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Reply to Arizona Address

July 28, 2018

Steven Simon, Esq.
U.S. Department of Justice
Federal Bureau of Prisons
230 North First Avenue, Ste. 201
Phoenix, AZ 85003

Evan Greenstein, Esq.
AFGE
80 F Street, N.W.
Washington, DC 20001

Subject: In the Matter of Arbitration between AFGE, Council of Prison Locals, Local #1612, AFL-CIO and Federal Bureau of Prisons, U.S. Medical Center for Prisoners, Springfield. MO; FMCS #17-01440-8; Removal: Rebekah Stafford Coker

Dear Messrs. Simon and Greenstein:

Enclosed are two (2) copies of my Opinion and Award, pertaining to the above-referenced subject. Also, two (2) copies of my invoice for arbitrator fees and expenses are enclosed. Please have a copy of the latter processed for payment by your respective client.

Mr. Simon, please let me know whether the Agency's invoice needs to be routed differently. Thank you.

Cordially,

Mario F. Bognanno
Labor Arbitrator & Professor Emeritus

Enclosures

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ARBITRATOR'S INVOICE: *DIRECT REPLY MAIL TO ARIZONA ADDRESS*

SUBJECT: IN THE MATTER OF ARBITRATION BETWEEN AFGE, COUNCIL OF PRISONS, U.S. MEDICAL CENTER FOR PRISONERS, SPRINGFIELD, MO.; FMCS CASE NO. 17-01440-8; REMOVAL OF REBEKAH STAFFORD COKER

FEES:

1 day of travel	$ 1,700.00
1 hearing day - 2/14/18	1,700.00
1 scheduled/cancelled hearing day – 2/15/18	1,700.00
6 study, drafting and case administration days	10,200.00
Total Fees:	**$ 15,300.00**

EXPENSES:

Clerical: Typing, Copying and Mailing Expenses		$ 200.00
Lodging: Residents Inn, Marriott: 2/14/18 & 2/15/18		273.43
Enterprise Car Rental: 2/14/18-1/16/18		130.86
American Airlines: 2/14/18-2/16/18		642.96
Meals:		
2/14/18	Snack	3.91
	Dinner	21.92
2/15/18	Lunch	11.89
	Dinner	23.00
2/17/18	Breakfast	6.61
	Lunch	10.27
EZ Parking & Shuttle (Tucson, AZ) – 1/14/18 – 2/16/18		6.00
Total Expenses:		**$ 1,330.91**
Total Fees & Expenses:		**$ 16,630.91**

Per Article 32, Arbitration, Section d. of the parties CBA, arbitrator fees and expenses are to be borne in equal shares by the employer and union. Thus, equally dividing Total Fees & Expenses, **the AFGE is assessed $8,315.46 and the Agency is assessed $8,315.46. Payment is due on or before 30 calendar days from the dates shown below.**

Date: July 28, 2018

Mario F. Bognanno

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Date: July 28, 2018

Mario F. Bognanno

Mario F. Bognanno, Labor Arbitrator & Professor Emeritus

IN THE MATTER OF ARBITRATION BETWEEN

American Federation of Government Employees/ Council of Prison Locals, Local No. 1612, AFL-CIO	)	**FMCS Case No. 17-01449-8**
("Union")	)	**Issue: Removal of Grievant**
&	)	**Hearing Site: Springfield, MO**
Federal Bureau of Prisons, U.S. Medical Center for Prisoners, Springfield, Missouri	)	**Hearing Date: February 15, 2018**
("Agency")	)	**Briefing Date: May 23, 2018**
	)	**Award Date: July 28, 2018**
	)	**Arbitrator Mario F. Bognanno**

I. JURISDICTION

The parties to the above-captioned matter are the American Federation of Government Employees/Council of Prison Locals, Local No. 1612 ("Union") and Federal Bureau of Prisons, U.S. Medical Center for Prisoners ("Agency"). The Agency is a federal prison in Springfield, Missouri that provides medical, mental health and dental services to male offenders. The Union represents all employees at the U.S. Medical Center for Prisoners, Springfield, Missouri, with the exception of Central Office employees. The parties are signatories to a Collective Bargaining Agreement ("CBA").[1] (Jx. 1)

Inasmuch as this decision may be published, the parties agreed that the Grievant ought not to be identified by her proper name. (Tx. pp. 7-8) Thus, herein, she is identified by her initials, RSC. The Grievant was hired on January 27, 2002. (Ax. 1, p. 1) On January 11, 2017, Kelly Bagwell, Assistant Health Services Administrator ("AHSA"), gave RSC notice that she was

[1] Exhibits are identified as follows: Joint Exhibits as Jx. #; Agency Exhibits as Ax. #, p./pp.; and Union Exhibits as Ux. #, p./pp. Transcript citations are denoted as Tx. p./pp.

proposing to have her removed (i.e., "discharged" or "terminated") for violations of the Federal Bureau of Prison's Standards of Employee Conduct. (Ax. 2, pp. 1-34) Ms. Bagwell's notice identified three (3) charges that were being brought against the Grievant, namely:

> *Charge 1: Sexual Conversations with Inmates;*
> *Charge 2: Demonstrating Favor to Inmates: Specifications A and B; and*
> *Charge 3: Inattention to Duty: Specifications A and B.*

(Ax. 1, p. 1; Ax. 1, pp. 13-18) In a letter dated February 8, 2017, the Grievant addressed a letter to Linda Sanders, Warden, in which she responded to AHSA Bagwell's January 11, 2017 notice of proposal to remove. (Ax. 1, pp. 11-12) Also, on February 8, 2017, RSC met with Warden Sanders to present her oral response to AHSA Bagwell's notice. (Ax. 1, pp. 8-10) Thereafter, on March 31, 2017, Warden Sanders determined that as of midnight on that date, the Grievant's employment would be terminated. (Ax. 1, p. 1) At the time of discharge, RSC worked as a Medical Supply Technician ("MST") which, like all positions at the U.S. Medical Center for Prisoners, Springfield, MO, is primarily a law enforcement position. (Ax. 1, p. 4)

Pursuant to Article 31, *Grievance Procedure*, of the CBA, the Union grieved RSC's dismissal. (Jx. 1) On May 24, 2017, the Federal Mediation and Conciliation Service, U.S. Government, advised the undersigned that he had been jointly selected by the parties to arbitrate said grievance. In accordance with the provisions in Article 32, *Arbitration*, of the CBA, the Arbitrator heard the grievance on February 15, 2018 in Springfield, Missouri. Appearing through their designated representatives the parties were given a full and fair hearing. Threshold issues were not raised during the proceedings. Witnesses were sequestered and witness testimony was sworn and cross-examined. Exhibits were introduced and accepted into the record, and a verbatim transcript of the arbitration hearing was made. The parties agreed

that the instant Award would be the final and binding resolution of the matter in dispute. Moreover, they agreed to waive the time limiting language in Article 32, Section g of the CBA. (Jx. 1) Related thereto, the undersigned stated that he would endeavor to decide the matter no later than sixty (60) calendar days following receipt of post-hearing briefs. Finally, the parties authorized publication of this decision provided that the Grievant's name is not made public. (Tr. pp. 5-12) The parties' post-hearing briefs were post-marked May 23, 2018.

II. APPEARANCES

For the Union:

Evan S. Greenstein, Esq.	Legal Rights Attorney, AFGE
Karrie Wright	President, AFGE, Local No. 1612
Tamara Jackson	Union Steward, AFGE, Local No. 1612
RSC	Grievant, formally Medical Supply Technician

For the Agency:

Steven R. Simon, Esq.	Sr. Labor Law Attorney, Federal Bureau of Prisons
Bradford Mackey	Technical Representative
Brandy Ybarra	Observer
Rhonda Yarbrough	Health Services Administrator
William Scott Mead	Retired, formerly Director of Quality Management and Assistant Health Services Administrator
Scott R. Anderson	Retired, formerly Special Investigative Agent
Brian Rice	Assistant Manager, Human Resources
Linda Sanders	Retired, formerly Warden

III. RELEVANT PROVISIONS FROM THE CBA AND STANDARDS OF EMPLOYEE CONDUCT

A. COLLECTIVE BARGAINING AGREEMENT

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 there are offenses so egregious as to warrant severe sanction 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.

***

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. [B]y 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?"

***

(Jx. 1)

B. STANDARDS OF EMPLOYEE CONDUCT

***

5. PERSONAL CONDUCT

***

b. **Sexual Relationships/Contact with Inmates.** Employees may not allow themselves to show partiality toward or become emotionally, physically, sexually or financially involved with inmates, former inmates, or persons known (or who should have been known based on circumstances) to the employee as a family member or close friend of inmates or former inmates.

(Ax. 2, p. 6)

6. RESPONSIVENESS

Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Employees are required to remain fully alert and attentive during duty hours.

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(Ax. 2, p. 8)

Attachment A. Standard Schedule of Disciplinary Offenses and Penalties[2]

Nature of Offense	Explanation	First Offense	Second Offense	Third Offense	Reckoning Period
7. Inattention to Duty	Potential danger to safety of person and/or actual damage to property is (sic) considered in determining severity of the penalty, as is potential or actual adverse impact on Government operations. Includes, but is not limited to, loafing, wasting time, idleness, or unproductive activities.	Official reprimand to removal	14-day suspension to removal	Removal	2 years
30. Preferential Treatment of Inmates	Potential or actual negative reaction of other inmates is a primary consideration in determining severity of penalty.	5-day suspension to removal	14-day suspension to removal	Removal	2 years

IV. STATEMENT OF THE ISSUE

The Statement of the Issue is as follows:

Pursuant to Article 31, Section h.1 of the Collective Bargaining Agreement, was the Grievant dismissed for "just and sufficient cause?" If not, what shall the remedy be?

V. FACTS AND BACKGROUND

On January 27, 2002, the Agency hired RSC as a Certified Registered Nurse. In 2005 or 2006, she was reassigned to Central Supply, working as a Medical Supply Technician ("MST"). (Ax. 1, p. 1; Tx. pp. 132-133) While in Central Supply, RSC initially worked with MSTs Rebecca Harrison and Sarah Ray with whom she had a "great" working relationship.[3] (Tx., pp. 133-134)

[2] Offense 7, Inattention to Duty, Ax. 2, p. 23; and Offense 30, Preferential Treatment of Inmates, Ax. 2, p. 28.

[3] Be that as it may, HSA Yarbrough testified that MSTs Harrison and Ray often complained to her about the Grievant's apathetic and unproductive conduct. (Tx., pp. 178-179)

Subsequently, about three (3) years later, MSTs Robert Vest and Lindsay Hannaford replaced the latter as the Grievant's co-workers in Central Supply. (Tx. p. 134) RSC testified that she socialized with MSTs Harrison and Ray; and, initially, she had a good relationship with MSTs Hannaford and Vest but, eventually, that relationship soured. (Tx. pp. 134-137)

Rhonda Yarbrough, Health Services Administrator ("HSA"), is a twenty-three and one-half (23.5) year employee of the Agency. She has held her current position since 2012, and in that capacity she indirectly supervised the Grievant and the other MSTs referenced *supra.* (Tx. pp. 25-27) HSA Yarbrough testified that over the years she had received verbal complaints about the Grievant's flagging work ethic, but it was not until October 8, 2015 that a noteworthy problem surfaced. Responsible for health services finances, she observed that during July and August, she repeatedly reminded Central Supply's MSTs to be sure to place purchase orders for supplies before the September 30th, FY 2015's end. Away from the facility for two (2) weeks of training and, then, upon her October 5th return five (5) e-mails from various health service department heads awaited her attention. Each e-mail complained that (s)he needed to place an "emergency order" for several needle/syringe items required routinely for dialysis. Same were not in stock (i.e., had not been ordered by Central Supply). The Grievant was responsible for failing to order said supplies and/or failing to build Central Supply's inventory of them going into FY2016. (Tx. pp. 27-28; Ax. 1, p. 104)

In October of 2015, William Scott Mead was HSA Yarbrough's Assistant Health Services Administrator ("AHSA"). As such, he was Central Supply's first-line supervisor. On October 8, 2015, he told HSA Yarbrough that MST Vest had come to see him, he was "very upset" with the Grievant and he was prepared to submit a written statement about the Grievant's inadequacies

and to submit same to him, HSA Yarbrough and to Warden Sanders.[4] (Tx. p. 29) HSA Yarbrough spoke with MST Vest later that day. *Inter alia*, he told HSA Yarbrough that MST Hannaford also wanted to speak with her. (Tx. p. 29) MST Hannaford met with HSA Yarbrough on October 9, 2015.[5]

HSA Yarbrough testified that MST Vest and MST Hannaford variously alleged the Grievant was lazy, leaving orders for them to fill, and she was on the telephone excessively, conversing with her mother, fiancé/husband, sister and vendors. Further, they stated, the Grievant would sit at her desk coloring with crayons and working on puzzles, faultily give supply items to inmates, discuss matters of a sexual nature with inmates, undermine their supervisory authority and she would make racially charged statements. (Tx. pp. 30-31; Ax. 1, p. 105)

On October 13, 2015, MST Vest and MST Hannaford each sent a memorandum to Warden Sanders. Each memorandum spells out in considerable detail their respective complaints about Grievant misconduct. (Tx. p. 32; Tx. p. 34)) For example, MST Vest wrote:

> 1. During work hours, Grievant made flower arrangements for her wedding, and made and printed flyers, pertaining to her grandfather's funeral;

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[4] As AHSA, Mr. Mead testified, he knew about the Grievant's shortcomings *via* criticism reported to him by others. He would write-up Grievant-related matters in memos directed to the attention of HSA Yarbrough. (See: Ax. 1, pp. 110-111; Ax. 1, p. 120) In addition, he stated, he himself had not witnessed the referenced shortcomings, and he had no personal knowledge about the facts and circumstances spelled out in AHSA Bagwell's "proposal to remove" letter. (Tx. p. 73; Tx. pp. 80-82; Ax. 1, pp. 13-18)

[5] Warden Sanders was also a party to the October 9, 2015 conversation between HSA Yarbrough and MST Hannaford. HSA Yarbrough memorialized that conversation in an October 14, 2015 memorandum addressed to Warden Sanders. (Ax. 1, pp. 104-105) MST Hannaford told HSA Yarbrough and Warden Sanders that RSC was "... confrontational and made it hard to work in the area." Moreover, MST Hannaford stated that RSC would have inappropriate conversations with inmates. Conversations that included:

> [S]trippers, love relationships, transgender questions concerning penis placement, use of strippers and use of drugs. Ms. Hannaford stated [Grievant] stays on the phone for hours, confirmed she colors and made her wedding arrangements on duty time, and felt she did leave work for others to do. The Warden told Ms. Hannaford she needed a memo from her as soon as possible.

(Ax. 1, p. 105)

2. Grievant is on the phone daily for 2-3 hours, discussing personal matters;

3. He placed inmate Trice on probation for poor OTJ performance. Inmate Trice appealed to the Grievant who, in turn, "... told me I could not put anyone on probation;"

4. He confronted inmates Trice and Green, advising that if he caught them handing out supplies to inmates he would "... write them shots and fire them on the spot." The inmates appealed to the Grievant who, in turn, asked him for an explanation;

5. He heard the Grievant talking about transsexuals with inmates Trice and Green, and talking with a third inmate about Bruce Jenner – "where he hid his penis" – and she asked an inmate who worked in laundry what he thought about strippers; and

6. Prior to end of Fiscal Year 2015, Grievant failed to order dialysis supplies.

(Ax. 1, pp. 113-114) Also, MST Vest sent Warden Sanders a second memorandum on October 14, 2015, reporting that earlier that day he witnessed RSC "laughing and talking" with inmate Ward in the sterilization room. (Tx. p. 33; Ax. 1, pp. 117-118; Ax. 1, p. 119)

MST Hannaford's memorandum variously states:

1. She witnessed and/or overheard the Grievant engaged in long conversations with inmates Trice and Green, regarding their personal lives;

2. She witnessed and/or overheard Grievant talking about a transgender man's penis, about strip-clubs and about strippers;

3. The Grievant makes multiple and prolonged phone calls during her shift every day;

4. She directed inmates working in the sterilization room to wear shoe covers and hair covers. Said inmates appealed to the Grievant who, in turn, questioned her about what she had told the inmates; and

5. On September 30 2015, the Grievant asked that I place an October 1st order for the "overnight" delivery of certain dialysis items, which carried an extra charge.

(Ax. 1, pp. 115-116)

On October 15, 2015, Warden Sanders referred the above-listed allegations to the Office of Internal Affairs ("OIA") for investigation. (Ax. 1, pp. 131-133) Special Investigative

Agent ("SIA") Scott Anderson conducted the investigation. On July 21, 2016, he issued the OIA's Investigative Report. (Ax. 1, pp. 134-152) Having taken staff and inmate sworn affidavits, reviewed relevant Central Supply videos and photographs, and having gone through telephone records and other supporting documentation, SIA Anderson concluded:

> There is sufficient evidence to sustain the allegations of Improper Contact with an Inmate/Inmate's Family," "Inattention to duty," and "Unprofessional Conduct of a Sexual Nature against [Grievant]. SIA Anderson sustained the allegations brought against the Grievant. (Tx. p. 93; Ax. 1, p, 151)

During cross-examination SIA Anderson acknowledged that it took him approximately 271 days[6] to complete the OIA investigation and not 210 days as stated in the investigation's authorization notice. (Tx. pp. 94-96; Ax. 1, p. 129) However, he continued, without elaborating, the initial 210 day deadline was appropriately extended. (Tx. p. 96) When queried about the Grievant's alleged misuse of the telephone, SIA Anderson acknowledged that he reviewed phone records for some dates in early October 2015 and early February 2016 and not for the intervening months, which the Union dubbed the "black hole."[7] (Tx., pp. 97-99) Based on said review of phone records for October 2015 and February 2016, SIA Anderson found that RSC had placed several personal phone calls during work hours on October 8, 2015, October 9, 2015, February 5, 2016, February 8, 2016 and February 9, 2016. (Tx. pp. 96-99; Ax. 1, p. 15; Ax. 1, pp. 60-61)

Regarding SIA Anderson's review of Central Supply videos, he states in his February 3, 2016 Memorandum of Interview that inmate Green and RSC were alone in Central Supply for

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[6] The testimony inaccurately put the number of lapsed days at "about 255."

