

JOHN B. BARNARD  
Arbitrator • Mediator

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March 5, 2008

Mrs. Jocelyn A. Stotts, Esq.  
Coplin & Heuer  
124 West Capitol Avenue  
Suite 1650  
Little Rock, Arkansas 72201

Re: FWC 07-52838  
FCC Order, #F6E3957  
Hernandez

Dear Mrs. Stotts:

Enclosed is the decision on the referenced case,  
along with the bill. Please have the invoice  
processed.

I've received your request for attorney  
fees, and I've asked Mike Markiewicz to  
respond.

Thanks,



# ARBITRATOR'S BILL

Arbitrator John B. Barnard

Case Number FMC S 07-52838

Address 13763 Danvers Drive

Number of Grievances 1

Dallas, Texas 75240

(Termination, Hernandez)

## UNION

American Federation of Government Employees  
AFGE Local 3957

## EMPLOYER

Department of Justice  
Federal Correctional Complex  
Ochslele, Louisiana

## ARBITRATOR COMPENSATION

Number of Hearing Days 1 @ \$ 950.00 = \$ 950.00

Hearing Dates 1/9/08

Study/Preparation Days 5 @ \$ 950.00 = \$ 4750.00

Other(Specify) 2 days travel 2 @ \$ 950.00 = \$ 1900.00

(down at bank) Fee \$ 7600.00

## ARBITRATOR EXPENSES

Transportation 736 miles @ 44¢ \$ 323.84

Hotel \$ 136.78

Meals \$ 68.50

Other (Specify) Admin fee \$ 85.00

EXPENSES \$ 614.12

TOTAL \$ 8214.12

PAYABLE BY American Federation of Govt Employees, Local 3957 \$ 4107.06

PAYABLE BY Dept of Justice, FCC Ochslele, Louisiana \$ 4107.06

Arbitrator Signature John B. Barnard Date 3/5/2008

Social Security Number 491 38 2501

In the Matter of Arbitration

between

U.S. Department of Justice  
Federal Bureau of Prisons  
Federal Correctional Complex  
Oakdale, Louisiana

and

American Federation of Government Employees  
Council of Prisons  
Local 3957

FMCS 07-52838  
Alfredo Hernandez,  
Termination

before

John B. Barnard  
Arbitrator

For the Company

Mr. Michael Markiowicz  
Labor Relations Specialist

For the Union

Ms. Jocelyn Stotts, Esq.  
Coplin & Heuer

Time and Place of Hearing

August 23, 2007, January 9, 2008  
FCC Oakdale, Louisiana

### The Issue

Was the removal action taken against the grievant, Alfredo Hernandez, for just and sufficient cause and the efficiency of the service? If not, what is the proper remedy?

### Background

The grievant, Alfredo Hernandez, has been a correctional officer at FCC Oakdale for approximately eight years. On June 21, 2006, he received a proposal notice of removal. Such notice stated,

#### Charge 1: Failure to Follow Policy

Specification A: On January 14, 2006, you were assigned as the Vernon Unit #1 Officer, from 7:30 a.m. to 4:00 p.m. You were assigned equipment for this post to include, Key Rings F-1, F-2, and a radio/body alarm. In your affidavit dated February 1, 2006, you admit to placing your assigned keys and radio in a unit team drawer in the conference room. The cabinet was unsecured and the door leading to the conference room was also unsecured. Both the cabinet and the conference room are potentially accessible to inmates. The Correctional Services Manual, Program Statement 5500.11, states in relevant part, that "keys must be secured, and attached to your belt at all times." The Post Orders for Vernon Unit require you to wear your assigned keys and radio at all times until exchanged with the evening –watch officer. Removing your keys and radio from your person and placing them in a cabinet hindered the security of the institution, is in violation of policy and forms the basis for this charge.

Specification B: On January 18, 2006, you were assigned as the Vernon Unit #1 Officer, from 7:30 a.m. to 4:00 p.m. You were assigned Key Rings F-1, F-2 and a radio. At approximately 3:15 p.m., you were observed by your supervisor approaching the front entrance. Prior to leaving the Vernon housing unit, you gave your assigned keys and radio

to the unit secretary. The Correctional Services Manual, Program Statement 5500.11, states in relevant part, that "keys must be secured, and attached to your belt at all times." The Post orders for Vernon Unit require you to wear your assigned keys and radio at all times until exchanged with the evening-watch officer. Removing your keys and radio from your person and giving them to the unit secretary, who was not your relief officer, is in violation of policy and forms the basis for this charge.

