and disciplinary processes, should be weighed in her favor.

In conclusion, the Union requests the Arbitrator to

> "...*rescind the suspension and make Officer Taylor whole, including the restoration of Officer Taylor's 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. Alternatively, should the arbitrator find that some discipline is warranted, we respectfully ask that the arbitrator mitigate the discipline to one more in keeping with the principles of corrective discipline in line with the doctrine of progressive discipline. 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 fees.* [17]

ANALYSIS AND OPINION

Initial Considerations

As the Union has made clear in both their opening remarks and post-hearing brief they have little argument with the Employer's case except that the penalty was excessive. There is no disagreement over the existence of the rule, Grievant's knowledge of the rule, or the fact the rule was violated. There is no contesting Grievant's guilt – she admitted to the charges from the outset. And, in response to a direct question during the hearing about whether she would accept some sort of disciplinary action, she replied, "*yes, of course.*"

The question(s) before me then relate to the nexus between admitted failures by the Grievant and the penalty handed down for those failures – Does the punishment fit the crime?

The Union provides two defenses against the severity of the discipline. First, they argue the penalty is disparate compared to others who had either broken established rules related to breaches of security in general, or more specifically, breaches related to the attacks of September 11, 2013. Secondly, they argue the penalty was inherently harsh given the Grievant's length of service and excellent work record.

[17] Ibid p. 20

Disparity

Although the Employer typically carries the burden of proof in a disciplinary matter, a claim of disparate treatment is an affirmative defense undertaken by the Union. In raising this defense, the Union must accept the burden of establishing the reasons the action should be set aside once the Employer satisfies its obligation of proving the underlying basis for the disciplinary action. In addition to the citations offered by the Employer, the common understanding of a disparity defense requires a demonstration that those employees offered for comparison were "*similarly situated*" The Union's burden is described as follows in the 2001 Supplement to *"Discipline and Discharge in Arbitration"*

> *To prove disparate treatment, one must show that the circumstances surrounding the cases offered for comparison were similar. The party alleging disparate treatment bears the burden of proving it by a preponderance of evidence.* [18]

As noted above, the Employer here has satisfied their obligation of proving the basis the action. There was no contesting it. The Union has accepted the basic facts that led to the Employer's conclusion to discipline the Grievant. Since the Employer met their initial burden, the burden shifts to the Union to prove their charge of disparity.

What is disparity? In this context, it is commonly considered to be distinguishable treatment of two employees who committed like offenses – but were treated differently in the Employer's response to those offenses, and were similarly situated. Both factors need to be present.

This concept of dual considerations is supported by Arbitrator Harry Dworkin in *Genie Co., 97 LA. (BNA) 542, 549 (Dworkin, Arb. 1991)*

> *In order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.*

In the case at bar, neither party could accurately or adequately establish a prior, comparable situation at ADX Florence. The Union's comparison to a situation involving Officer Evan Engebretsen, wherein he received a one-day suspension for "*failure to follow policy*" is not compelling. Officer Engebretsen's admission of using a hand signal rather than a direct radio request to call for a door to be opened (which resulted in the wrong door being opened) is not

[18] "Discipline and Discharge in Arbitration", 2001 Supplement, page 14

sufficiently similar. The error was caught immediately and no one was injured as a result of his offense.

Ms. Patch's testimony that she did find similar cases, with similar charges, was not supported by any evidence. The only employee Ms. Patch could refer to, and only after prompting under direct questioning, was Officer Cox, who received a 21 day suspension as one of the officers who were complicit in the September 11 feeding situation. Under cross-examination, she again stated there were other cases, but was unable to name them.

A passage in Warden Berkebile's Decision Letter is consistent with a finding that this event was one of first impression.

> *I reviewed the disciplinary records at the complex in search of similar proposed discipline, and did not find any similar instances where staff had been assaulted so brutally as a result of the failure to properly secure doors, so I cannot consider any case to use as a comparison to the current discipline proposed against you.* [19]

Notwithstanding the absence of historical cases, disparity could still exist if the Union's theory of disparity within the group of employees who failed to follow procedure leading up to and contributing to the assault is found to be valid. The Union's main contention is the Employer treated the Grievant disparately when they issued her a 21 day suspension and failed to even investigate actions of the three assaulted employees that might have led to the inmate's escape from his cell. Specifically, they contend the failure of the three assaulted employees to make visual contact with inmate Petty prior to calling for his outer cell door to be opened was also a serious breach of security. The Union's opening remarks included the following:

> *Further, while the three Education staff certainly did not deserve to be attacked, those three employees who were victimized by Inmate Petty did not follow procedures themselves, also failing to visually confirm the location of the inmate in the proper part of the cell. None of these three were investigated, and none of these three received so much as a reprimand.*
>
> *Selective discipline does not further the principles of the Master Agreement, to be treated fairly and equitably in all aspects of personnel management, in Article 6. The Agency proposed a 30-day calendar suspension, and it mitigated this adverse action to an equally unreasonable 21-day suspension, for a first-time offense, for an excellent employee, with no prior discipline.* [20]

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[19] JE #4

[20] TR p.23: 4-19

It is curious the Employer did not investigate the three educational employees' actions to determine if discipline was warranted. This non-action was first brought to evidence under direct questioning of Warden Berkebile, when he responded he had not received any reports of the three assaulted employees violating security procedures. He detailed these security procedures just a few moments before as follows:

> *The procedures for the Education staff is that they would step to the cell, observe where the inmate is, and then call on the radio to open the outer cell door, so that they could step into the sally port and interact with the inmate in that cell. We have Psychology staff, we have Teachers, we have Facilities operators, Maintenance workers, Food Service staff, people from a variety of departments who interact with the inmate population every day, all day.*
>
> *And the procedure is, you look, you find out where that inmate is, make sure it's safe, you call for the outer door to be opened, and then the inmate steps in the sally port.* [21]

However, the video, entered into evidence as EX #1, appears to show the three assaulted employees did not follow the procedure detailed by the warden. They appear to go from cell to cell, calling for doors to be opened or secured without first observing the whereabouts of the inmate. In addition, circumstantially, if they had attempted visual confirmation of inmate Petty they would have seen he was not secured behind the iron bar door and would not have called for the door to be open.

Under cross-examination, we then learned from Investigator Vialpando

Q	*Who assigned you the task of investigating this?*
A	*Ms. Payne.*
Q	*And did she give you any instructions on what to look for?*
A	*No.*
Q	*What did she tell you?*
A	*She gave me the case, and that was it.*
Q	*What was in the case?*
A	*Predicating information, and video of the incident, and the authorization to conduct a local investigation.*

[21] TR p.40: 1-14

Q *And did you review the video, looking for anything in particular?*

A *Looked for everything, you know, policy-wise, and what was going on during the -- during the feeding portion of the -- of the investigation.*

Q *Did you review, also, the video of the assault?*

A *I did.*

Q *Were you asked to look for any procedure or policy violations in that video?*

A *No. My understanding was, the investigation was the -- the investigation was the feeding procedures that led up to the assault on the staff.* [22]

And finally, from Director of Human Resources, Laura Patch, we had testimony under cross-examination that none of three assaulted employees were disciplined. [23]

Q *To your knowledge, did any of the education staff who were victims in this case receive any discipline?*

A *Not to my knowledge.*

As offensive as the concept of disciplining those so badly injured might sound, if those employees' actions similarly violated the established rules for securing inmates, then their actions, might have borne some responsibility for the assault and should have been, at the very least, investigated. To ignore their apparent failure to abide by the requirement to make visual contact with the inmate prior to calling for the door to be opened calls the discipline of Officer Taylor into question. These employees were very likely similarly situated. They were all involved in the same incident and they seemingly made decisions that allowed inmate Petty to escape his cell by violating established rules for securing inmates. [24]

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[22] TR pp 54:18 – 55-19

[23] TR p. 65: 5-8

[24] This investigation could have resulted in a host of outcomes, including similar discipline or no discipline, depending on specific determinations, so long as those determinations were made in a deliberate, reasoned fashion. Since there was no investigation of these apparent breakdowns in security, it is impossible to reach any conclusions based solely on a grainy image on a video and supposition. The arbitrator will not come to a conclusion whether their behavior violated policy as it is unnecessary. It is sufficient for purposes of this case to simply know no investigation occurred despite valid questions of the employees' actions.

Grievant clearly violated the established procedures and was subject to discipline for her actions. However, for the process to cast a blind eye to the possible failures of the other employees, essentially placing the complete fault and failure on the employees who were involved in the feeding before an investigation even began (as testified to by Investigator Vialpando), corrupts the disciplinary action against Officer Taylor. It establishes a presumption of disparate treatment, to which the Employer offered no rebuttal.