[7] Arbitral notice is made of the fact that Grievant's July 13, 2016 sworn affidavit states, *inter alia*, that she "... calls her mother and husband every day. Sometimes I will call them several times a day." (Ax. 1, p. 36; Ax. 1, p. 15)

approximately fifty-three (53) minutes on February 3, 2016. (Ax. 1, p. 62) This same video footage shows Michelle Davidson, Assistant Director of Nursing ("ADN") entering Central Supply at 12:50:44 p.m. to pick up supply items, such as, boxes of Kleenex and lint rollers. She left Central Supply approximately ten (10) minutes later. (Ax. 1, p. 19; Ax. 1, p. 62) Significantly, the Union pointed out, in her June 9, 2016 sworn affidavit, ADN Davidson, states, *inter alia*, "I have not overhead any inappropriate conversations between staff and inmates." (Tx. pp. 99-100; Ax. 1, p. 19)

In a similar vein, the Union showed that on October 14, 2015, MST Vest filed an incident report,[8] stating that RSC was in Central Supply's sterilization room with inmate Ward who was not assigned to work in Central Supply. (Ax. 1, p. 91) However, after looking into this matter, the Agency learned that Robert Williams, Laundry Supervisor, had authorized inmate Ward to frequent Central Supply to pick up weekly supplies. (Ax. 1, p. 100) Subsequently, MST Vest's "shot" was expunged from inmates Ward's file.[9] (Tx. pp. 100-101; Ax. 1, p. 95)

On February 4, 2016, while the OIA investigation was still ongoing, MST Vest addressed a memorandum to HSA Yarbrough. Therein, he stated that Central Supply was understaffed because MST Hannaford was off and, as he worked, the Grievant sat at her desk doing crossword puzzles. He also reported that on February 3, 2016, an inmate told him that inmate Green and the Grievant were visiting in Central Supply's sterilization room when the former retrieved something from the cabinet "under the sink." (Tx. p. 36; Ax. 1, pp. 120-121) On the

[8] The record repeatedly reports said filing date as being on November 10, 2015, rather than October 14, 2015 when the incident report was actually filed. (Compare Ax. 1, p. 46 and Ax. 1, p. 91)

[9] When asked, SIA Anderson acknowledged that MST Vest and inmate Aiello are "white;" whereas, the Grievant and Green, Ward and Trice are "black." Said racial distinction, he added, was immaterial and did not affect his findings. (Tx. pp. 107-113)

following Monday, February 8, 2016, AHSA Mead advised HSA Yarbrough that MST Vest told him that the Grievant just concluded a personal phone conversation that lasted seventy-one (71) minutes. (Ax. 1, p. 122)

On February 9, 2016, HSA Yarbrough removed the Grievant from Central Supply. She did so for two (2) reasons. First, Sharon Bennett, a Unit Manager, called HSA Yarbrough to tell her that recently assigned/hired inmate Aiello already wanted to quit working in Central Supply. Later that day, HSA Yarbrough and Michael Williams, Correctional Counselor ("CC"), spoke with inmate Aiello. The latter stated that Central Supply was the locus of probable racial trouble; inmates had unsupervised access to the sterilization room where sharp instruments (e.g., scalpels) are stored; on February 3, 2015, the Grievant and inmate Green had a lengthy conversation while in Central Supply and, as he was leaving, inmate Green procured an item from a cabinet located "underneath the sink;" and, last, the Grievant often spoke of racism, berated MST Vest, and had inappropriate conversations with inmates. (Tx. pp. 37-40) Later that same day, HSA Yarbrough and CC Williams, memorialized their conversations with inmate Aiello in separate memoranda addressed to SIA Anderson. (Ax. 1, pp. 108-109; Ax. 1, p. 123) Further, on March 25 2017, HSA Yarbrough described the Aiello matter in a sworn affidavit taken by SIA Anderson. (Tx. p. 48; Ax 1, pp. 56-59)

Second, following the Aiello matter, HSA Yarbrough stated that she received a call from the 1-2 Clinic requesting her immediate presence. Upon arriving, there stood a Central Supply inmate with a lunch bag containing a stapler and four (4) unsecured scalpels. HSA Yarbrough testified that he told her that he was delivering same to the 1-2 Clinic as RSC had instructed him to do. Immediately thereafter, HSA Yarbrough testified, she went to Central Supply. The

Grievant acknowledged that she had directed the inmate to deliver said items, and HSA Yarbrough remarked that her order was inappropriate inasmuch as a scalpel can be used as a weapon to stab an inmate or an Agency staffer. (Tx. pp. 41-42)

That same day, after speaking with Warden Sanders and showing her the bag of scalpels, HSA Yarbrough prepared a memo reassigning the Grievant to a clerical position. (Tx. p. 43) Returning to Central Supply to give RSC her reassignment, HSA Yarbrough testified, she was sitting at her desk "... with an open crossword puzzle ..." HSA Yarbrough gave the Grievant the memo and the latter proceeded to gather some personal items and left Central Supply. (Tx. p. 44) The next day, February 10, 2016, HSA Yarbrough testified that she returned to Central Supply to collect the items RSC had left at her desk. In the Grievant's desk drawers was a large cache of non-work related coloring pictures, crayons (that appeared to have been recently used) and crossword puzzles, which HSA Yarbrough photographed. (Tx. pp. 44-46; Ax. 1, pp. 77-89) On that same day, HSA Yarbrough prepared a memorandum addressed to SIA Anderson with a subject-line that read "Inattention to Duties." (Ax. 1, p. 124-125) This testimony and additional remarks pertaining to the Grievant's inattention to duty are replicated in a March 25, 2016 sworn affidavit HSA Yarbrough prepared for SIA Anderson. (Tx. pp. 47-48) Finally, HSA Yarbrough testified that staff members have told her that if RSC is ever returned to duty they would resign or request reassignments, fearing their safety would be in jeopardy. (Tx. pp. 48-49)

With AHSA Bagwell's January 11, 2107 "proposal to remove" letter in hand, HSA Yarbrough testified as follows while under cross-examination:

1. Charge 1: *Sexual Conversations with Inmates.* HSA Yarbrough testified she had no personal knowledge of the Grievant's alleged sexual conversations with inmates. (Tx. p. 50; Ax. 1, p. 14)

2. Charge 2: *Demonstrating Favor to Inmates, Specification A.* HSA Yarbrough stated she had personal knowledge of the Grievant's proclivity to allow unauthorized inmates to be in Central Supply. Said matter was addressed at departmental meetings; and, she stated, she had a sign placed outside of Central Supply that stated, "No Unauthorized Inmates." (Tx. p. 51; Ax. 1, p. 14) However, she also testified to having no personal knowledge regarding allegations that: (1) on February 3, 2016, inmate Green was impermissibly in Central Supply with the Grievant for nearly an hour, having a conversation about his family; (2) on October 14, 2015, inmate Ward and RSC were "laughing and talking" in the sterilization room. (Tx. pp. 51-52; Ax. 1, p. 14) HSA Yarbrough had not seen the video-taped evidence of either allegation.

Charge 2: *Demonstrating Favor to Inmates, Specification B.* This charge describes events bearing on the allegation that the Grievant interfered with inmate supervision by MSTs Vest and MST Hannaford. HSA Yarbrough testified to having no personal knowledge of same. (Tx. pp. 52-53; Ax 1, pp. 14-15)

3. Charge 3: *Inattention to Duty, Specification A.* This charge addresses the Grievant's excessive use of the telephone during normal duty hours, conversing with family members and her fiancé/husband. On cross, while acknowledged that the Agency does not prohibit personal calls during duty hours, HSA Yarbrough testified that on several occasions she has witnessed the Grievant on the telephone talking with family members. (Tx. pp. 53-54; Ax 1, p. 15)

Charge 3: *Inattention to Duty, Specification B.* This charge alleges the Grievant made and printed personal items using government equipment and colored and worked puzzles during duty hours. Too, this charge specifically referenced HSA Yarbrough's February 9, 2016 "reassignment of duties" interaction with the Grievant who, at that time, had an "... opened Word Search puzzle book in front of her with a pen in her hand," and it references her February 10, 2016 return visit the Grievant's work area, finding puzzle books and crayons in her desk drawers. (Ax. 1, pp. 15-16)

These adverse findings would seemingly compound RSC's standing within the Agency since they came on the heels of HSA Yarbrough's January 29, 2016 memorandum to Warden Sanders, criticizing the Grievant's performance. (Ax. 1, pp. 106-107) Yet, with reference to the Grievant's performance review for the rating period April 1, 2015 to March 31, 2016, HSA Yarbrough acknowledged, she gave RSC a "satisfactory" rating, and she had not recorded any negative comments. (Tx. pp. 54-56; Ux. 2)

Finally, on redirect examination, HSA Yarbrough made clear that each Agency employee is given a copy of the booklet *Standards of Employee Conduct* when first hired and, thereafter, its content is reviewed annually: Testimony about which the Grievant concurred. (Tx. pp. 69-70; Tx. pp. 166-167; Ax. 2)

On March 30, 2016 and April 27, 2016, MST Vest and MST Hannaford, respectively, gave multipage statements to SIA Anderson that variously repeated the allegations leveled against the Grievant as discussed *supra*. Both swore under oath that their respective statement was true and accurate. (Ax. 1, pp. 45-48; Ax. 1, pp. 21-24) On March 31, 2017, Warden Sanders terminated the Grievant's employment because she: (1) engaged in sexual conversations with inmates; (2) demonstrated favoritism in her treatment of inmates; and (3) was inattentive to her duties as a MST. (Ax. 1, p. 4) The Warden considered each of the Douglas Factors' twelve (12) decisional criteria in reaching her decision. (Ax. 1, pp. 4-6) Said factors included the Grievant's disciplinary record, which included three (3) one (1) day suspensions and a letter of reprimand. (Ax. 1, p. 4) However, Warden Sanders testified, even if the Grievant had a clean record of discipline, she would have terminated her employment: As a law enforcement officer the security of the institution and safety of inmates and Agency staff should have been upper-most in the Grievant's mind, and it was not. (Tx. p. 120) Too, the Warden added, the Grievant's reinstatement would disrupt the institution. The Grievant's inability to maintain a professional distance *vis a vis* inmates is a danger to all. (Tx. p. 121)

When Warden Sanders was being cross-examined, the Union observed that subsequent to the Grievant's removal from Central Supply, the Agency later returned her to that post. In so many words, the Union asked, rhetorically, "Did the Agency believe that the Grievant's threat

to institutional security had somehow subsided?" Further, the Union pointed out that fourteen (14) months had lapsed between October 15, 2015, the date Warden Sanders forwarded the Vest/Hannaford allegations to OIA for investigation, and January 11, 2017, the date of AHSA Bagwell's notice of proposed removal. Again, in so many words, the Union asked, rhetorically, "Was the Grievant's discharge timely?" Warden Sanders' reply was "Yes." When deciding on the appropriate level of Grievant-discipline, the Warden stated that she gave zero weight to the timeliness issue; she neither reviewed the Grievant's phone records nor viewed relevant videos; and she could not recall whether she had read OIA's investigative report before deciding to terminate the Grievant's employment. (Tx. pp. 122-125)

Next, regarding the Grievant's past discipline record, the Union observed that AHSA Bagwell's January 11, 2017 "proposal to remove" the Grievant considered only her October 19, 2015 suspension. (Ax. 1, p. 17) Yet, it continued, the Douglas Factor analysis appended to Warden Sanders' March 31, 2017 removal letter refers to all four (4) of the Grievant's past disciplinary events. (Ax. 1, p. 4) In response, Warden Sanders testified that while the Grievant's overall record of past disciplines are listed in the Douglas Factor appendage, only the October 19th suspension was considered simply because it was the only discipline that fell within the Table of Penalties "reckoning period." (Tx. pp. 125-128)

The Grievant testified at length about the three (3) charges brought against her, maintaining the following:

> 1. Charge 1: *Sexual Conversations with Inmates.* Bruce Jenner and his male-to-female transformation was a subject of discussion: A "current event" about which MSTs Vest, Hannaford and she had chatted. No doubt, the Grievant went on to say, inmates overheard their conversation. (Tx. pp. 138-139) About strippers, RSC stated that the subject would come up because a strip club was located across the street from the institution. The strip club would sponsor summertime car washes and, scantly clothed,

the club's strippers would be outside washing cars. Inmates could see them and, on occasion, some would ask RSC questions, which she would answer. However, said Q and A never involved anything personal. (Tx. pp. 139-140)

2. Charge 2: *Demonstrating Favor to Inmates, Specification A.* On October 14, 2015, the Grievant and inmate Ward were "laughing and talking" in the sterilization room, as MST Vest had claimed. (Ax. 1, p. 91; Ax. 1, p. 97) RSC testified they were laughing because she had forgotten to pick up Purell and alcohol the day before as inmate Ward's supervisor had requested. (Tx. pp. 144-148) MST Vest filed an Incident Report (i.e., "shot"), maintaining that inmate Ward should not have been in Central Supply. (Ax. 1, p. 91; Ax. 1, p. 97) Said shot was subsequently expunged because inmate Ward was in the area at the request of his supervisor to pick up certain supplies. (Tx. pp. 146-150; Ax. 1, pp. 93-95) RSC also testified that inmate Ward told her that MST Vest had filed a shot. Subsequently, she stated, she and MST Vest had a conversation, during which she told him that inmate Ward was "... not out of bounds." However, RSC opined, MST Vest wrongly believed that it was she who had the shot expunged, which was not the case. Thereafter, their relationship went south: A fact the Grievant variously reported to AHSA Mead, AHSA Bagwell and HSA Yarbrough. (Tx. 150-152)

On February 3, 2016, for an hour or so, as alleged, inmate Green was in Central Supply. Usually on Wednesdays, RSC explained, inmate Green would stop by Central Supply and ask whether I needed help pulling a "jack" – sometimes was loaded with 400-to-500 pounds of supplies – from 5 Building to Central Supply. On that day, the Grievant told inmate Green that she did not need help. However, at about that time, the institution went on "closed quarters," meaning that unlocked inmates were not to be walking around institution's halls. Thus, inmate Green stayed in Central Supply until the call for closed quarters was lifted. The two (2) visited, he talked about his family and ailing grandmother. RSC opined that said conversation was not improper. Rather, her aim was to establish "rapport" with the inmate, as instructed at Annual Refresher Training. Moreover, HSA Yarbrough gave permission to use inmates for this purpose.[10] (Tx. pp. 141-144)

3. Charge 2: *Demonstrating Favor to Inmates, Specification B.* MSTs Vest and Hannaford believed that the Grievant's interaction with inmates, particularly Green and Trice, had poisoned their relationships with them.[11] The Grievant stated, she relates to inmates as

[10] HSA Yarbrough testified that a "jack" is a Class A tool to be used only by staff members. She stated that she would not have okayed an inmate's use of a jack to assist the Grievant and, particularly inmate Green who no longer worked in Central Supply. (Tx. pp. 179-180)

[11] On cross-examination, RSC testified:

> No. I didn't intervene. The only thing that I did I was trying to be on the same page as Vest so that I can let the inmate know what was actually going on so that we would be level and so that both of us would know we were on the same page so I wouldn't be saying one thing and Mr. Vest would be saying another." (Tx. pp. 169-170)

"human beings," not as "inmates." Unlike MST Vest, she does not tell them "what," "how" and "when;" she was not a "military guy," "gruff," as was MST Vest. She is more "up front;" she merely tells the inmate this or that and it gets done. MST Vest's style invited questions that inmates would bring to her. MST Hannaford, the Grievant observed, is "very quiet." Race could be part of the problem. Perhaps the two (2) inmates go to her because, like them, she is black. Or, she opined, they may go to her out of respect, or because she was Central Supply's senior MST. (Tx. pp. 154-157)

The Grievant denied telling MST Vest that the inmates were "her inmates." Rather, she testified, she told him they were the "department's inmates." (Tx. p. 157) She also denies she "confronted" MST Vest after he told inmates Green and Trice that he would file an incident report if either was caught "passing out" supplies to other inmates. Rather, she concurred, telling him that if caught, he should file an incident report. However, she did expect him to let her know about problem areas to insure that each would mete out the same level of discipline whenever inmate incidences arise. (Tx. pp. 158-159)

4. Charge 3: *Inattention to Duty, Specification A.* RSC acknowledged that some of her personal phone calls occurred while on duty time; however, unless unaware of the time, most of her calls take place during breaks. She also testified, the calls she placed during duty time did not interfere with her responsibilities. On point, the Grievant noted that her supervisors never told her to stop making personal calls, coloring or doing crossword puzzles while on duty, and the subject was never raised during her performance reviews. (Tx. pp. 161-162; Ux. 1; Ux. 2)

Finally, RSC observed that around February 1, 2017, she was returned to Central Supply where she worked until removed on March 31, 2017. (Tx. pp. 164-165)

VI. POSITIONS OF THE PARTIES

A. Agency's Arguments: RSC maintained that she interacted and communicated with inmates to establish a work-related "rapport" with them: A claim the Agency derided. (Tx. p. 137) On February 9, 2016, the Grievant allowed a Central Supply inmate to deliver unsecured scalpels – a security breach (Tx. p. 42); later that same day, the Grievant is seen working a puzzle at her desk (Tx. pp. 43-44); and throughout her years in Central Supply, the Grievant's co-workers, namely, MSTs Harrison, Ray, Vest and Hannaford, all complained about her propensity to shirk job responsibilities. (Tx. pp. 27-31; Tx. pp. 74-75; Tx. pp. 178-179) HSA

Yarbrough was an in-person witness to these facts. Further, the Agency argued, the items seized from the Grievant's desk in Central Supply corroborate co-worker claims that she often colored pictures and played crossword puzzles at her desk rather than attending to duty. (Ax. 1, pp. 77-89) Still further, the Agency observed that the Grievant did not challenge the above-asserted facts with witnesses of her own.