Charge 2: Leaving Assigned Post without Authorization

Specification A: On January 14, 2006, you were assigned Vernon #1 Officer, from 7:30 a.m. to 4:00 p.m. At approximately 3:35 p.m. or 3:40 p.m., you proceeded to leave Vernon Unit without being properly relieved by the officer for the next shift. you did not request nor receive permission from your supervisor to leave your assigned post prior to the end of your shift. Your post orders require you maintain security and accountability of inmates at all times while on your assigned post. Leaving your assigned post without authorization hinders inmate accountability, the safety and security of staff and inmates, and forms the basis for this charge.

Specification B: On January 18, 2006, you were assigned Vernon Unit #1 Officer, from 7:30 a.m. to 4:00 p.m. At approximately 3:10 p.m., you were observed by your supervisors Captain Shawn Million, and Lieutenant Charlie Sibly, approaching the front entrance. You informed Captain Million you had been relieved from duty and going home. Upon further review by your supervisors, it was determined that you were not officially relieved from your housing unit post assignment. Additionally, you did not request nor receive permission from your supervisor to leave your assigned post prior to the end of your shift. You state in your affidavit dated February 1, 2006, "I did not get authorization from the Operations Lieutenant to leave the unit clearly because I did not think it was necessary as I had seen my relief coming down the walk." Your post orders require you to maintain security and accountability of inmates at all times while on your assigned post. Leaving your assigned post without authorization hinders inmate accountability, the safety and security of staff and inmates, and forms the basis for this charge.

Following Hernandez's written and oral replies to the charges, the

Agency made the decision to terminate him by letter dated September 27, 2006.

Such matter was timely grieved and is now properly before the arbitrator.

### Discussion and Conclusions

Charge 1, Failure to Follow Policy, Specification A reads in part,

On January 14, 2006,...

...you admit to placing your assigned keys and radio in a unit team drawer in the conference room. The cabinet was unsecured and the door leading to the conference room was also unsecured...removing your keys and radio from your person and placing them in a cabinet hindered the security of the institution, is in violation of policy and forms the basis for this charge...

In his written statement dated July 13, 2006, referencing the January 14, 2006 incident, and in reply to Specification A, Hernandez stated in part,

...At approximately 3:40 p.m., I asked Officer Mancil to watch my equipment, which he said he would, so I put it in the cabinet until he was ready to take possession of it. I knew the compound was closed and all the doors were secured with all inmates locked inside the dorm...I was never counseled on equipment control and my quarterly evaluation never reflected that there was a problem in this area...

Officer Mancil testified,

Q. Have you ever held equipment for another officer while they left the unit for any reason?

A. Yes, ma'am.

... Q. If an officer isn't there to relieve another officer, will the unit secretary held that equipment until the next officer came?

A. Yes ma'am, most of them would have.

Q. Have you ever known any secretary or officer being reprimanded for that?

A. No, ma'am.

Q. Is that something that you would do?

A. I would hold it for another officer, yes ma'am.  
(tr pp 94/ 95)

Hernandez testified that Mancil relieved both he and Officer Aucion on January 14, 2006. Hernandez,

A. Mancil came in. We opened the door for him to come into the unit. So he came into the unit. Alcoin gave him the equipment. He was on one side, and I was one the other side of him. He got Acoin's equipment and the keys and the radio and I said, "Hey, Manuel, you got this?" If he had mine. And he said "Yes, I got it." And then I put it down—I put it in the drawer...So I just put it right there. He said, "I got it." Then he got his keys, put it on his pocket and his radio, ad he walked me and Alicoin out, opened the door...

... Q. After January 14, 2006, did you continue with your regular shift and your regular schedule?

A. Yes, I did.

Q. Did anything change whatsoever?

A. Nothing changed.  
(tr pp 98, 99)

Charge 1, Failure to Follow Policy, Specification B reads in part,

On January 18, 2006...you were observed by your supervisor approaching the front entrance. Prior to leaving the Vernon house unit, you gave your assigned keys and radio to the unit secretary—removing your keys and radio from your person and giving the to the unit secretary who was not your relief officer, is in violation of policy and forms the basis for this charge...

In his written statement reference the January 18, 2006 incident, and in reply to Specification B, Hernandez stated in part,

...I asked the unit secretary to hold my equipment and observe the Unit for a few minutes until the relieving Officer arrived, which she agreed to do so. I saw my relief coming down to the key so I knew that it would be only a few minutes. It is a common practice in Correctional Services that the secretaries relieve the Unit Officers.

...It is also part practice that the Agency utilizes Unit Secretaries to work as a Unit Officer for entire shifts. This is a fact well known by all employees at FCC Oakdale, including Management. No equipment was jeopardized during this, nor was any inmate or staff put at risk. The post orders are guidelines and not policy. Policy does not state that a Unit Officer cannot be relieved by a Secretary...