The Employer has emphasized throughout the case that the outcome of the security breach, the brutal assault, was the most significant factor supporting the unusually severe penalty for a first time offense. The Employer asserts, quoting from Warden Berkebile:

> *Warden Berkebile testified that Grievant's offense was serious and warranted a twenty-on (21) day suspension because the serious staff assault never would have occurred had the feeding procedures been followed. TX p. 33.* [25]

If this is the case, there is then no doubt these other employees were similarly situated as their possible breach likely led to the outcome of the serious staff assault, as well. If the outcome drove the conclusion of severe discipline, it was incumbent on the Employer to investigate all the events that led to or contributed to that outcome. They did not. I find the Union carried its burden of proving disparate treatment of the Grievant.

Excessive Penalty

The Union also argues the penalty was inherently excessive given the Grievant's long tenure and excellent work history. A 21 day suspension, they argue, fails to comport with the principles of corrective action v. punitive, and progressive discipline.

I disagree. The level of punishment is a function of both the employee's past record and the seriousness of the offense for which they are charged. An employee should not be fired for a first charge of tardiness and will not receive a reprimand for assaulting a supervisor. The two factors of past record and seriousness of the offense each weigh on the penalty. As contained in the Standards of Conduct,

> *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 and including removal.* [26]

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[25] Post-Hearing Brief of the Employer, pp 6-7

[26] JE #10, Attachment "A", p. 1 (similar language appears in Article 30, section c)

This was a serious breach of security that warranted a severe penalty. If not for the finding of disparity, it might have stood despite Grievant's tenure and record. However, whether 21 days was excessive or appropriate, on its own, need not be examined at this juncture since I have already determined the Employer made a serious error in singling out the "feeding" employees for discipline while ignoring the other employees' failures. This error will result in significant mitigation of the penalty from the *"adverse action"* status of a 21 day suspension to a contractual "*disciplinary action*". Both the Grievant and the Union have acknowledged some degree of discipline may be warranted and the Grievant testified some discipline would be acceptable. This mitigation counters any additional argument of excessive penalty and will override any further claim.

Attorney's fees

The Union requested recovery of Attorney Fees in accordance with Back Pay Act if they prevailed in their request for reversal of the discipline. They argue a violation of the Master Agreement constitutes an unjustified or unwarranted personnel action, qualifying the action as compensable under the Act, if the Arbitrator finds such violation.[27]

The Employer counters the awarding of attorney fees must meet certain criteria, including a requirement that it be founded in the interest of justice, established by a finding of one of the following factors:

1. *Whether the Agency engaged in a prohibited personnel practice;*
2. *Whether the Agency action was clearly without merit or wholly unfounded, or the employee was substantially innocent of the charges;*
3. *Whether the Agency initiated the action in bad faith;*
4. *Whether the Agency committed gross procedural error or;*
5. *Whether the Agency knew or should have known that it would not prevail on the merits.*

Allen v. USPS, 2 M.S.P.R. 420 (1980) [28]

Without undue deliberation, the Arbitrator finds that the Employer did not conduct itself in any manner, described in *Allen*, which would support the conclusion that the awarding of

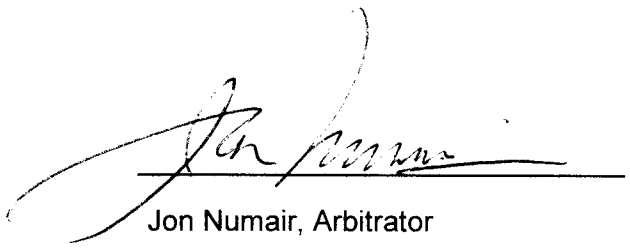
[27] Post-Hearing Brief of the Union pp.20-21
[28] Post-Hearing Brief of the Employer pp. 13-14

Attorney Fees would be in the interest of justice. My analysis of the merits of this case excludes such a finding since the Employer's action was modified and not overturned.

CONCLUSION

For reasons detailed above, the grievance is sustained in part. The Employer had good and sufficient cause to discipline the Grievant, but failed in their obligation to be consistent in their approach to that discipline. The 21 day suspension will be reduced to a suspension of 7 days. Although this is a first offense and there was a finding of disparate treatment, those factors cannot override the seriousness of the charges against the Grievant and the fact that some disciplinary response is appropriate.

The Grievant shall be made whole for all lost wages, compensation, benefits, and any other reductions in status, in accordance with the Back Pay Act. Attorney's fees will not be awarded.



Jon Numair, Arbitrator

November 20, 2015