Finally, based on the facts presented *supra,* the Agency maintained that RSC violated the following Standards of Employee Conduct: (1) Section 5.b, "Employees may not allow themselves to show partiality toward ... inmates;" and (2) Section 6, "Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Employees are required to remain fully alert and attentive during duty hours." (Ax. 2, p. 6; Ax. 2, p. 8) Relevant to these violations, the Agency pointed out that the Standard Schedule of Disciplinary Offenses and Penalties states as follows: (1) Offense 7, Inattention to Duty, calls for an official reprimand to removal for a first offense, and a 14-day suspension to removal for a second offense (Ax., 2, p. 23); and (2) Offense 30, Preferential Treatment of Inmates, provides for a 5-day suspension to removal for a first offense, and a 14-day suspension to removal for a second offense (Ax., 2, p. 28).

Citing *DOC v. Derry,* 510 S.E. 2d 832, 833-837, 235 Ga. App. 622, 623-629 (Ct. App. Ga., 1999), the Agency urged, the Grievant was removed for just and sufficient cause, and the appropriate penalty for her proven offenses is the Agency's decision to terminate her employment. As Warden Sanders stated, the Grievant was removed because of her inattention to duty and preferential treatment of inmates, which compromised the safety of correctional staff, inmates, and security of the institution itself. (Tx. pp. 119-121)

B. Union's Arguments: The Union's argument began with the following three-part preface: first, the Agency has the burden of proving, by a preponderance of the evidence, the charges it brought against the Grievant; second, if wrongdoing is proven, the Agency must prove that the penalty it meted out was reasonable; and third, citing *Doe v. Hampton*, 56 F.2d. 265 (D.C. Cir. 1977), the Agency must also prove that a genuine nexus exists between the discipline imposed and the efficiency of the institution.

Before arguing proof, the Union maintained that Warden Sanders, the Agency's deciding officer, relied on a certain aggravating factor that violated the Grievant's due process rights, rendering her removal procedurally defective. The aggravating factor at issue is the Grievant's disciplinary record. *Lopes vs. Department of the Navy*, 116 M.S.P.R. 470 (MSPB, 2011) provides that all federal employees are entitled to a "constitutionally correct removal procedure."

Of relevance is that when determining whether the Grievant ought to be removed, Warden Sanders relied on the Grievant's *entire* disciplinary record, which consisted of a one (1) day suspension on October 19, 2015, January 5, 2016 and January 9, 2017 as well as a June 2, 2015 Letter of Reprimand. (Ax. 1, p. 4) In the Agency's Douglas Factor analysis, Douglas Factor #3, Past Disciplinary Record, lists each of these disciplinary events, the implication being that the Warden Sanders had considered the Grievant's *entire* disciplinary record (i.e., Douglas Factor #3) along with the remaining eleven (11) Douglas Factors, before reaching her March 31, 2017 determination that the Grievant be removed. (Ax. 1, p. 1) However, prior to being removed, the Grievant believed that the *only* aggravating or disciplinary factor the Agency considered was her October 19, 2015 one (1) day suspension. This suspension was the only disciplinary item AHSA Bagwell considered, as stated in her January 11, 2017 letter to RSC,

proposing her removal. (Ax. 1, p. 17) The Agency failed to notify RSC in advance that her *entire* disciplinary record was factored into the decision to terminate her employment. Said failure denied the Grievant of her fundamental right to due process and, thus, as a matter of law, the Grievant ought to be reinstated.

Concerning the above analysis, the Union argued that Warden Sanders incorrectly maintained that the only October 19, 2015 suspension was germane, because it alone fell within the controlling two (2) year reckoning period. That's inaccurate, the Union urged. The January 5, 2016 and January 9, 2017 suspensions also had two (2) year reckoning periods, according to the Bureau of Prisons' Standard Schedule of Disciplinary Offenses and Penalties. (Ax. 2, pp. 21-34)

Returning to the matter of proof, the Union maintained that the Agency failed to prove that it had "just and sufficient cause" for removing the Grievant, *per* Article 30, Section a. of the CBA, quote *supra*. This conclusion follows for the discussion, *infra*.

Charge 1: *Sexual Conversation with Inmates*. This charge centered on 2015 newscasts about Bruce Jenner's transsexualism. Notwithstanding that fact, the Agency failed to produce a single witness with personal knowledge of sexual conversations between RSC and inmates and, further, the Agency failed to cite the specific policy that the alleged interactions violated. MSTs Vest and Hannaford are the sources of the Charge 1 allegation. Critically, however, for whatever reason the Agency did not call either MST to testify, relying instead on their sworn affidavits. The Union urged the undersigned to dismiss Charge 1 because it pertains to a fighting issue,[12]

[12] The Grievant disputes the alleged charge. She testified that she discussed the news about Bruce Jenner with MSTs Vest and Hannaford, not with inmates. Although, she allowed, the latter may have overheard the formers' conversations. (Tx. pp. 138-139)

because the MSTs' sworn affidavits are sketchy and, most importantly, because their affidavits cannot be cross-examined. The Union cited precedents but, most pointedly, *AFGE Local 221 and Department of Veterans Affairs, VA Boston Healthcare System,* FMCS Case No. 12-01957-1 (Arb. Williams, July 1, 2103). The Grievant admitted she discussed the Bruce Jenner matter but her discussions were with MSTs Vest and Hannaford, not with inmates.

Charge 1 also references discussions about strippers. RSC described the physical context for these discussions and she testified that inmates would bring questions to her about the public display being made by the nearby strip club's scantily clothed female employees. She would answer their questions. Nevertheless, there was nothing personal or sexually inappropriate about the Qs and As. (Tx. pp. 139-140)

Ultimately, the Union argued, the Agency failed to prove the Grievant had inappropriate sexual conversation with inmates. Also, the Agency references vague "policy" language that arguably covers the instant allegation, namely: "Employees must conduct themselves in a manner that fosters respect for the Bureau of Prisons, the Department of Justice and the US Government;" and "Employees are expected to conduct themselves in a manner that contributes to the orderly running of Bureau facilities."[13] Charge 1 must fail due to lack of evidence.

Charge 2: *Demonstrating Favor to Inmates, Specification A.* This issue deals with whether the Grievant showed favoritism toward inmates Ward and Green. She maintained that she had a professional relationship with these inmates based on her desire to establish a rapport with those with whom she worked. (Tx. p. 137) Inmate Aiello was one who advanced

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[13] See: Standards of Employee Conduct. (Ax. 2, p. 5; Ax. 2, p. 6)

this charge, and it was he who primarily introduced the specter of racism. Inmates lie, inmates have agendas; thus, the Union urged, the Arbitrator should be wary eyed about inmate Aiello's statements that appear in affidavit form and, once again, that are not subject to cross-examination.

There is a distinction between "appropriate rapport" and "misconduct." The Grievant claimed her conduct was appropriate, while inmate Aiello and MSTs Vest and Hannaford claim it was manifest misconduct. As factfinder, the Union cautioned the undersigned should not hastily sustain Charge 2. Specification A, because evidence proffered in its support is rank hearsay. Further, SIA Anderson testified that on February 3, 2016, Green and the Grievant were together in Central Supply for nearly one (1) hour. He witnessed the foregoing from a video tape taken by a Central Supply camera. (Ax. 1, p. 62) More hearsay, inasmuch as the Agency did not put the video in evidence; and neither the Union nor the Arbitrator was given the opportunity to review it. Michelle Davidson, Assistant Director of Nursing, allegedly entered Central Supply on February 3, 2016 at a time during which inmate Green and the Grievant were both there. She stated as much in her sworn affidavit. (Ax. 1, p. 19) However, once again, this prospective eye-witness did not testify at the hearing and her affidavit cannot be cross-examined. Still further, the Union pointed out, RSC testified that it was not uncommon for inmate Green to come to Central Supply to help her move heavy items. (Tx. p. 37; Tx. p. 149)

Charge 2, Specification A, also alleged that on the morning of October 14, 2015, MST Vest entered Central Supply, finding inmate Ward and RSC in the sterilization room "laughing and talking." (Ax. 1, p. 14) RSC explained why the two (2) of them were laughing and she

averred that inmate Ward was authorized to be in Central Supply on that occasion. In all, the Union concluded that Charge 2, Specification must fail for lack of evidence.

Charge 2: *Demonstrating Favor to Inmates, Specification B.* The Union maintained that this charge stemmed from MST Vest's resentment of the Grievant's good relationship with inmates. At the hearing, the Grievant addressed their different interpersonal relationship styles. She is more obliging and he is more "military" and "gruff." (Tx. pp. 155-156) MST Vest's and MST Hannaford's affidavits speak about inmates complaining to the Grievant about assignments/critiques the latter would issue, and the Grievant's subsequent intervention. (Ax. 1, p. 14) MST Vest accused RSC of referring to the inmates as "her inmates." She denied using this verbiage. (Tx. pp. 157-158) The Union argued, communications between RSC and her peers had totally broken down.

RSC speculated that the inmates were attracted to her because she hired them, because she was the senior person in Central Supply and, possibly, because she is black, as were most of the department's inmates, they trusted her. This, the Union argued, is reality and has nothing to do with inappropriate behavior by the Grievant. Again, the Agency's offer of proof of Charge 2, Specification B, is found in affidavits that cannot be cross-examined. This charge should be dismissed.

Charge 3: *Inattention to Duty, Specification A.* The allegation that the Grievant's spent an inordinate amount of time on the telephone and that she asked colleagues not to answer her phone are not policy violations, the Union argued. First, there is no evidence that the Grievant made continuous use of the phone between September 2015 and February 2016, as her accusers asserted. The Agency only proved that RSC made personal calls on October 8,

2015, October 9, 2015, February 2, 2016 and February 5, 2016. (Ax. 1, pp. 60-61) Hardly a systemic problem! Moreover, the Union argued, there is no evidence that the Grievant's *de minimus* use of the phone adversely affected her performance of official duties.

Second, the Grievant did not instruct her co-workers not to answer her phone. Rather, she testified, she reminded them that her voicemail automatically picks up any message callers may wish to leave. (Tx. p. 176) Again, the Union pointed out, since the referenced co-workers (i.e., MST Vest and MST Hannaford) were not called as Agency witnesses they did not contradict this testimony. Charge 3, Specification A, should be dismissed.

Charge 3: *Inattention to Duty, Specification B.* The Union acknowledged that the Grievant testified to having printed personal materials on her computer, but only during break times. Further, as required by Standards of Employee Conduct, she testified to using her own paper. (Ax. 2, p. 11) Too, the Grievant admitted to sometimes coloring pictures and working crossword puzzles: Activities that served as "stress reliever[s]." (Tx. p. 161) These activities, the Union averred neither hindered RSC's job performance nor harmed the government. As proof, the Union pointed to the Grievant's performance review ratings for the periods 4/1/14 – 5/31/15 and 4/1/15 – 3/31/16: Both rated the Grievant's work as being "satisfactory." (Ux. 1; Ux. 2) Charge 3, Specification B should be dismissed.

Next, the Union maintained that the Agency's removal of the Grievant was not progressive as required by the CBA, Article 30, Section c, quoted *supra*. This case involved practically no aggravating factors, and the Agency's foremost allegation is Charge 2: *Demonstrated Favor to Inmates.* Yet, the Union argued, the record evidence suggests that RSC was never told (i.e., notified) that her conduct *vis a vis* inmates was inappropriate. Absent

notice, to have terminated the Grievant for favoring inmates is hardly progressive. Rather, that level of discipline, for a first-time offense, denies an employee the opportunity to modify the inappropriate conduct in question, contradicting Article 30, Section c's guidance. Accordingly, the Union urged, the Grievant's removal was made in violation of Article 30, Section c of the CBA.

Further, in the present case, the Agency's disciplinary action also violated Article 30, Section d of the CBA, which is quoted *supra*. On or about November 5, 2015, the Agency authorized a local investigation of the charges alleged. According to this authorization notice, the OIA was given 120 days to conclude its investigation. (Ax. p. 129) SIA Anderson completed OIA's investigation on July 21, 2016. (Ax. p. 134) That is, the Union pointed out, the investigation of the charges alleged was concluded 271 days after being commissioned; and the Grievant was removal 533 days after the Agency authorized OIA's investigation.[14] These lag times are not even arguably consistent with Article 30, Section d's provision that "... the parties endorse the concept of timely disposition of investigation and disciplinary actions." (See Ux. 4) Further, the Union argued, the record does not explain said untimeliness. The Agency should not be rewarded for turning a blind eye on the CBA's mandates.

Still further, the Union presented its own analysis of the Douglas Factors, finding that the Agency failed to prove by a preponderance of evidence that the Grievant was guilty of any misconduct and should not have been disciplined. However, if the undersigned disagrees, the Union pressed, than its analysis of the twelve (12) Douglas Factors shows that a Letter of Counseling would be most appropriate along with an order that the Agency offer to train the

[14] These lag time counts are more accurate than comparable counts that are discussed in the record.

Grievant on how to properly interact with inmates. A bullet-point summary of the Union's analysis for each of the Douglas Factors is presented below:[15]

1. *Nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated:*

- The Agency failed to provide any substantive evidence that the Grievant inappropriately engaged in sexual conversations with inmates.
- The Grievant's version of events deserves heavy weight since the Agency failed to provide eyewitness testimony.
- The Grievant admitted to having discussed Bruce Jenner's gender reassignment with co-workers not inmates, and their discussions arose in the context of a current event.
- Stripper discussions were not evoked, they were initiated by inmates; and said discussions arose within a context of geographic proximity.
- Like she, the inmates in question were black. Naturally, they would converse with her. There is scant evidence that any of the referenced discussions rose to the level of misconduct.
- Yes, the Grievant made personal phone calls, which did not violate conduct standards and she colored pictures and worked crossword puzzles to relieve stress: *De minimus* offenses.
- The Grievant's written and oral responses to the proposal that she be removed demonstrate her sense of ownership and remorse.
- Proof: This factor is slightly aggravating.

2. *Employee's job level:*

- The Grievant's job level was GL-6. A relatively low job level in the federal sector and anything but prominent.
- The Grievant's job level should carry little or no weight as an aggravating factor.
- Proof: This factor is slightly aggravating.

3. *Past discipline record*:

- As discussed *supra*, the Grievant's record of discipline consisted of four (4) items, clearly an aggravating factor.
- Warden Sanders overstated the weight she assigned to this factor. First, the AHSA Bagwell's proposed "notice to remove" analysis considered

[15] See: *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.P.R. 280, 306 (1981).

only one (1) disciplinary item. Pursuant to *Lopes* the other three (3) disciplinary items ought not to have been considered. Second, the Grievant's past disciplines are of a different genre than are the offenses the led to her removal.

- In a sense, the offenses now alleged are a "first," and the Agency's disciplinary response should have been "progressive."
- Proof: This factor should carry some mitigating weight.

4. *Past work record and length of service*:

- The Grievant had fifteen (15) years of service and her 2013 to 2016 performance ratings were either "Exceeds" or "Satisfactory."
- If the Grievant's interactions with inmates were inappropriate, they should have been referenced in her performance reviews: None were.
- Did Agency lull the Grievant into a false sense of security? Supervision had heard complaints about the Grievant from inmates and staff – even during time MST Ray and MST Harrison worked in Central Supply – but no effort was ever made to employ corrective measures designed to remedy the complaints.
- Proof: On balance, this factor is mitigating.

5. *Effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect on the supervisor's confidence in the employee's ability to perform assigned duties:*

- HSA Yarbrough reassigned the Grievant on February 9, 2016, and approximately one (1) year later she was moved back to Central Supply. During that period, the Grievant proved to be a satisfactory worker.
- For that period, there are no documented problems.
- The time lag between the Grievant's alleged offenses and her removal had a positive, behavioral modification effect on her. Any supervisor would be confident in her willingness to do her job.
- Proof: This factor is mitigating.

6. *Consistency of the penalty with those imposed upon other employees for similar offense:*

- Neither Michelle Davidson, Assistant Director of Nursing, nor Emily Kyle, Financial Program Specialist, was disciplined for failing to timely report a unique violation allegedly committed by the Grievant. (See: Ax. 1, p. 19; Ax. 1, p. 28)
- The Grievant was treated in a disparate manner.
- Proof: This factor is mitigating.

7. *Consistency of penalty with the Agency's Table of Disciplinary Offenses and Penalties:*

- This factor is of no import since the penalty associated with almost all offenses is not a "point" but a "range" that extends from reprimand to removal.
- The Agency did not offer testimony about the appropriateness of the Grievant's penalty and it carried the burden of doing so.
- Proof: The probative value of this factor is neutral.

8. *The notoriety of the offense or its impact upon the reputation of the Agency*:

- The Warden Sanders believes this factor is aggravating because the Grievant's offenses are known to others in the institution. However, there is no evidence that the matter has received any outside publicity. (Ax. 1, p. 5)
- Proof: This factor is mitigating.