Hernandez testified,

...I see my relief that was walking down the walk...I could see him walking... And I asked the secretary, I said, "They called me. My daughter has a tooth problem and I have to leave. Can you please hold the keys and the radio and give it to Rider? I see him coming. When I walk by him, I'm going to tell him not to take too long and get over there because you got the keys."

Q. Which secretary was this?

A. Lopez.

Q. What did she say?

A. No problem.

Q. Who did you give the keys and the radio to that day on January 18, 2006?

A. I gave it to Miss Lopez.  
(tr p 101)

Oberlin unit secretary Tamara Grantham testified as to the practice,

Q. Will you tell us about your involvement with shift changes where an officer is getting off of shift?

A. I've relieved officers sometimes. I would take their equipment, and they would be properly relieved. And so they would go ahead and go.

Q. What caused you to get involved with relieving an officer from a shift?

A. Their relief may be running behind...and they would come to me and ask me if I would do it, and I would tell them, yeah, you know.

Q. Has that been the practice since you became a secretary six years ago?

A. Yes, ma'am.

... Q. Have you ever been counseled by any of your supervisors or anyone about this practice?

A. No, ma'am.

I then asked of Union counsel,

Q. Are you specifically with this witness trying to refer to the 14<sup>th</sup> or the 18<sup>th</sup>?

A. To the 18<sup>th</sup>.  
(tr pp 62-64)

Senior Officer Specialist Juanita Walls testified as to an incident that occurred on February 21, 2007,

...When I arrived on my post in Vernon Unit, I got there and one of the case managers was sitting at the table, but the equipment was on the side of her with the keys on—the radio has a little antenna on it, and the keys was on top of the radio, and it was just sitting on top of the table. And I asked her where was the officer, and she told me she didn't know. "I guess he's gone." I said, "Well, who's supposed to have the equipment? She said, "Well, he said he had to leave and go pick his kids up."

Q. What officer were you supposed to be relieving?

A. Officer Andrews.

... Q. To your knowledge, was there any investigation of Officer Andrews for his behavior?

A. Not to my knowledge.  
(tr pp 68, 69)

Walls further testified as to several other similar incidents that occurred subsequent to Hernandez's termination. She testified that, to her knowledge, the officers involved were not reprimanded.

Finally, unit secretary, Jacqueline Lopez testified as to the described practice,

Q. Will you describe for us how shift changes occurred in which you were involved prior to Officer Hernandez's termination?

A. I would take the keys and the radio from the officer, and that's basically it.

... Q. Did you call anybody and notify them of that?

A. Never.

... Q. From the time that you found out that there was an investigation of Officer Hernandez until he was terminated, did you change your practice with regard to accepting keys from correctional officers?

A. No.

Q. After he was terminated, did you change your practice?

A. Yes.

(tr pp 77, 78)

Charge 2, Leaving Assigned Post without Authorization, Specification A

reads in part,

On January 14, 2006, you were assigned Vernon #1 Officer, from 7:30 a.m. to 4:00 p.m. At approximately 3:35 p.m. or 3:40 p.m. you proceeded to leave Vernon Unit without being properly relieved by the officer to the next shift...

In his written statement dated July 13, 2006, Hernandez stated,

On January 14, 2006, I was assigned to Vernon #1 as the Unit Officer. At approximately 3:40 p.m., I asked Officer Mancil to hold my equipment and he said he would. At that time, I departed the Unit as do all the Correctional Officers when they are relieved.

Hernandez testified that at 3:40 p.m., he asked Mancil to watch his equipment, which he said he would. Hernandez further testified that Mancil, on January 14, 2006, relieved both he and Officer Ancion, and that both he

and Ancion gave Mancil their equipment. Mancil testified,

Q. Have you ever held equipment for another officer while they left the unit for any reason?

A. Yes, ma'am.  
(tr p 94, 95)

Charge 2, Leaving Assigned Post without Authorization, Specification B

reads in part,

On January 18, 2006...at approximately 3:10 p.m., you were observed by your supervisors, Captain Shawn Million and Lieutenant Charlie Sibley, approaching the front entrance. You informed Captain Million you had been relieved from duty and going home...you were not officially relieved...you did not request nor receive permission from your supervisor to leave your assigned post prior to the end of your shift...Leaving your assigned post without authorization...forms the basis for this charge.

Hernandez, in his written response, stated in part,

I asked the Unit Secretary to hold my equipment and supervise the Unit until my relief arrived, and she agreed. This is nothing unusual and in fact a common practice... for some unknown reason the Captain has chosen to go after me in an attempt to make an example of me...All of these incidents are well known daily practices used by all Correctional Services Staff. I have no idea why the Captain decided to select and charge me with a violation when all other Correctional Services have done the same thing and it has never been an issue before...

Hernandez testified that he saw his relief on January 18, 2006 walking down the walk, and could see him walking. With that, he asked the unit secretary to hold his keys and radio and then give it to his relief. Officer Rider. She agreed.