9. *The clarity with which the employee was on notice of any rules that was violated in committing the offense, or had been warned about the conduct in question*:

- The Warden believed this factor is aggravating because the Grievant signed for a copy of the Standards of Employee Conduct booklet and she received Standards training. (Ax. 1, p. 5)
- The Standards do not explicitly prohibit interaction with inmates; Grievant was not on notice that her inmate-related conduct was an issue; and Grievant's performance reviews are silent on the matter.
- Proof: This is a heavily mitigating factor.

10. *Potential for employee's rehabilitation:*

- There is no evidence of Grievant misconduct during her last year of employment.
- There is zero reference to misconduct-related counseling in the Grievant's performance appraisal forms.
- The Agency failed to proffer progressive discipline.
- Proof: The Grievant can be rehabilitated.

11. *Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of others involved in the matter:*

- Warden Sanders considered the Grievant the cause of unusual tension in Central Supply. Inmate Aiello transferred out of Central Supply and MST Vest resigned because of said tension.

- There is evidence that MST Vest and inmate Aiello were hardly innocent bystanders: MST Vest's "shot" was expunged and he wrongly blamed RSC for same, and inmate Aiello was a source of racial slurs.
- The Grievant acknowledged that she had a hand in causing some tension.
- Proof: There is blame aplenty for all concerned.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee and others:

- The Agency failed to inform the Grievant that her interactions were inappropriate and it offered zero progressive discipline. Hence, if found guilty, some sanction short of removal would be appropriate.
- In deciding to remove the Grievant the Warden Sanders overemphasized the case's aggravating factors and underemphasized its mitigating factors
- Proof: A balanced analysis of the record evidence begs for a reduction in the discipline imposed: From the Grievant's removal to a Letter of Counseling.

Finally, the Union argued, the Grievant was not removed for just and sufficient cause. As remedy, it requests the Grievant's reinstatement, that she be "made whole" with interest, including compensation for any lost overtime opportunities she may have suffered, and that the instant discipline be expunged from her official personnel file. Further, the Union requests the Arbitrator retain jurisdiction for both Award-enforcement purposes and, prospectively, to decide whether the Union is entitled to reasonable attorney's fees and expenses.

VII. DISCUSSION AND OPINION

The Grievant, RSC, was hired by the Medical Center for Prisoners, Springfield, Missouri on January 27, 2002. She was removed on March 31, 2017, approximately fifteen (15) years later. Three (3) distinct charges of misconduct, each investigated and each sustained by SIA Anderson, explain why Warden Sanders terminated her employment. Discussed below is whether the Grievant's removal, pursuant to Article 31, Section h.1 of the CBA, was for "good and sufficient cause" and, if not, what is an appropriate remedy.

For several years, as far back as 2005/2006, HSA Yarbrough testified that she has received complaints about the Grievant's inattention to duty during the work day. However, it was not until the latter part of 2015 that Medical Center's managers began to take this matter seriously. On October 8, 2015, HSA Yarbrough testified to having heard from several health services department heads that Central Supply's stock of dialysis-related needles and syringes was depleted, forcing them to place expensive "emergency orders." RSC was responsible for this mishap: A serious mishap inasmuch as dialysis is likely a prescribed medical procedure for many of the Medical Center's ill prisoners.

Later that same day, HSA Yarbrough spoke with MST Vest. For a plethora of reasons, he was fed up with RSC and her workplace conduct. On October 9, 2015, HSA Yarbrough met with MST Hannaford who repeated many of MST Vest's complaints. RSC was lazy, left orders for peers to fill, talked continuously on the phone about personal matters, misused the institution's printer and computer, sat at her desk coloring pictures with crayons, working on puzzles, undercut peer's ability to supervise inmates, permitted inappropriate inmate activity, involving inmates Trice and Green, and inappropriately conversed with inmates about sexual matters. (Ax. 1, pp. 13-14; Ax. 1, pp. 15-16) These allegations were memorialized in memoranda that MSTs Vest and Hannaford sent to Warden Sanders on October 13, 2015. MST Vest sent Warden Sanders a second memorandum on October 14, 2015, reporting that earlier that day he witnessed RSC "laughing and talking" with inmate Ward in the sterilization room. (Tx. p. 33; Ax: 1, pp. 117-118; Ax. 1, p. 119)

On October 13, 2015, HSA Yarbrough removed inmates Trice and Green from Central Supply. (Tx. p. 46; Tx. pp. 186-187)

On October 15, 2015, Warden Sanders referred the allegations made about RSC to the OIA for investigation. (Ax. 1, pp. 131-133) On November 5, 2015, OIA issued an *Authorization to Conduct a Local Investigation into Alleged Staff Misconduct*, assigned the matter to a special agent and directed that "Within 120 days from the date of this correspondence, please forward your completed investigation ... to the Office of Internal Affairs ... for review." (Ax. 1, p. 129) SIA Anderson was the special agent assigned to this case. On July 21, 2016, 271 days later, SIA Anderson issued his report, concluding that there was sufficient evidence to support the allegations discussed *supra*. (Ax. 1, p. 151) On March 31, 2017, 533 days later, Warden Sanders removed the Grievant. (Ax. 1, p. 1) SIA Anderson neither explained why his investigation took so long to complete nor did he identify who authorized its extension.

Apropos the above discussion about time lags, Arbitral notice is made of Article 30, *Disciplinary and Adverse Actions*, Section d. of the CBA, which states:

> 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.

(Jx. 1) There is nothing in the record that explains why both the disposition of the OIA's investigation and the disposition of Warden Sanders' disciplinary action took so incredibly long. Thus, based on available evidence, the Arbitrator concludes that both the investigative and determinative aspects of the case were "untimely." In effect, the institution's managerial authority turned its collective back on above-quoted contract language. This conclusion is not dispositive of the instant Statement of the Issue, but it does serve as a mitigating factor in determining what the Grievant's penalty should be for proven misconduct.

On February 9, 2016, RSC was reassigned, exiting Central Supply. (Ax. 1, p. 52) On or about February 1, 2017, she was returned to Central Supply. (Tx. p. 165) On March 31, 2017, she was removed by Warden Sanders. (Ax. 1, p. 1) For approximately fourteen (14) months from the time she was removed from Central Supply until she was discharged, she worked elsewhere in the facility and, absent evidence to the contrary, she did so without incident. Based on this "field experiment," it is reasonable to conclude that she may be rehabilitated, that she can perform satisfactorily, and that a sanction of less than removal would adequately and effectively deter any future misconduct.

Charge 3: *Inattention to Duty: Specifications A.* SIA Anderson conducted a limited review of the Grievant's record of personal phone calls. He found that during work hours, RSC placed several personal phone calls on October 8 and 9, 2015 and on February 8 and 9, 2016. (Ax. 1, pp. 60-61) This record of phone calls, albeit limited, adds credibility to HSA Yarbrough's testimony that on several occasions she witnessed the Grievant on the phone, talking with family members. (Tx. pp. 53-54) Further, on July 13, 2016, in her sworn affidavit, the Grievant even acknowledged that she "... calls her mother and husband every day. Sometimes I will call them several times a day." (Ax. 1, p. 36) Further, at the February 15, 2018 Arbitration Hearing, the Grievant admitted to using the phone to make personal calls, but most calls, she maintained, were made during breaks, and they did not interfere with the performance of her duties. (Tx. pp. 161-162)

SIA Anderson's finding of excessive phone use on the dates he researched, HSA Yarbrough's eye witnessed testimony, and the Grievant's faintly self-critical account of her phone use are credible accounts that corroborate the phone misuse charges found in MSTs

Vest's and Hannaford's sworn affidavits. (Ax. 1, p. 22; Ax. 1, p. 45) For these reasons, the Arbitrator concludes that RSC's telephone use was excessive and that most certainly interfered with her OTJ performance. It's axiomatic: To be on a personal telephone call is not to be performing one's job duties. The Grievant is guilty as charged under Charge 3: Inattention to Duty: Specification A. Moreover, her misconduct was violative of Section 6, Responsiveness, Standards of Employee Conduct.

Charge 3: *Inattention to Duty: Specifications B.* As discussed *supra*, HSA Yarbrough removed the Grievant from Central Supply on February 9, 2016. (Ax. 1, p. 52) On that day, she heard about inmate Aiello's accusations and she learned that the Grievant had directed an inmate to deliver a paper bag containing four (4) scalpels to a clinic. As a result, with Warden Sanders' blessings, HSA Yarbrough prepared a memo reassigning the Grievant. In route to Central Supply to present said memo, HSA Yarbrough credibly testified that when she entered the room the Grievant was at her desk, working on a crossword puzzle. (Tx. p. 44) HSA Yarbrough gave the Grievant the memo and, while doing so, told RSC that she should not have allowed an inmate to deliver unsecured scalpels because they can be used as a weapon. The next day, February 10, 2016, HSA Yarbrough returned to the Grievant's desk where she found a cache of coloring pictures, crayons, crossword puzzles – which she photographed – in the desk's drawers. (Ax. 1, pp. 77-89) Neither this eye witnessed testimony nor the supporting photos were rebutted and, further, they corroborate the memoranda and sworn affidavits that MSTs Vest and Hannaford had prepared. Notwithstanding the Grievant's stress-relief rationale for coloring and working on crossword puzzles, the undersigned concludes that she is guilty as

charged in Charge 3: *Inattention to Duty: Specification B*, and that her proven misconduct violated the Standards of Employee Conduct, Section 6. (Ax. 2, p. 8)

Finally, as to Charge 3: *Inattention to Duty, Specification A and B*, it is noteworthy that the Grievant received a copy of the Agency's controlling rules – Standards of Employee Conduct – and she had received training about same annually for more than a decade. (Tx. pp. 69-70; Ax. 2, p. 8) The Union argued that the rules in question are vague: They are! The undersigned agrees. However, in this day and age, an employee would have to be from the planet Mars not to know that at work, one does not spend time on the telephone, color pictures, working on crossword puzzles and so forth. Also, but this time, as the Union persuasively argued, while Agency management has known for years that the Grievant tends to shirk her OTJ duties and responsibility, it has never counseled her or given her a reprimand for said misconduct. (Tx., pp. 178-179) Unfortunately, the Union argued, the first wake-up call the Agency gave to the Grievant was to terminate her employment. Article 30, Section c. of the CBA, quoted *supra*, states that parties endorse "progressive" discipline. The undersigned, like most labor arbitrators, concurs with this philosophy: Many, if not most, employee missteps can be corrected through behavioral modification prompted by counseling, a letter of reprimand or a suspension of the appropriate length.

Charge 2, *Demonstrating Favor to Inmates, Specification A*. HSA Yarbrough testified that she had some personal knowledge that the Grievant would allow unauthorized inmates be in Central Supply. In fact, HSA Yarbrough said, she once posted a sign outside of Central Supply that read, "No Unauthorized Inmates." (Tx. p. 51) In contrast, she also testified to not having first-hand knowledge regarding the accusations that (1) on October 14, 2015, inmate Ward was

impermissibly in Central Supply's sterilization room with the Grievant "laughing and talking," as MST Vest claimed; (Ax. 1, p. 91; Ax. 1, p. 97) and (2) on February 3, 2016, inmate Green was impermissibly in Central Supply for the better part of one (1) hour with the Grievant. (Tx. pp. 51-52; Ax. 1, p. 14) Unlike SIA Anderson, HSA Yarbrough had not seen the video tapes which show that each inmate was in Central Supply on the indicated dates.

Regarding the above accusations, the record's documented evidence shows that inmate Ward was in Central Supply on October 14, 2015, as MST Vest reported. Critically, however, his presence was not impermissible. His supervisor sent him to Central Supply to pick up certain supplies for the Laundry. Further, the anti-Ward "shot" that MST Vest had issued about this matter was subsequently expunged. (Tx. pp. 146-150; Ax. 1, pp. 93-95) The Agency failed to prove this allegation.

However, regarding the inmate Green accusation, the Agency did prove that he was in Central Supply for nearly one (1) hour on Wednesday, February 3, 2016, as charged. OIA Anderson witnessed as much, albeit indirectly, by viewing that date's Central Supply video feed. (Ax. 1, p. 62) The Arbitrator did not view the video. However, SIA Anderson did and his testimony was reliable. However, more importantly, RSC admitted that she and inmate Green were in Central Supply for a considerable amount of time. That admission was the only bit of her testimony on point that was trustworthy. The Grievant's labored explanation about inmate Green permissibly stopping by Central Supply on Wednesdays to assist her by pulling a "jack" heavily loaded with supplies from 5 Building to Central Supply did not ring true. (Tx. pp. 141-148) At that point in the arbitration proceedings, the undersigned had already learned that HSA Yarbrough had inmate Green removed from Central Supply four (4) months earlier. In any

event, when HSA Yarbrough was recalled, she testified that she had not authorized inmate Green to assist in Central Supply. Indeed, she took umbrage at the thought of it. Further, she stated that only staff may use the "jack." (Tx. pp. 179-180) As already implied, the arbitrator found HSA Yarbrough's testimony to be credible and her remark about the "jack" was never contradicted.

Concerning Charge 2, *Specification A*, the evidence that was proffered by the parties does not prove that the Grievant showed favoritism toward inmate Wade. Further, there is nothing in the record to suggest that his conversation with the Grievant somehow compromised the security of the institution or its occupants, or was a violation of the Standards of Employee Conduct, particularly, Section 5. b. (Ax. 2, p. 6) Nevertheless, the Agency did prove that inmate Green's presence in Central Supply was unauthorized. Further, the undersigned certainly will not reward the Grievant for her lack of candor in this particular matter. As a law enforcement officer, testifying under sworn oath, more, much more is expected. The Arbitrator finds that, as charged, RSC demonstrated favoritism toward inmate Green.

Charge 2, *Demonstrating Favor to Inmates, Specification B.* The Agency failed to prove by a sufficient quantum of evidence that RSC interfered with the ability of MSTs Vest and Hannaford to effectively supervise inmates. The Grievant's discussion of supervisory styles and racial differences made sense. Further, MST Vest's accusation regarding inmate Wade was so far off the mark that there is cause to question his motivations. Still further, absent from the record is eye-witnessed testimony about this specification. All the undersigned had to work with were MST Vest's and MST Hannaford's sworn affidavits, which as the Union pointed out are hearsay.

Charge 1: *Sexual Conversations with Inmates*. HSA Yarbrough testified that she had no personal knowledge of sexual conversation between the Grievant and inmates. (Tx., p. 50) Indeed, except for the Grievant, none of witnesses the Agency presented in this case had personal knowledge of such conversations.

The Grievant, acknowledged that she had conversations about Bruce Jenner's gender conversion, but she denied that her conversations were with inmates. Rather, she testified, the topic was a current event about which only she, MST Vest and MST Hannaford discussed. (Tx. pp. 138-139) Moreover, the Grievant admitted to stripper conversations that did involve inmates. However, she explained, the conversations only surfaced because the institution is located adjacent to a strip club. Further, she affirmed that the conversations were never "personal," and that she never initiated the conversations. (Tx. pp. 139-140)

To prove Charge 1, the undersigned needed to hear from the Agency's only eye witnesses: Specifically, MSTs Vest and Hannaford, and inmate Aiello. Their sworn affidavits allege sexual conversations. However, the Agency failed to present testimony by MST Hannaford, even though she was an employee of the institution and by MST Vest, who had resigned. Interestingly, the Agency's overall case included testimony from AHSA Mead, SIA Anderson and Warden Sanders, all retired. It is understandable that the Agency might not use inmate Aiello as a witness, but why the Agency did not use MSTs Vest and Hannaford as witnesses remains an unanswered question.

MSTs Vest and Hannaford each allege Charge 1 in their sworn affidavits, but the Grievant, also under oath, refuted their allegations. Hearsay cannot be cross-examined and, as

such, it takes a back seat to the Grievant's own words. Ultimately, the Arbitrator concludes, the Agency did not prove that the RSC is guilty of Charge 1's allegations.

The above-discussed findings are easily summarized. By a preponderance of evidence, the Agency: (1) failed to prove Charge 1; (2) succeeded in proving Charge 2, Specification A, but failed to prove Specification B; and (3) succeeded in proving Charge 3, Specifications A and B. Some of the Agency's charges that resulted in the Grievant's removal have fallen to the wayside, specifically: that she impermissibly partakes in sexual conversations with inmates; and that she interferes with her peer's ability to effectively supervise inmates. Proven, however, is that the Grievant inattention to duty is legend and, to a lesser degree than charged, she does show inmate favoritism. Based on these findings, the undersigned concludes, the Agency removed the Grievant without "just and sufficient cause."

A penalty is warranted particularly because of the Grievant's various ways of avoiding work while on duty, which seemed chronic, having persisted for so many years. Whether she could modify her behavior to become a trustworthy and productive employee was an open question. However, in the instant case, the time that elapsed between the date of the Grievant's alleged missteps and the date of her removal, was so long that, while still employed, she was able to demonstrate that she was both willing and able to modify her workplace conduct.

As remarked *supra*, the undersigned is unaware of any problems the Medical Center had with her subsequent to her removal from Central Supply. Said problems, previous to her removal from Central Supply, include complaints from both supervisors and peers who found

her difficult to work with and/or who feared that her workplace conduct compromised the institution's efficiency and exposed staff and inmates to harmful risks.

Given what is now known about the Grievant, including the likelihood that she could be a rehabilitated and productive employee, the undersigned referred to Article 30, Section c. in the CBA – progressive discipline – when contemplating the level of discipline her missteps warrant. The undersigned is cognizant of the fact that said discipline will be her first disciplinary event for the proven offenses. Further, the undersigned treats as mitigating the Grievant's fifteen (15) years of service at the Medical Center and a disciplinary record of offenses that are fundamentally different from the offenses for which she was removed. The single most significant aggravating factor in the disciplinary calculus is the extent to which the Grievant was inattentive to duty. According to the Federal Bureau of Prisons, Standard of Disciplinary Offenses and Penalties "... loafing, wasting time, idleness, or unproductive activities" are illustrative of offenses covered by the term Inattentive to Duty. (Ax. 2, p. 23) Spending time on the telephone, coloring pictures, working crossword puzzles and so forth fits this genre of offenses. Interestingly, the Inattentive to Duty offense carries a penalty that extends from letter of reprimand to removal. (Ax. 2, p. 23)

VIII. AWARD

After considering the record evidence, the parties' arguments and relevant mitigating and aggravating factors, the undersigned concludes that the Grievant's removal was not for just and sufficient cause. For her proven offenses, the Grievant shall be reinstated and her removal shall be reduced to a one (1) week suspension. The Grievant shall be reinstated to her previous position and pay grade or to an equivalent position and pay grade. With reinstatement, the

Grievant shall be "made whole," excluding interest and foregone overtime opportunities, but including seniority and fringe benefits. Further, the Grievant's official personnel file shall be updated to reflect that the Grievant's removal is replaced by the ordered one (1) week disciplinary suspension.

Further, for the sole purpose of enforcing this Award, the undersigned shall retain jurisdiction for both Award-enforcement purposes and for the purpose of deciding whether the Union is entitled to reasonable attorney's fees and expenses.

ISSUED and ORDERED on the 28th day of July, 2018 from Tucson, Arizona.

Mario F. Bognanno,
Labor Arbitrator and Professor Emeritus

IN THE MATTER OF ARBITRATION BETWEEN

American Federation of Government Employees/ Council of Prison Locals, Local No. 1612, AFL-CIO	)	**FMCS Case No. 17-01449-8**
("Union")	)	**Issue: Removal of Grievant**
&	)	**Hearing Site: Springfield, MO**
Federal Bureau of Prisons, U.S. Medical Center for Prisoners, Springfield, Missouri	)	**Hearing Date: February 15, 2018**
("Agency")	)	**Briefing Date: May 23, 2018**
	)	**Award Date: July 28, 2018**
	)	**Arbitrator Mario F. Bognanno**

I. JURISDICTION

The parties to the above-captioned matter are the American Federation of Government Employees/Council of Prison Locals, Local No. 1612 ("Union") and Federal Bureau of Prisons, U.S. Medical Center for Prisoners ("Agency"). The Agency is a federal prison in Springfield, Missouri that provides medical, mental health and dental services to male offenders. The Union represents all employees at the U.S. Medical Center for Prisoners, Springfield, Missouri, with the exception of Central Office employees. The parties are signatories to a Collective Bargaining Agreement ("CBA").[1] (Jx. 1)

Inasmuch as this decision may be published, the parties agreed that the Grievant ought not to be identified by her proper name. (Tx. pp. 7-8) Thus, herein, she is identified by her initials, RSC. The Grievant was hired on January 27, 2002. (Ax. 1, p. 1) On January 11, 2017, Kelly Bagwell, Assistant Health Services Administrator ("AHSA"), gave RSC notice that she was

[1] Exhibits are identified as follows: Joint Exhibits as Jx. #; Agency Exhibits as Ax. #, p./pp.; and Union Exhibits as Ux. #, p./pp. Transcript citations are denoted as Tx. p./pp.

proposing to have her removed (i.e., "discharged" or "terminated") for violations of the Federal Bureau of Prison's Standards of Employee Conduct. (Ax. 2, pp. 1-34) Ms. Bagwell's notice identified three (3) charges that were being brought against the Grievant, namely:

> *Charge 1: Sexual Conversations with Inmates;*
> *Charge 2: Demonstrating Favor to Inmates: Specifications A and B; and*
> *Charge 3: Inattention to Duty: Specifications A and B.*

(Ax. 1, p. 1; Ax. 1, pp. 13-18) In a letter dated February 8, 2017, the Grievant addressed a letter to Linda Sanders, Warden, in which she responded to AHSA Bagwell's January 11, 2017 notice of proposal to remove. (Ax. 1, pp. 11-12) Also, on February 8, 2017, RSC met with Warden Sanders to present her oral response to AHSA Bagwell's notice. (Ax. 1, pp. 8-10) Thereafter, on March 31, 2017, Warden Sanders determined that as of midnight on that date, the Grievant's employment would be terminated. (Ax. 1, p. 1) At the time of discharge, RSC worked as a Medical Supply Technician ("MST") which, like all positions at the U.S. Medical Center for Prisoners, Springfield, MO, is primarily a law enforcement position. (Ax. 1, p. 4)

Pursuant to Article 31, *Grievance Procedure*, of the CBA, the Union grieved RSC's dismissal. (Jx. 1) On May 24, 2017, the Federal Mediation and Conciliation Service, U.S. Government, advised the undersigned that he had been jointly selected by the parties to arbitrate said grievance. In accordance with the provisions in Article 32, *Arbitration*, of the CBA, the Arbitrator heard the grievance on February 15, 2018 in Springfield, Missouri. Appearing through their designated representatives the parties were given a full and fair hearing. Threshold issues were not raised during the proceedings. Witnesses were sequestered and witness testimony was sworn and cross-examined. Exhibits were introduced and accepted into the record, and a verbatim transcript of the arbitration hearing was made. The parties agreed

that the instant Award would be the final and binding resolution of the matter in dispute. Moreover, they agreed to waive the time limiting language in Article 32, Section g of the CBA. (Jx. 1) Related thereto, the undersigned stated that he would endeavor to decide the matter no later than sixty (60) calendar days following receipt of post-hearing briefs. Finally, the parties authorized publication of this decision provided that the Grievant's name is not made public. (Tr. pp. 5-12) The parties' post-hearing briefs were post-marked May 23, 2018.

II. APPEARANCES

For the Union:

Evan S. Greenstein, Esq.	Legal Rights Attorney, AFGE
Karrie Wright	President, AFGE, Local No. 1612
Tamara Jackson	Union Steward, AFGE, Local No. 1612
RSC	Grievant, formally Medical Supply Technician

For the Agency:

Steven R. Simon, Esq.	Sr. Labor Law Attorney, Federal Bureau of Prisons
Bradford Mackey	Technical Representative
Brandy Ybarra	Observer
Rhonda Yarbrough	Health Services Administrator
William Scott Mead	Retired, formerly Director of Quality Management and Assistant Health Services Administrator
Scott R. Anderson	Retired, formerly Special Investigative Agent
Brian Rice	Assistant Manager, Human Resources
Linda Sanders	Retired, formerly Warden

III. RELEVANT PROVISIONS FROM THE CBA AND STANDARDS OF EMPLOYEE CONDUCT

A. COLLECTIVE BARGAINING AGREEMENT

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 there are offenses so egregious as to warrant severe sanction 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.

***

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. [B]y 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?"

***

(Jx. 1)

B. STANDARDS OF EMPLOYEE CONDUCT

***

5. PERSONAL CONDUCT

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b. **Sexual Relationships/Contact with Inmates.** Employees may not allow themselves to show partiality toward or become emotionally, physically, sexually or financially involved with inmates, former inmates, or persons known (or who should have been known based on circumstances) to the employee as a family member or close friend of inmates or former inmates.

(Ax. 2, p. 6)

6. RESPONSIVENESS

Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Employees are required to remain fully alert and attentive during duty hours.

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(Ax. 2, p. 8)

Attachment A. Standard Schedule of Disciplinary Offenses and Penalties[2]

Nature of Offense	Explanation	First Offense	Second Offense	Third Offense	Reckoning Period
7. Inattention to Duty	Potential danger to safety of person and/or actual damage to property is (sic) considered in determining severity of the penalty, as is potential or actual adverse impact on Government operations. Includes, but is not limited to, loafing, wasting time, idleness, or unproductive activities.	Official reprimand to removal	14-day suspension to removal	Removal	2 years
30. Preferential Treatment of Inmates	Potential or actual negative reaction of other inmates is a primary consideration in determining severity of penalty.	5-day suspension to removal	14-day suspension to removal	Removal	2 years

IV. STATEMENT OF THE ISSUE

The Statement of the Issue is as follows:

Pursuant to Article 31, Section h.1 of the Collective Bargaining Agreement, was the Grievant dismissed for "just and sufficient cause?" If not, what shall the remedy be?

V. FACTS AND BACKGROUND

On January 27, 2002, the Agency hired RSC as a Certified Registered Nurse. In 2005 or 2006, she was reassigned to Central Supply, working as a Medical Supply Technician ("MST"). (Ax. 1, p. 1; Tx. pp. 132-133) While in Central Supply, RSC initially worked with MSTs Rebecca Harrison and Sarah Ray with whom she had a "great" working relationship.[3] (Tx., pp. 133-134)

[2] Offense 7, Inattention to Duty, Ax. 2, p. 23; and Offense 30, Preferential Treatment of Inmates, Ax. 2, p. 28.

[3] Be that as it may, HSA Yarbrough testified that MSTs Harrison and Ray often complained to her about the Grievant's apathetic and unproductive conduct. (Tx., pp. 178-179)

Subsequently, about three (3) years later, MSTs Robert Vest and Lindsay Hannaford replaced the latter as the Grievant's co-workers in Central Supply. (Tx. p. 134) RSC testified that she socialized with MSTs Harrison and Ray; and, initially, she had a good relationship with MSTs Hannaford and Vest but, eventually, that relationship soured. (Tx. pp. 134-137)

Rhonda Yarbrough, Health Services Administrator ("HSA"), is a twenty-three and one-half (23.5) year employee of the Agency. She has held her current position since 2012, and in that capacity she indirectly supervised the Grievant and the other MSTs referenced *supra.* (Tx. pp. 25-27) HSA Yarbrough testified that over the years she had received verbal complaints about the Grievant's flagging work ethic, but it was not until October 8, 2015 that a noteworthy problem surfaced. Responsible for health services finances, she observed that during July and August, she repeatedly reminded Central Supply's MSTs to be sure to place purchase orders for supplies before the September 30th, FY 2015's end. Away from the facility for two (2) weeks of training and, then, upon her October 5th return five (5) e-mails from various health service department heads awaited her attention. Each e-mail complained that (s)he needed to place an "emergency order" for several needle/syringe items required routinely for dialysis. Same were not in stock (i.e., had not been ordered by Central Supply). The Grievant was responsible for failing to order said supplies and/or failing to build Central Supply's inventory of them going into FY2016. (Tx. pp. 27-28; Ax. 1, p. 104)

In October of 2015, William Scott Mead was HSA Yarbrough's Assistant Health Services Administrator ("AHSA"). As such, he was Central Supply's first-line supervisor. On October 8, 2015, he told HSA Yarbrough that MST Vest had come to see him, he was "very upset" with the Grievant and he was prepared to submit a written statement about the Grievant's inadequacies

and to submit same to him, HSA Yarbrough and to Warden Sanders.[4] (Tx. p. 29) HSA Yarbrough spoke with MST Vest later that day. *Inter alia*, he told HSA Yarbrough that MST Hannaford also wanted to speak with her. (Tx. p. 29) MST Hannaford met with HSA Yarbrough on October 9, 2015.[5]

HSA Yarbrough testified that MST Vest and MST Hannaford variously alleged the Grievant was lazy, leaving orders for them to fill, and she was on the telephone excessively, conversing with her mother, fiancé/husband, sister and vendors. Further, they stated, the Grievant would sit at her desk coloring with crayons and working on puzzles, faultily give supply items to inmates, discuss matters of a sexual nature with inmates, undermine their supervisory authority and she would make racially charged statements. (Tx. pp. 30-31; Ax. 1, p. 105)

On October 13, 2015, MST Vest and MST Hannaford each sent a memorandum to Warden Sanders. Each memorandum spells out in considerable detail their respective complaints about Grievant misconduct. (Tx. p. 32; Tx. p. 34)) For example, MST Vest wrote:

> 1. During work hours, Grievant made flower arrangements for her wedding, and made and printed flyers, pertaining to her grandfather's funeral;

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[4] As AHSA, Mr. Mead testified, he knew about the Grievant's shortcomings *via* criticism reported to him by others. He would write-up Grievant-related matters in memos directed to the attention of HSA Yarbrough. (See: Ax. 1, pp. 110-111; Ax. 1, p. 120) In addition, he stated, he himself had not witnessed the referenced shortcomings, and he had no personal knowledge about the facts and circumstances spelled out in AHSA Bagwell's "proposal to remove" letter. (Tx. p. 73; Tx. pp. 80-82; Ax. 1, pp. 13-18)

[5] Warden Sanders was also a party to the October 9, 2015 conversation between HSA Yarbrough and MST Hannaford. HSA Yarbrough memorialized that conversation in an October 14, 2015 memorandum addressed to Warden Sanders. (Ax. 1, pp. 104-105) MST Hannaford told HSA Yarbrough and Warden Sanders that RSC was "... confrontational and made it hard to work in the area." Moreover, MST Hannaford stated that RSC would have inappropriate conversations with inmates. Conversations that included:

> [S]trippers, love relationships, transgender questions concerning penis placement, use of strippers and use of drugs. Ms. Hannaford stated [Grievant] stays on the phone for hours, confirmed she colors and made her wedding arrangements on duty time, and felt she did leave work for others to do. The Warden told Ms. Hannaford she needed a memo from her as soon as possible.

(Ax. 1, p. 105)

2. Grievant is on the phone daily for 2-3 hours, discussing personal matters;

3. He placed inmate Trice on probation for poor OTJ performance. Inmate Trice appealed to the Grievant who, in turn, "... told me I could not put anyone on probation;"

4. He confronted inmates Trice and Green, advising that if he caught them handing out supplies to inmates he would "... write them shots and fire them on the spot." The inmates appealed to the Grievant who, in turn, asked him for an explanation;

5. He heard the Grievant talking about transsexuals with inmates Trice and Green, and talking with a third inmate about Bruce Jenner – "where he hid his penis" – and she asked an inmate who worked in laundry what he thought about strippers; and

6. Prior to end of Fiscal Year 2015, Grievant failed to order dialysis supplies.

(Ax. 1, pp. 113-114) Also, MST Vest sent Warden Sanders a second memorandum on October 14, 2015, reporting that earlier that day he witnessed RSC "laughing and talking" with inmate Ward in the sterilization room. (Tx. p. 33; Ax. 1, pp. 117-118; Ax. 1, p. 119)

MST Hannaford's memorandum variously states:

1. She witnessed and/or overheard the Grievant engaged in long conversations with inmates Trice and Green, regarding their personal lives;

2. She witnessed and/or overheard Grievant talking about a transgender man's penis, about strip-clubs and about strippers;

3. The Grievant makes multiple and prolonged phone calls during her shift every day;

4. She directed inmates working in the sterilization room to wear shoe covers and hair covers. Said inmates appealed to the Grievant who, in turn, questioned her about what she had told the inmates; and

5. On September 30 2015, the Grievant asked that I place an October 1st order for the "overnight" delivery of certain dialysis items, which carried an extra charge.

(Ax. 1, pp. 115-116)

On October 15, 2015, Warden Sanders referred the above-listed allegations to the Office of Internal Affairs ("OIA") for investigation. (Ax. 1, pp. 131-133) Special Investigative

Agent ("SIA") Scott Anderson conducted the investigation. On July 21, 2016, he issued the OIA's Investigative Report. (Ax. 1, pp. 134-152) Having taken staff and inmate sworn affidavits, reviewed relevant Central Supply videos and photographs, and having gone through telephone records and other supporting documentation, SIA Anderson concluded:

> There is sufficient evidence to sustain the allegations of Improper Contact with an Inmate/Inmate's Family," "Inattention to duty," and "Unprofessional Conduct of a Sexual Nature against [Grievant]. SIA Anderson sustained the allegations brought against the Grievant. (Tx. p. 93; Ax. 1, p, 151)

During cross-examination SIA Anderson acknowledged that it took him approximately 271 days[6] to complete the OIA investigation and not 210 days as stated in the investigation's authorization notice. (Tx. pp. 94-96; Ax. 1, p. 129) However, he continued, without elaborating, the initial 210 day deadline was appropriately extended. (Tx. p. 96) When queried about the Grievant's alleged misuse of the telephone, SIA Anderson acknowledged that he reviewed phone records for some dates in early October 2015 and early February 2016 and not for the intervening months, which the Union dubbed the "black hole."[7] (Tx., pp. 97-99) Based on said review of phone records for October 2015 and February 2016, SIA Anderson found that RSC had placed several personal phone calls during work hours on October 8, 2015, October 9, 2015, February 5, 2016, February 8, 2016 and February 9, 2016. (Tx. pp. 96-99; Ax. 1, p. 15; Ax. 1, pp. 60-61)

Regarding SIA Anderson's review of Central Supply videos, he states in his February 3, 2016 Memorandum of Interview that inmate Green and RSC were alone in Central Supply for

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[6] The testimony inaccurately put the number of lapsed days at "about 255."

[7] Arbitral notice is made of the fact that Grievant's July 13, 2016 sworn affidavit states, *inter alia*, that she "... calls her mother and husband every day. Sometimes I will call them several times a day." (Ax. 1, p. 36; Ax. 1, p. 15)

approximately fifty-three (53) minutes on February 3, 2016. (Ax. 1, p. 62) This same video footage shows Michelle Davidson, Assistant Director of Nursing ("ADN") entering Central Supply at 12:50:44 p.m. to pick up supply items, such as, boxes of Kleenex and lint rollers. She left Central Supply approximately ten (10) minutes later. (Ax. 1, p. 19; Ax. 1, p. 62) Significantly, the Union pointed out, in her June 9, 2016 sworn affidavit, ADN Davidson, states, *inter alia*, "I have not overhead any inappropriate conversations between staff and inmates." (Tx. pp. 99-100; Ax. 1, p. 19)

In a similar vein, the Union showed that on October 14, 2015, MST Vest filed an incident report,[8] stating that RSC was in Central Supply's sterilization room with inmate Ward who was not assigned to work in Central Supply. (Ax. 1, p. 91) However, after looking into this matter, the Agency learned that Robert Williams, Laundry Supervisor, had authorized inmate Ward to frequent Central Supply to pick up weekly supplies. (Ax. 1, p. 100) Subsequently, MST Vest's "shot" was expunged from inmates Ward's file.[9] (Tx. pp. 100-101; Ax. 1, p. 95)

On February 4, 2016, while the OIA investigation was still ongoing, MST Vest addressed a memorandum to HSA Yarbrough. Therein, he stated that Central Supply was understaffed because MST Hannaford was off and, as he worked, the Grievant sat at her desk doing crossword puzzles. He also reported that on February 3, 2016, an inmate told him that inmate Green and the Grievant were visiting in Central Supply's sterilization room when the former retrieved something from the cabinet "under the sink." (Tx. p. 36; Ax. 1, pp. 120-121) On the

[8] The record repeatedly reports said filing date as being on November 10, 2015, rather than October 14, 2015 when the incident report was actually filed. (Compare Ax. 1, p. 46 and Ax. 1, p. 91)

[9] When asked, SIA Anderson acknowledged that MST Vest and inmate Aiello are "white;" whereas, the Grievant and Green, Ward and Trice are "black." Said racial distinction, he added, was immaterial and did not affect his findings. (Tx. pp. 107-113)

following Monday, February 8, 2016, AHSA Mead advised HSA Yarbrough that MST Vest told him that the Grievant just concluded a personal phone conversation that lasted seventy-one (71) minutes. (Ax. 1, p. 122)

On February 9, 2016, HSA Yarbrough removed the Grievant from Central Supply. She did so for two (2) reasons. First, Sharon Bennett, a Unit Manager, called HSA Yarbrough to tell her that recently assigned/hired inmate Aiello already wanted to quit working in Central Supply. Later that day, HSA Yarbrough and Michael Williams, Correctional Counselor ("CC"), spoke with inmate Aiello. The latter stated that Central Supply was the locus of probable racial trouble; inmates had unsupervised access to the sterilization room where sharp instruments (e.g., scalpels) are stored; on February 3, 2015, the Grievant and inmate Green had a lengthy conversation while in Central Supply and, as he was leaving, inmate Green procured an item from a cabinet located "underneath the sink;" and, last, the Grievant often spoke of racism, berated MST Vest, and had inappropriate conversations with inmates. (Tx. pp. 37-40) Later that same day, HSA Yarbrough and CC Williams, memorialized their conversations with inmate Aiello in separate memoranda addressed to SIA Anderson. (Ax. 1, pp. 108-109; Ax. 1, p. 123) Further, on March 25 2017, HSA Yarbrough described the Aiello matter in a sworn affidavit taken by SIA Anderson. (Tx. p. 48; Ax 1, pp. 56-59)

Second, following the Aiello matter, HSA Yarbrough stated that she received a call from the 1-2 Clinic requesting her immediate presence. Upon arriving, there stood a Central Supply inmate with a lunch bag containing a stapler and four (4) unsecured scalpels. HSA Yarbrough testified that he told her that he was delivering same to the 1-2 Clinic as RSC had instructed him to do. Immediately thereafter, HSA Yarbrough testified, she went to Central Supply. The

Grievant acknowledged that she had directed the inmate to deliver said items, and HSA Yarbrough remarked that her order was inappropriate inasmuch as a scalpel can be used as a weapon to stab an inmate or an Agency staffer. (Tx. pp. 41-42)

That same day, after speaking with Warden Sanders and showing her the bag of scalpels, HSA Yarbrough prepared a memo reassigning the Grievant to a clerical position. (Tx. p. 43) Returning to Central Supply to give RSC her reassignment, HSA Yarbrough testified, she was sitting at her desk "... with an open crossword puzzle ..." HSA Yarbrough gave the Grievant the memo and the latter proceeded to gather some personal items and left Central Supply. (Tx. p. 44) The next day, February 10, 2016, HSA Yarbrough testified that she returned to Central Supply to collect the items RSC had left at her desk. In the Grievant's desk drawers was a large cache of non-work related coloring pictures, crayons (that appeared to have been recently used) and crossword puzzles, which HSA Yarbrough photographed. (Tx. pp. 44-46; Ax. 1, pp. 77-89) On that same day, HSA Yarbrough prepared a memorandum addressed to SIA Anderson with a subject-line that read "Inattention to Duties." (Ax. 1, p. 124-125) This testimony and additional remarks pertaining to the Grievant's inattention to duty are replicated in a March 25, 2016 sworn affidavit HSA Yarbrough prepared for SIA Anderson. (Tx. pp. 47-48) Finally, HSA Yarbrough testified that staff members have told her that if RSC is ever returned to duty they would resign or request reassignments, fearing their safety would be in jeopardy. (Tx. pp. 48-49)

With AHSA Bagwell's January 11, 2107 "proposal to remove" letter in hand, HSA Yarbrough testified as follows while under cross-examination:

1. Charge 1: *Sexual Conversations with Inmates*. HSA Yarbrough testified she had no personal knowledge of the Grievant's alleged sexual conversations with inmates. (Tx. p. 50; Ax. 1, p. 14)

2. Charge 2: *Demonstrating Favor to Inmates, Specification A*. HSA Yarbrough stated she had personal knowledge of the Grievant's proclivity to allow unauthorized inmates to be in Central Supply. Said matter was addressed at departmental meetings; and, she stated, she had a sign placed outside of Central Supply that stated, "No Unauthorized Inmates." (Tx. p. 51; Ax. 1, p. 14) However, she also testified to having no personal knowledge regarding allegations that: (1) on February 3, 2016, inmate Green was impermissibly in Central Supply with the Grievant for nearly an hour, having a conversation about his family; (2) on October 14, 2015, inmate Ward and RSC were "laughing and talking" in the sterilization room. (Tx. pp. 51-52; Ax. 1, p. 14) HSA Yarbrough had not seen the video-taped evidence of either allegation.

Charge 2: *Demonstrating Favor to Inmates, Specification B*. This charge describes events bearing on the allegation that the Grievant interfered with inmate supervision by MSTs Vest and MST Hannaford. HSA Yarbrough testified to having no personal knowledge of same. (Tx. pp. 52-53; Ax 1, pp. 14-15)

3. Charge 3: *Inattention to Duty, Specification A*. This charge addresses the Grievant's excessive use of the telephone during normal duty hours, conversing with family members and her fiancé/husband. On cross, while acknowledged that the Agency does not prohibit personal calls during duty hours, HSA Yarbrough testified that on several occasions she has witnessed the Grievant on the telephone talking with family members. (Tx. pp. 53-54; Ax 1, p. 15)

Charge 3: *Inattention to Duty, Specification B*. This charge alleges the Grievant made and printed personal items using government equipment and colored and worked puzzles during duty hours. Too, this charge specifically referenced HSA Yarbrough's February 9, 2016 "reassignment of duties" interaction with the Grievant who, at that time, had an "... opened Word Search puzzle book in front of her with a pen in her hand," and it references her February 10, 2016 return visit the Grievant's work area, finding puzzle books and crayons in her desk drawers. (Ax. 1, pp. 15-16)

These adverse findings would seemingly compound RSC's standing within the Agency since they came on the heels of HSA Yarbrough's January 29, 2016 memorandum to Warden Sanders, criticizing the Grievant's performance. (Ax. 1, pp. 106-107) Yet, with reference to the Grievant's performance review for the rating period April 1, 2015 to March 31, 2016, HSA Yarbrough acknowledged, she gave RSC a "satisfactory" rating, and she had not recorded any negative comments. (Tx. pp. 54-56; Ux. 2)

Finally, on redirect examination, HSA Yarbrough made clear that each Agency employee is given a copy of the booklet *Standards of Employee Conduct* when first hired and, thereafter, its content is reviewed annually: Testimony about which the Grievant concurred. (Tx. pp. 69-70; Tx. pp. 166-167; Ax. 2)

On March 30, 2016 and April 27, 2016, MST Vest and MST Hannaford, respectively, gave multipage statements to SIA Anderson that variously repeated the allegations leveled against the Grievant as discussed *supra*. Both swore under oath that their respective statement was true and accurate. (Ax. 1, pp. 45-48; Ax. 1, pp. 21-24) On March 31, 2017, Warden Sanders terminated the Grievant's employment because she: (1) engaged in sexual conversations with inmates; (2) demonstrated favoritism in her treatment of inmates; and (3) was inattentive to her duties as a MST. (Ax. 1, p. 4) The Warden considered each of the Douglas Factors' twelve (12) decisional criteria in reaching her decision. (Ax. 1, pp. 4-6) Said factors included the Grievant's disciplinary record, which included three (3) one (1) day suspensions and a letter of reprimand. (Ax. 1, p. 4) However, Warden Sanders testified, even if the Grievant had a clean record of discipline, she would have terminated her employment: As a law enforcement officer the security of the institution and safety of inmates and Agency staff should have been upper-most in the Grievant's mind, and it was not. (Tx. p. 120) Too, the Warden added, the Grievant's reinstatement would disrupt the institution. The Grievant's inability to maintain a professional distance *vis a vis* inmates is a danger to all. (Tx. p. 121)

When Warden Sanders was being cross-examined, the Union observed that subsequent to the Grievant's removal from Central Supply, the Agency later returned her to that post. In so many words, the Union asked, rhetorically, "Did the Agency believe that the Grievant's threat

to institutional security had somehow subsided?" Further, the Union pointed out that fourteen (14) months had lapsed between October 15, 2015, the date Warden Sanders forwarded the Vest/Hannaford allegations to OIA for investigation, and January 11, 2017, the date of AHSA Bagwell's notice of proposed removal. Again, in so many words, the Union asked, rhetorically, "Was the Grievant's discharge timely?" Warden Sanders' reply was "Yes." When deciding on the appropriate level of Grievant-discipline, the Warden stated that she gave zero weight to the timeliness issue; she neither reviewed the Grievant's phone records nor viewed relevant videos; and she could not recall whether she had read OIA's investigative report before deciding to terminate the Grievant's employment. (Tx. pp. 122-125)

Next, regarding the Grievant's past discipline record, the Union observed that AHSA Bagwell's January 11, 2017 "proposal to remove" the Grievant considered only her October 19, 2015 suspension. (Ax. 1, p. 17) Yet, it continued, the Douglas Factor analysis appended to Warden Sanders' March 31, 2017 removal letter refers to all four (4) of the Grievant's past disciplinary events. (Ax. 1, p. 4) In response, Warden Sanders testified that while the Grievant's overall record of past disciplines are listed in the Douglas Factor appendage, only the October 19th suspension was considered simply because it was the only discipline that fell within the Table of Penalties "reckoning period." (Tx. pp. 125-128)

The Grievant testified at length about the three (3) charges brought against her, maintaining the following:

> 1. Charge 1*: Sexual Conversations with Inmates.* Bruce Jenner and his male-to-female transformation was a subject of discussion: A "current event" about which MSTs Vest, Hannaford and she had chatted. No doubt, the Grievant went on to say, inmates overheard their conversation. (Tx. pp. 138-139) About strippers, RSC stated that the subject would come up because a strip club was located across the street from the institution. The strip club would sponsor summertime car washes and, scantly clothed,

the club's strippers would be outside washing cars. Inmates could see them and, on occasion, some would ask RSC questions, which she would answer. However, said Q and A never involved anything personal. (Tx. pp. 139-140)

2. Charge 2: *Demonstrating Favor to Inmates, Specification A.* On October 14, 2015, the Grievant and inmate Ward were "laughing and talking" in the sterilization room, as MST Vest had claimed. (Ax. 1, p. 91; Ax. 1, p. 97) RSC testified they were laughing because she had forgotten to pick up Purell and alcohol the day before as inmate Ward's supervisor had requested. (Tx. pp. 144-148) MST Vest filed an Incident Report (i.e., "shot"), maintaining that inmate Ward should not have been in Central Supply. (Ax. 1, p. 91; Ax. 1, p. 97) Said shot was subsequently expunged because inmate Ward was in the area at the request of his supervisor to pick up certain supplies. (Tx. pp. 146-150; Ax. 1, pp. 93-95) RSC also testified that inmate Ward told her that MST Vest had filed a shot. Subsequently, she stated, she and MST Vest had a conversation, during which she told him that inmate Ward was "... not out of bounds." However, RSC opined, MST Vest wrongly believed that it was she who had the shot expunged, which was not the case. Thereafter, their relationship went south: A fact the Grievant variously reported to AHSA Mead, AHSA Bagwell and HSA Yarbrough. (Tx. 150-152)

On February 3, 2016, for an hour or so, as alleged, inmate Green was in Central Supply. Usually on Wednesdays, RSC explained, inmate Green would stop by Central Supply and ask whether I needed help pulling a "jack" – sometimes was loaded with 400-to-500 pounds of supplies – from 5 Building to Central Supply. On that day, the Grievant told inmate Green that she did not need help. However, at about that time, the institution went on "closed quarters," meaning that unlocked inmates were not to be walking around institution's halls. Thus, inmate Green stayed in Central Supply until the call for closed quarters was lifted. The two (2) visited, he talked about his family and ailing grandmother. RSC opined that said conversation was not improper. Rather, her aim was to establish "rapport" with the inmate, as instructed at Annual Refresher Training. Moreover, HSA Yarbrough gave permission to use inmates for this purpose.[10] (Tx. pp. 141-144)

3. Charge 2: *Demonstrating Favor to Inmates, Specification B.* MSTs Vest and Hannaford believed that the Grievant's interaction with inmates, particularly Green and Trice, had poisoned their relationships with them.[11] The Grievant stated, she relates to inmates as

[10] HSA Yarbrough testified that a "jack" is a Class A tool to be used only by staff members. She stated that she would not have okayed an inmate's use of a jack to assist the Grievant and, particularly inmate Green who no longer worked in Central Supply. (Tx. pp. 179-180)

[11] On cross-examination, RSC testified:

> No. I didn't intervene. The only thing that I did I was trying to be on the same page as Vest so that I can let the inmate know what was actually going on so that we would be level and so that both of us would know we were on the same page so I wouldn't be saying one thing and Mr. Vest would be saying another." (Tx. pp. 169-170)

"human beings," not as "inmates." Unlike MST Vest, she does not tell them "what," "how" and "when;" she was not a "military guy," "gruff," as was MST Vest. She is more "up front;" she merely tells the inmate this or that and it gets done. MST Vest's style invited questions that inmates would bring to her. MST Hannaford, the Grievant observed, is "very quiet." Race could be part of the problem. Perhaps the two (2) inmates go to her because, like them, she is black. Or, she opined, they may go to her out of respect, or because she was Central Supply's senior MST. (Tx. pp. 154-157)

The Grievant denied telling MST Vest that the inmates were "her inmates." Rather, she testified, she told him they were the "department's inmates." (Tx. p. 157) She also denies she "confronted" MST Vest after he told inmates Green and Trice that he would file an incident report if either was caught "passing out" supplies to other inmates. Rather, she concurred, telling him that if caught, he should file an incident report. However, she did expect him to let her know about problem areas to insure that each would mete out the same level of discipline whenever inmate incidences arise. (Tx. pp. 158-159)

4. Charge 3: *Inattention to Duty, Specification A.* RSC acknowledged that some of her personal phone calls occurred while on duty time; however, unless unaware of the time, most of her calls take place during breaks. She also testified, the calls she placed during duty time did not interfere with her responsibilities. On point, the Grievant noted that her supervisors never told her to stop making personal calls, coloring or doing crossword puzzles while on duty, and the subject was never raised during her performance reviews. (Tx. pp. 161-162; Ux. 1; Ux. 2)

Finally, RSC observed that around February 1, 2017, she was returned to Central Supply where she worked until removed on March 31, 2017. (Tx. pp. 164-165)

VI. POSITIONS OF THE PARTIES

A. Agency's Arguments: RSC maintained that she interacted and communicated with inmates to establish a work-related "rapport" with them: A claim the Agency derided. (Tx. p. 137) On February 9, 2016, the Grievant allowed a Central Supply inmate to deliver unsecured scalpels – a security breach (Tx. p. 42); later that same day, the Grievant is seen working a puzzle at her desk (Tx. pp. 43-44); and throughout her years in Central Supply, the Grievant's co-workers, namely, MSTs Harrison, Ray, Vest and Hannaford, all complained about her propensity to shirk job responsibilities. (Tx. pp. 27-31; Tx. pp. 74-75; Tx. pp. 178-179) HSA

Yarbrough was an in-person witness to these facts. Further, the Agency argued, the items seized from the Grievant's desk in Central Supply corroborate co-worker claims that she often colored pictures and played crossword puzzles at her desk rather than attending to duty. (Ax. 1, pp. 77-89) Still further, the Agency observed that the Grievant did not challenge the above-asserted facts with witnesses of her own.

Finally, based on the facts presented *supra,* the Agency maintained that RSC violated the following Standards of Employee Conduct: (1) Section 5.b, "Employees may not allow themselves to show partiality toward ... inmates;" and (2) Section 6, "Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Employees are required to remain fully alert and attentive during duty hours." (Ax. 2, p. 6; Ax. 2, p. 8) Relevant to these violations, the Agency pointed out that the Standard Schedule of Disciplinary Offenses and Penalties states as follows: (1) Offense 7, Inattention to Duty, calls for an official reprimand to removal for a first offense, and a 14-day suspension to removal for a second offense (Ax., 2, p. 23); and (2) Offense 30, Preferential Treatment of Inmates, provides for a 5-day suspension to removal for a first offense, and a 14-day suspension to removal for a second offense (Ax., 2, p. 28).

Citing *DOC v. Derry*, 510 S.E. 2d 832, 833-837, 235 Ga. App. 622, 623-629 (Ct. App. Ga., 1999), the Agency urged, the Grievant was removed for just and sufficient cause, and the appropriate penalty for her proven offenses is the Agency's decision to terminate her employment. As Warden Sanders stated, the Grievant was removed because of her inattention to duty and preferential treatment of inmates, which compromised the safety of correctional staff, inmates, and security of the institution itself. (Tx. pp. 119-121)

B. Union's Arguments: The Union's argument began with the following three-part preface: first, the Agency has the burden of proving, by a preponderance of the evidence, the charges it brought against the Grievant; second, if wrongdoing is proven, the Agency must prove that the penalty it meted out was reasonable; and third, citing *Doe v. Hampton*, 56 F.2d. 265 (D.C. Cir. 1977), the Agency must also prove that a genuine nexus exists between the discipline imposed and the efficiency of the institution.

Before arguing proof, the Union maintained that Warden Sanders, the Agency's deciding officer, relied on a certain aggravating factor that violated the Grievant's due process rights, rendering her removal procedurally defective. The aggravating factor at issue is the Grievant's disciplinary record. *Lopes vs. Department of the Navy*, 116 M.S.P.R. 470 (MSPB, 2011) provides that all federal employees are entitled to a "constitutionally correct removal procedure."

Of relevance is that when determining whether the Grievant ought to be removed, Warden Sanders relied on the Grievant's *entire* disciplinary record, which consisted of a one (1) day suspension on October 19, 2015, January 5, 2016 and January 9, 2017 as well as a June 2, 2015 Letter of Reprimand. (Ax. 1, p. 4) In the Agency's Douglas Factor analysis, Douglas Factor #3, Past Disciplinary Record, lists each of these disciplinary events, the implication being that the Warden Sanders had considered the Grievant's *entire* disciplinary record (i.e., Douglas Factor #3) along with the remaining eleven (11) Douglas Factors, before reaching her March 31, 2017 determination that the Grievant be removed. (Ax. 1, p. 1) However, prior to being removed, the Grievant believed that the *only* aggravating or disciplinary factor the Agency considered was her October 19, 2015 one (1) day suspension. This suspension was the only disciplinary item AHSA Bagwell considered, as stated in her January 11, 2017 letter to RSC,

proposing her removal. (Ax. 1, p. 17) The Agency failed to notify RSC in advance that her *entire* disciplinary record was factored into the decision to terminate her employment. Said failure denied the Grievant of her fundamental right to due process and, thus, as a matter of law, the Grievant ought to be reinstated.

Concerning the above analysis, the Union argued that Warden Sanders incorrectly maintained that the only October 19, 2015 suspension was germane, because it alone fell within the controlling two (2) year reckoning period. That's inaccurate, the Union urged. The January 5, 2016 and January 9, 2017 suspensions also had two (2) year reckoning periods, according to the Bureau of Prisons' Standard Schedule of Disciplinary Offenses and Penalties. (Ax. 2, pp. 21-34)

Returning to the matter of proof, the Union maintained that the Agency failed to prove that it had "just and sufficient cause" for removing the Grievant, *per* Article 30, Section a. of the CBA, quote *supra*. This conclusion follows for the discussion, *infra*.

Charge 1: *Sexual Conversation with Inmates*. This charge centered on 2015 newscasts about Bruce Jenner's transsexualism. Notwithstanding that fact, the Agency failed to produce a single witness with personal knowledge of sexual conversations between RSC and inmates and, further, the Agency failed to cite the specific policy that the alleged interactions violated. MSTs Vest and Hannaford are the sources of the Charge 1 allegation. Critically, however, for whatever reason the Agency did not call either MST to testify, relying instead on their sworn affidavits. The Union urged the undersigned to dismiss Charge 1 because it pertains to a fighting issue,[12]

[12] The Grievant disputes the alleged charge. She testified that she discussed the news about Bruce Jenner with MSTs Vest and Hannaford, not with inmates. Although, she allowed, the latter may have overheard the formers' conversations. (Tx. pp. 138-139)

because the MSTs' sworn affidavits are sketchy and, most importantly, because their affidavits cannot be cross-examined. The Union cited precedents but, most pointedly, *AFGE Local 221 and Department of Veterans Affairs, VA Boston Healthcare System,* FMCS Case No. 12-01957-1 (Arb. Williams, July 1, 2103). The Grievant admitted she discussed the Bruce Jenner matter but her discussions were with MSTs Vest and Hannaford, not with inmates.

Charge 1 also references discussions about strippers. RSC described the physical context for these discussions and she testified that inmates would bring questions to her about the public display being made by the nearby strip club's scantily clothed female employees. She would answer their questions. Nevertheless, there was nothing personal or sexually inappropriate about the Qs and As. (Tx. pp. 139-140)

Ultimately, the Union argued, the Agency failed to prove the Grievant had inappropriate sexual conversation with inmates. Also, the Agency references vague "policy" language that arguably covers the instant allegation, namely: "Employees must conduct themselves in a manner that fosters respect for the Bureau of Prisons, the Department of Justice and the US Government;" and "Employees are expected to conduct themselves in a manner that contributes to the orderly running of Bureau facilities."[13] Charge 1 must fail due to lack of evidence.

Charge 2: *Demonstrating Favor to Inmates, Specification A.* This issue deals with whether the Grievant showed favoritism toward inmates Ward and Green. She maintained that she had a professional relationship with these inmates based on her desire to establish a rapport with those with whom she worked. (Tx. p. 137) Inmate Aiello was one who advanced

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[13] See: Standards of Employee Conduct. (Ax. 2, p. 5; Ax. 2, p. 6)

this charge, and it was he who primarily introduced the specter of racism. Inmates lie, inmates have agendas; thus, the Union urged, the Arbitrator should be wary eyed about inmate Aiello's statements that appear in affidavit form and, once again, that are not subject to cross-examination.

There is a distinction between "appropriate rapport" and "misconduct." The Grievant claimed her conduct was appropriate, while inmate Aiello and MSTs Vest and Hannaford claim it was manifest misconduct. As factfinder, the Union cautioned the undersigned should not hastily sustain Charge 2. Specification A, because evidence proffered in its support is rank hearsay. Further, SIA Anderson testified that on February 3, 2016, Green and the Grievant were together in Central Supply for nearly one (1) hour. He witnessed the foregoing from a video tape taken by a Central Supply camera. (Ax. 1, p. 62) More hearsay, inasmuch as the Agency did not put the video in evidence; and neither the Union nor the Arbitrator was given the opportunity to review it. Michelle Davidson, Assistant Director of Nursing, allegedly entered Central Supply on February 3, 2016 at a time during which inmate Green and the Grievant were both there. She stated as much in her sworn affidavit. (Ax. 1, p. 19) However, once again, this prospective eye-witness did not testify at the hearing and her affidavit cannot be cross-examined. Still further, the Union pointed out, RSC testified that it was not uncommon for inmate Green to come to Central Supply to help her move heavy items. (Tx. p. 37; Tx. p. 149)

Charge 2, Specification A, also alleged that on the morning of October 14, 2015, MST Vest entered Central Supply, finding inmate Ward and RSC in the sterilization room "laughing and talking." (Ax. 1, p. 14) RSC explained why the two (2) of them were laughing and she

averred that inmate Ward was authorized to be in Central Supply on that occasion. In all, the Union concluded that Charge 2, Specification must fail for lack of evidence.

Charge 2: *Demonstrating Favor to Inmates, Specification B.* The Union maintained that this charge stemmed from MST Vest's resentment of the Grievant's good relationship with inmates. At the hearing, the Grievant addressed their different interpersonal relationship styles. She is more obliging and he is more "military" and "gruff." (Tx. pp. 155-156) MST Vest's and MST Hannaford's affidavits speak about inmates complaining to the Grievant about assignments/critiques the latter would issue, and the Grievant's subsequent intervention. (Ax. 1, p. 14) MST Vest accused RSC of referring to the inmates as "her inmates." She denied using this verbiage. (Tx. pp. 157-158) The Union argued, communications between RSC and her peers had totally broken down.

RSC speculated that the inmates were attracted to her because she hired them, because she was the senior person in Central Supply and, possibly, because she is black, as were most of the department's inmates, they trusted her. This, the Union argued, is reality and has nothing to do with inappropriate behavior by the Grievant. Again, the Agency's offer of proof of Charge 2, Specification B, is found in affidavits that cannot be cross-examined. This charge should be dismissed.

Charge 3: *Inattention to Duty, Specification A.* The allegation that the Grievant's spent an inordinate amount of time on the telephone and that she asked colleagues not to answer her phone are not policy violations, the Union argued. First, there is no evidence that the Grievant made continuous use of the phone between September 2015 and February 2016, as her accusers asserted. The Agency only proved that RSC made personal calls on October 8,

2015, October 9, 2015, February 2, 2016 and February 5, 2016. (Ax. 1, pp. 60-61) Hardly a systemic problem! Moreover, the Union argued, there is no evidence that the Grievant's *de minimus* use of the phone adversely affected her performance of official duties.

Second, the Grievant did not instruct her co-workers not to answer her phone. Rather, she testified, she reminded them that her voicemail automatically picks up any message callers may wish to leave. (Tx. p. 176) Again, the Union pointed out, since the referenced co-workers (i.e., MST Vest and MST Hannaford) were not called as Agency witnesses they did not contradict this testimony. Charge 3, Specification A, should be dismissed.

Charge 3: *Inattention to Duty, Specification B.* The Union acknowledged that the Grievant testified to having printed personal materials on her computer, but only during break times. Further, as required by Standards of Employee Conduct, she testified to using her own paper. (Ax. 2, p. 11) Too, the Grievant admitted to sometimes coloring pictures and working crossword puzzles: Activities that served as "stress reliever[s]." (Tx. p. 161) These activities, the Union averred neither hindered RSC's job performance nor harmed the government. As proof, the Union pointed to the Grievant's performance review ratings for the periods 4/1/14 – 5/31/15 and 4/1/15 – 3/31/16: Both rated the Grievant's work as being "satisfactory." (Ux. 1; Ux. 2) Charge 3, Specification B should be dismissed.

Next, the Union maintained that the Agency's removal of the Grievant was not progressive as required by the CBA, Article 30, Section c, quoted *supra*. This case involved practically no aggravating factors, and the Agency's foremost allegation is Charge 2: *Demonstrated Favor to Inmates.* Yet, the Union argued, the record evidence suggests that RSC was never told (i.e., notified) that her conduct *vis a vis* inmates was inappropriate. Absent

notice, to have terminated the Grievant for favoring inmates is hardly progressive. Rather, that level of discipline, for a first-time offense, denies an employee the opportunity to modify the inappropriate conduct in question, contradicting Article 30, Section c's guidance. Accordingly, the Union urged, the Grievant's removal was made in violation of Article 30, Section c of the CBA.

Further, in the present case, the Agency's disciplinary action also violated Article 30, Section d of the CBA, which is quoted *supra*. On or about November 5, 2015, the Agency authorized a local investigation of the charges alleged. According to this authorization notice, the OIA was given 120 days to conclude its investigation. (Ax. p. 129) SIA Anderson completed OIA's investigation on July 21, 2016. (Ax. p. 134) That is, the Union pointed out, the investigation of the charges alleged was concluded 271 days after being commissioned; and the Grievant was removal 533 days after the Agency authorized OIA's investigation.[14] These lag times are not even arguably consistent with Article 30, Section d's provision that "... the parties endorse the concept of timely disposition of investigation and disciplinary actions." (See Ux. 4) Further, the Union argued, the record does not explain said untimeliness. The Agency should not be rewarded for turning a blind eye on the CBA's mandates.

Still further, the Union presented its own analysis of the Douglas Factors, finding that the Agency failed to prove by a preponderance of evidence that the Grievant was guilty of any misconduct and should not have been disciplined. However, if the undersigned disagrees, the Union pressed, than its analysis of the twelve (12) Douglas Factors shows that a Letter of Counseling would be most appropriate along with an order that the Agency offer to train the

[14] These lag time counts are more accurate than comparable counts that are discussed in the record.

Grievant on how to properly interact with inmates. A bullet-point summary of the Union's analysis for each of the Douglas Factors is presented below:[15]

1. *Nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated:*

- The Agency failed to provide any substantive evidence that the Grievant inappropriately engaged in sexual conversations with inmates.
- The Grievant's version of events deserves heavy weight since the Agency failed to provide eyewitness testimony.
- The Grievant admitted to having discussed Bruce Jenner's gender reassignment with co-workers not inmates, and their discussions arose in the context of a current event.
- Stripper discussions were not evoked, they were initiated by inmates; and said discussions arose within a context of geographic proximity.
- Like she, the inmates in question were black. Naturally, they would converse with her. There is scant evidence that any of the referenced discussions rose to the level of misconduct.
- Yes, the Grievant made personal phone calls, which did not violate conduct standards and she colored pictures and worked crossword puzzles to relieve stress: *De minimus* offenses.
- The Grievant's written and oral responses to the proposal that she be removed demonstrate her sense of ownership and remorse.
- Proof: This factor is slightly aggravating.

2. *Employee's job level:*

- The Grievant's job level was GL-6. A relatively low job level in the federal sector and anything but prominent.
- The Grievant's job level should carry little or no weight as an aggravating factor.
- Proof: This factor is slightly aggravating.

3. *Past discipline record*:

- As discussed *supra*, the Grievant's record of discipline consisted of four (4) items, clearly an aggravating factor.
- Warden Sanders overstated the weight she assigned to this factor. First, the AHSA Bagwell's proposed "notice to remove" analysis considered

[15] See: *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.P.R. 280, 306 (1981).

only one (1) disciplinary item. Pursuant to *Lopes* the other three (3) disciplinary items ought not to have been considered. Second, the Grievant's past disciplines are of a different genre than are the offenses the led to her removal.

- In a sense, the offenses now alleged are a "first," and the Agency's disciplinary response should have been "progressive."
- Proof: This factor should carry some mitigating weight.

4. *Past work record and length of service*:

- The Grievant had fifteen (15) years of service and her 2013 to 2016 performance ratings were either "Exceeds" or "Satisfactory."
- If the Grievant's interactions with inmates were inappropriate, they should have been referenced in her performance reviews: None were.
- Did Agency lull the Grievant into a false sense of security? Supervision had heard complaints about the Grievant from inmates and staff – even during time MST Ray and MST Harrison worked in Central Supply – but no effort was ever made to employ corrective measures designed to remedy the complaints.
- Proof: On balance, this factor is mitigating.

5. *Effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect on the supervisor's confidence in the employee's ability to perform assigned duties:*

- HSA Yarbrough reassigned the Grievant on February 9, 2016, and approximately one (1) year later she was moved back to Central Supply. During that period, the Grievant proved to be a satisfactory worker.
- For that period, there are no documented problems.
- The time lag between the Grievant's alleged offenses and her removal had a positive, behavioral modification effect on her. Any supervisor would be confident in her willingness to do her job.
- Proof: This factor is mitigating.

6. *Consistency of the penalty with those imposed upon other employees for similar offense:*

- Neither Michelle Davidson, Assistant Director of Nursing, nor Emily Kyle, Financial Program Specialist, was disciplined for failing to timely report a unique violation allegedly committed by the Grievant. (See: Ax. 1, p. 19; Ax. 1, p. 28)
- The Grievant was treated in a disparate manner.
- Proof: This factor is mitigating.

7. *Consistency of penalty with the Agency's Table of Disciplinary Offenses and Penalties:*

- This factor is of no import since the penalty associated with almost all offenses is not a "point" but a "range" that extends from reprimand to removal.
- The Agency did not offer testimony about the appropriateness of the Grievant's penalty and it carried the burden of doing so.
- Proof: The probative value of this factor is neutral.

8. *The notoriety of the offense or its impact upon the reputation of the Agency*:

- The Warden Sanders believes this factor is aggravating because the Grievant's offenses are known to others in the institution. However, there is no evidence that the matter has received any outside publicity. (Ax. 1, p. 5)
- Proof: This factor is mitigating.

9. *The clarity with which the employee was on notice of any rules that was violated in committing the offense, or had been warned about the conduct in question*:

- The Warden believed this factor is aggravating because the Grievant signed for a copy of the Standards of Employee Conduct booklet and she received Standards training. (Ax. 1, p. 5)
- The Standards do not explicitly prohibit interaction with inmates; Grievant was not on notice that her inmate-related conduct was an issue; and Grievant's performance reviews are silent on the matter.
- Proof: This is a heavily mitigating factor.

10. *Potential for employee's rehabilitation:*

- There is no evidence of Grievant misconduct during her last year of employment.
- There is zero reference to misconduct-related counseling in the Grievant's performance appraisal forms.
- The Agency failed to proffer progressive discipline.
- Proof: The Grievant can be rehabilitated.

11. *Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, bad faith, malice, or provocation on the part of others involved in the matter:*

- Warden Sanders considered the Grievant the cause of unusual tension in Central Supply. Inmate Aiello transferred out of Central Supply and MST Vest resigned because of said tension.

- There is evidence that MST Vest and inmate Aiello were hardly innocent bystanders: MST Vest's "shot" was expunged and he wrongly blamed RSC for same, and inmate Aiello was a source of racial slurs.
- The Grievant acknowledged that she had a hand in causing some tension.
- Proof: There is blame aplenty for all concerned.

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee and others:

- The Agency failed to inform the Grievant that her interactions were inappropriate and it offered zero progressive discipline. Hence, if found guilty, some sanction short of removal would be appropriate.
- In deciding to remove the Grievant the Warden Sanders overemphasized the case's aggravating factors and underemphasized its mitigating factors
- Proof: A balanced analysis of the record evidence begs for a reduction in the discipline imposed: From the Grievant's removal to a Letter of Counseling.

Finally, the Union argued, the Grievant was not removed for just and sufficient cause. As remedy, it requests the Grievant's reinstatement, that she be "made whole" with interest, including compensation for any lost overtime opportunities she may have suffered, and that the instant discipline be expunged from her official personnel file. Further, the Union requests the Arbitrator retain jurisdiction for both Award-enforcement purposes and, prospectively, to decide whether the Union is entitled to reasonable attorney's fees and expenses.

VII. DISCUSSION AND OPINION

The Grievant, RSC, was hired by the Medical Center for Prisoners, Springfield, Missouri on January 27, 2002. She was removed on March 31, 2017, approximately fifteen (15) years later. Three (3) distinct charges of misconduct, each investigated and each sustained by SIA Anderson, explain why Warden Sanders terminated her employment. Discussed below is whether the Grievant's removal, pursuant to Article 31, Section h.1 of the CBA, was for "good and sufficient cause" and, if not, what is an appropriate remedy.

For several years, as far back as 2005/2006, HSA Yarbrough testified that she has received complaints about the Grievant's inattention to duty during the work day. However, it was not until the latter part of 2015 that Medical Center's managers began to take this matter seriously. On October 8, 2015, HSA Yarbrough testified to having heard from several health services department heads that Central Supply's stock of dialysis-related needles and syringes was depleted, forcing them to place expensive "emergency orders." RSC was responsible for this mishap: A serious mishap inasmuch as dialysis is likely a prescribed medical procedure for many of the Medical Center's ill prisoners.

Later that same day, HSA Yarbrough spoke with MST Vest. For a plethora of reasons, he was fed up with RSC and her workplace conduct. On October 9, 2015, HSA Yarbrough met with MST Hannaford who repeated many of MST Vest's complaints. RSC was lazy, left orders for peers to fill, talked continuously on the phone about personal matters, misused the institution's printer and computer, sat at her desk coloring pictures with crayons, working on puzzles, undercut peer's ability to supervise inmates, permitted inappropriate inmate activity, involving inmates Trice and Green, and inappropriately conversed with inmates about sexual matters. (Ax. 1, pp. 13-14; Ax. 1, pp. 15-16) These allegations were memorialized in memoranda that MSTs Vest and Hannaford sent to Warden Sanders on October 13, 2015. MST Vest sent Warden Sanders a second memorandum on October 14, 2015, reporting that earlier that day he witnessed RSC "laughing and talking" with inmate Ward in the sterilization room. (Tx. p. 33; Ax. 1, pp. 117-118; Ax. 1, p. 119)

On October 13, 2015, HSA Yarbrough removed inmates Trice and Green from Central Supply. (Tx. p. 46; Tx. pp. 186-187)

On October 15, 2015, Warden Sanders referred the allegations made about RSC to the OIA for investigation. (Ax. 1, pp. 131-133) On November 5, 2015, OIA issued an *Authorization to Conduct a Local Investigation into Alleged Staff Misconduct*, assigned the matter to a special agent and directed that "Within 120 days from the date of this correspondence, please forward your completed investigation ... to the Office of Internal Affairs ... for review." (Ax. 1, p. 129) SIA Anderson was the special agent assigned to this case. On July 21, 2016, 271 days later, SIA Anderson issued his report, concluding that there was sufficient evidence to support the allegations discussed *supra*. (Ax. 1, p. 151) On March 31, 2017, 533 days later, Warden Sanders removed the Grievant. (Ax. 1, p. 1) SIA Anderson neither explained why his investigation took so long to complete nor did he identify who authorized its extension.

Apropos the above discussion about time lags, Arbitral notice is made of Article 30, *Disciplinary and Adverse Actions*, Section d. of the CBA, which states:

> 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.

(Jx. 1) There is nothing in the record that explains why both the disposition of the OIA's investigation and the disposition of Warden Sanders' disciplinary action took so incredibly long. Thus, based on available evidence, the Arbitrator concludes that both the investigative and determinative aspects of the case were "untimely." In effect, the institution's managerial authority turned its collective back on above-quoted contract language. This conclusion is not dispositive of the instant Statement of the Issue, but it does serve as a mitigating factor in determining what the Grievant's penalty should be for proven misconduct.

On February 9, 2016, RSC was reassigned, exiting Central Supply. (Ax. 1, p. 52) On or about February 1, 2017, she was returned to Central Supply. (Tx. p. 165) On March 31, 2017, she was removed by Warden Sanders. (Ax. 1, p. 1) For approximately fourteen (14) months from the time she was removed from Central Supply until she was discharged, she worked elsewhere in the facility and, absent evidence to the contrary, she did so without incident. Based on this "field experiment," it is reasonable to conclude that she may be rehabilitated, that she can perform satisfactorily, and that a sanction of less than removal would adequately and effectively deter any future misconduct.

Charge 3: *Inattention to Duty: Specifications A.* SIA Anderson conducted a limited review of the Grievant's record of personal phone calls. He found that during work hours, RSC placed several personal phone calls on October 8 and 9, 2015 and on February 8 and 9, 2016. (Ax. 1, pp. 60-61) This record of phone calls, albeit limited, adds credibility to HSA Yarbrough's testimony that on several occasions she witnessed the Grievant on the phone, talking with family members. (Tx. pp. 53-54) Further, on July 13, 2016, in her sworn affidavit, the Grievant even acknowledged that she "... calls her mother and husband every day. Sometimes I will call them several times a day." (Ax. 1, p. 36) Further, at the February 15, 2018 Arbitration Hearing, the Grievant admitted to using the phone to make personal calls, but most calls, she maintained, were made during breaks, and they did not interfere with the performance of her duties. (Tx. pp. 161-162)

SIA Anderson's finding of excessive phone use on the dates he researched, HSA Yarbrough's eye witnessed testimony, and the Grievant's faintly self-critical account of her phone use are credible accounts that corroborate the phone misuse charges found in MSTs

Vest's and Hannaford's sworn affidavits. (Ax. 1, p. 22; Ax. 1, p. 45) For these reasons, the Arbitrator concludes that RSC's telephone use was excessive and that most certainly interfered with her OTJ performance. It's axiomatic: To be on a personal telephone call is not to be performing one's job duties. The Grievant is guilty as charged under Charge 3: Inattention to Duty: Specification A. Moreover, her misconduct was violative of Section 6, Responsiveness, Standards of Employee Conduct.

Charge 3: *Inattention to Duty: Specifications B.* As discussed *supra*, HSA Yarbrough removed the Grievant from Central Supply on February 9, 2016. (Ax. 1, p. 52) On that day, she heard about inmate Aiello's accusations and she learned that the Grievant had directed an inmate to deliver a paper bag containing four (4) scalpels to a clinic. As a result, with Warden Sanders' blessings, HSA Yarbrough prepared a memo reassigning the Grievant. In route to Central Supply to present said memo, HSA Yarbrough credibly testified that when she entered the room the Grievant was at her desk, working on a crossword puzzle. (Tx. p. 44) HSA Yarbrough gave the Grievant the memo and, while doing so, told RSC that she should not have allowed an inmate to deliver unsecured scalpels because they can be used as a weapon. The next day, February 10, 2016, HSA Yarbrough returned to the Grievant's desk where she found a cache of coloring pictures, crayons, crossword puzzles – which she photographed – in the desk's drawers. (Ax. 1, pp. 77-89) Neither this eye witnessed testimony nor the supporting photos were rebutted and, further, they corroborate the memoranda and sworn affidavits that MSTs Vest and Hannaford had prepared. Notwithstanding the Grievant's stress-relief rationale for coloring and working on crossword puzzles, the undersigned concludes that she is guilty as

charged in Charge 3: *Inattention to Duty: Specification B*, and that her proven misconduct violated the Standards of Employee Conduct, Section 6. (Ax. 2, p. 8)

Finally, as to Charge 3: *Inattention to Duty, Specification A and B*, it is noteworthy that the Grievant received a copy of the Agency's controlling rules – Standards of Employee Conduct – and she had received training about same annually for more than a decade. (Tx. pp. 69-70; Ax. 2, p. 8) The Union argued that the rules in question are vague: They are! The undersigned agrees. However, in this day and age, an employee would have to be from the planet Mars not to know that at work, one does not spend time on the telephone, color pictures, working on crossword puzzles and so forth. Also, but this time, as the Union persuasively argued, while Agency management has known for years that the Grievant tends to shirk her OTJ duties and responsibility, it has never counseled her or given her a reprimand for said misconduct. (Tx., pp. 178-179) Unfortunately, the Union argued, the first wake-up call the Agency gave to the Grievant was to terminate her employment. Article 30, Section c. of the CBA, quoted *supra*, states that parties endorse "progressive" discipline. The undersigned, like most labor arbitrators, concurs with this philosophy: Many, if not most, employee missteps can be corrected through behavioral modification prompted by counseling, a letter of reprimand or a suspension of the appropriate length.

Charge 2, *Demonstrating Favor to Inmates, Specification A*. HSA Yarbrough testified that she had some personal knowledge that the Grievant would allow unauthorized inmates be in Central Supply. In fact, HSA Yarbrough said, she once posted a sign outside of Central Supply that read, "No Unauthorized Inmates." (Tx. p. 51) In contrast, she also testified to not having first-hand knowledge regarding the accusations that (1) on October 14, 2015, inmate Ward was

impermissibly in Central Supply's sterilization room with the Grievant "laughing and talking," as MST Vest claimed; (Ax. 1, p. 91; Ax. 1, p. 97) and (2) on February 3, 2016, inmate Green was impermissibly in Central Supply for the better part of one (1) hour with the Grievant. (Tx. pp. 51-52; Ax. 1, p. 14) Unlike SIA Anderson, HSA Yarbrough had not seen the video tapes which show that each inmate was in Central Supply on the indicated dates.

Regarding the above accusations, the record's documented evidence shows that inmate Ward was in Central Supply on October 14, 2015, as MST Vest reported. Critically, however, his presence was not impermissible. His supervisor sent him to Central Supply to pick up certain supplies for the Laundry. Further, the anti-Ward "shot" that MST Vest had issued about this matter was subsequently expunged. (Tx. pp. 146-150; Ax. 1, pp. 93-95) The Agency failed to prove this allegation.

However, regarding the inmate Green accusation, the Agency did prove that he was in Central Supply for nearly one (1) hour on Wednesday, February 3, 2016, as charged. OIA Anderson witnessed as much, albeit indirectly, by viewing that date's Central Supply video feed. (Ax. 1, p. 62) The Arbitrator did not view the video. However, SIA Anderson did and his testimony was reliable. However, more importantly, RSC admitted that she and inmate Green were in Central Supply for a considerable amount of time. That admission was the only bit of her testimony on point that was trustworthy. The Grievant's labored explanation about inmate Green permissibly stopping by Central Supply on Wednesdays to assist her by pulling a "jack" heavily loaded with supplies from 5 Building to Central Supply did not ring true. (Tx. pp. 141-148) At that point in the arbitration proceedings, the undersigned had already learned that HSA Yarbrough had inmate Green removed from Central Supply four (4) months earlier. In any

event, when HSA Yarbrough was recalled, she testified that she had not authorized inmate Green to assist in Central Supply. Indeed, she took umbrage at the thought of it. Further, she stated that only staff may use the "jack." (Tx. pp. 179-180) As already implied, the arbitrator found HSA Yarbrough's testimony to be credible and her remark about the "jack" was never contradicted.

Concerning Charge 2, *Specification A*, the evidence that was proffered by the parties does not prove that the Grievant showed favoritism toward inmate Wade. Further, there is nothing in the record to suggest that his conversation with the Grievant somehow compromised the security of the institution or its occupants, or was a violation of the Standards of Employee Conduct, particularly, Section 5. b. (Ax. 2, p. 6) Nevertheless, the Agency did prove that inmate Green's presence in Central Supply was unauthorized. Further, the undersigned certainly will not reward the Grievant for her lack of candor in this particular matter. As a law enforcement officer, testifying under sworn oath, more, much more is expected. The Arbitrator finds that, as charged, RSC demonstrated favoritism toward inmate Green.

Charge 2, *Demonstrating Favor to Inmates, Specification B.* The Agency failed to prove by a sufficient quantum of evidence that RSC interfered with the ability of MSTs Vest and Hannaford to effectively supervise inmates. The Grievant's discussion of supervisory styles and racial differences made sense. Further, MST Vest's accusation regarding inmate Wade was so far off the mark that there is cause to question his motivations. Still further, absent from the record is eye-witnessed testimony about this specification. All the undersigned had to work with were MST Vest's and MST Hannaford's sworn affidavits, which as the Union pointed out are hearsay.

Charge 1: *Sexual Conversations with Inmates.* HSA Yarbrough testified that she had no personal knowledge of sexual conversation between the Grievant and inmates. (Tx., p. 50) Indeed, except for the Grievant, none of witnesses the Agency presented in this case had personal knowledge of such conversations.

The Grievant, acknowledged that she had conversations about Bruce Jenner's gender conversion, but she denied that her conversations were with inmates. Rather, she testified, the topic was a current event about which only she, MST Vest and MST Hannaford discussed. (Tx. pp. 138-139) Moreover, the Grievant admitted to stripper conversations that did involve inmates. However, she explained, the conversations only surfaced because the institution is located adjacent to a strip club. Further, she affirmed that the conversations were never "personal," and that she never initiated the conversations. (Tx. pp. 139-140)

To prove Charge 1, the undersigned needed to hear from the Agency's only eye witnesses: Specifically, MSTs Vest and Hannaford, and inmate Aiello. Their sworn affidavits allege sexual conversations. However, the Agency failed to present testimony by MST Hannaford, even though she was an employee of the institution and by MST Vest, who had resigned. Interestingly, the Agency's overall case included testimony from AHSA Mead, SIA Anderson and Warden Sanders, all retired. It is understandable that the Agency might not use inmate Aiello as a witness, but why the Agency did not use MSTs Vest and Hannaford as witnesses remains an unanswered question.

MSTs Vest and Hannaford each allege Charge 1 in their sworn affidavits, but the Grievant, also under oath, refuted their allegations. Hearsay cannot be cross-examined and, as

such, it takes a back seat to the Grievant's own words. Ultimately, the Arbitrator concludes, the Agency did not prove that the RSC is guilty of Charge 1's allegations.

The above-discussed findings are easily summarized. By a preponderance of evidence, the Agency: (1) failed to prove Charge 1; (2) succeeded in proving Charge 2, Specification A, but failed to prove Specification B; and (3) succeeded in proving Charge 3, Specifications A and B. Some of the Agency's charges that resulted in the Grievant's removal have fallen to the wayside, specifically: that she impermissibly partakes in sexual conversations with inmates; and that she interferes with her peer's ability to effectively supervise inmates. Proven, however, is that the Grievant inattention to duty is legend and, to a lesser degree than charged, she does show inmate favoritism. Based on these findings, the undersigned concludes, the Agency removed the Grievant without "just and sufficient cause."

A penalty is warranted particularly because of the Grievant's various ways of avoiding work while on duty, which seemed chronic, having persisted for so many years. Whether she could modify her behavior to become a trustworthy and productive employee was an open question. However, in the instant case, the time that elapsed between the date of the Grievant's alleged missteps and the date of her removal, was so long that, while still employed, she was able to demonstrate that she was both willing and able to modify her workplace conduct.

As remarked *supra*, the undersigned is unaware of any problems the Medical Center had with her subsequent to her removal from Central Supply. Said problems, previous to her removal from Central Supply, include complaints from both supervisors and peers who found

her difficult to work with and/or who feared that her workplace conduct compromised the institution's efficiency and exposed staff and inmates to harmful risks.

Given what is now known about the Grievant, including the likelihood that she could be a rehabilitated and productive employee, the undersigned referred to Article 30, Section c. in the CBA – progressive discipline – when contemplating the level of discipline her missteps warrant. The undersigned is cognizant of the fact that said discipline will be her first disciplinary event for the proven offenses. Further, the undersigned treats as mitigating the Grievant's fifteen (15) years of service at the Medical Center and a disciplinary record of offenses that are fundamentally different from the offenses for which she was removed. The single most significant aggravating factor in the disciplinary calculus is the extent to which the Grievant was inattentive to duty. According to the Federal Bureau of Prisons, Standard of Disciplinary Offenses and Penalties "... loafing, wasting time, idleness, or unproductive activities" are illustrative of offenses covered by the term Inattentive to Duty. (Ax. 2, p. 23) Spending time on the telephone, coloring pictures, working crossword puzzles and so forth fits this genre of offenses. Interestingly, the Inattentive to Duty offense carries a penalty that extends from letter of reprimand to removal. (Ax. 2, p. 23)

VIII. AWARD

After considering the record evidence, the parties' arguments and relevant mitigating and aggravating factors, the undersigned concludes that the Grievant's removal was not for just and sufficient cause. For her proven offenses, the Grievant shall be reinstated and her removal shall be reduced to a one (1) week suspension. The Grievant shall be reinstated to her previous position and pay grade or to an equivalent position and pay grade. With reinstatement, the

Grievant shall be "made whole," excluding interest and foregone overtime opportunities, but including seniority and fringe benefits. Further, the Grievant's official personnel file shall be updated to reflect that the Grievant's removal is replaced by the ordered one (1) week disciplinary suspension.

Further, for the sole purpose of enforcing this Award, the undersigned shall retain jurisdiction for both Award-enforcement purposes and for the purpose of deciding whether the Union is entitled to reasonable attorney's fees and expenses.

ISSUED and ORDERED on the 28th day of July, 2018 from Tucson, Arizona.

Mario F. Bognanno,
Labor Arbitrator and Professor Emeritus