First and foremost, it seems inconceivable that the indents that led to Hernandez's termination occurred in January, 2006, yet he was not terminated until late September, 2006, a period of eight months. There was no testimony or evidence that would explain or excuse such a time lag. Even more egregious is the fact that Hernandez performed his normal duties from January until late September. Such begs the question that if Hernandez's actions were that serious that they would lead to his termination, why then was he allowed to perform his duties for those eight months? Not only were the Agency's actions inexcusable in this regard, they sent the message that Hernandez's allegations were not that serious, as he was allowed to continue to work. That in itself more than suggests that his termination was not taken for the efficiency of the service. There is simply no excuse for the Agency's actions in this regard. Much arbitrable authority would reinstate a grievant and make him whole on the basis of that alone.

That aside, the Agency would have been well served in their investigation to be aware of what was a common practice within the units among the officers and the unit secretaries. It is hard to imagine that supervision was not aware of that practice.

There is ample testimony from unit secretaries, such testimony was not

refuted, that the common and accepted practice was to accept Officers' keys and equipment and to relieve those Officers. The testimony of Jacqueline Lopez was on point,

Q. Will you describe for us how shift changes occurred in which you were involved prior to Officer Hernandez's termination?

A. I would take the keys and the radio from the office, and that's basically it.  
(tr p 77)

Lopez,

Q. Did anybody reprimand you or discipline you for accepting keys from correctional offices?

A. No.

Q. Has anyone told you not to do it again?

A. No.

Q. Have any of the correctional officers asked you to do it since he's been...

A. Yes.  
(tr p 79)

As noted, both Tamara Grantham and Juanita Walls testified as to the same practice.

Existing practices such as described only serve to reinforce that it is acceptable to give keys and equipment to a unit secretary, rather than to follow guidelines/procedures. Such acceptable practices are even more

reinforced when supervision take no action. To now discipline an officer such as Hernandez when he and others acted in accordance with such a condoned practice cannot be validated, as other officers have done the same thing, undoubtedly believing they were not violating any guideline/policy, and especially since supervision did nothing to correct such a practice. There was no evidence presented to even suggest that anyone was ever disciplined for engaging in the described practice.

I note, however, that Agency ex. 2, Annual Training, FY 2005, Key Control (ACA) instructs officers on the proper procedures. Such training includes some specifics,

...strict adherence to key control policies and procedures is required. This topic is so important that ACA has designed it as a mandatory topic for yearly training.

...keys will be carried on a ring which is securely fastened on your belt...keys shall never be thrown around, dropped, left unattended, or otherwise handled carelessly.

...Always personally hand the keys to your relief.

Obviously there was a breakdown somewhere in the system from the key control instructions and the existing practice with the officers and the unit secretaries. It's one thing to conduct training, and it's another thing to have a continuing practice such as what occurred here.

As to the specifics of this case, based upon the evidence and testimony as

presented, I must conclude that Hernandez's removal was not taken for just and sufficient cause and the efficiency of the service. Specifically,

Charge 1 Specification 1

Hernandez's testimony was unrebutted that on January 14, 2006, both he and Officer Alcoin gave Officer Mancil their equipment. Mancil was relieving both officers. Officer Alcoin verified that,

Q. Will you tell us what happened on January 14<sup>th</sup> at the end of the shift?

A. My relief got there. I think it was Officer Mancil. And I wasn't normally working down there. So he relieved me. He said, "I'm your relief." I said, "Okay." And I got my stuff together, and I was going to leave. And Officer Hernandez was working with me that day and he said, "I got something I need to see about." And he said, "Do you mind taking—holding my stuff?" and he said, "Sure" He said, "I got it." And we exited the unit at the same time.

... Q. How did you get out of the unit?

A. Officer Mancil opened the door for us because we had already given him our stuff... he had to open the door for us because at that time I had no more keys or anything.

(tr pp 85, 86)

Of significant note here is that there was no evidence presented to show that Alcoin was disciplined. Only Hernandez received any discipline.

Charge 1 Specification 2

Hernandez, after having observed his relief coming within a few minutes, gave his equipment to the unit secretary, as such was the common practice in existence.

Again, no discipline was given to the unit secretary for that. Hernandez was

the only one disciplined.

Charge 2 Specification A

Again, Hernandez testified without rebuttal that Officer Mancil agreed to take the equipment. Alcoin's testimony verified that. Alcoin was not disciplined.

Charge 2 Specification B

Hernandez responds to such charge by noting that this equipment was left with the unit secretary, the accepted practice at that time. Hernandez was the only one disciplined.

In sum, no other officer or unit secretary was ever disciplined for the accepted practice of leaving equipment, other than Hernandez. It is one thing to have annual training with officer as to proper guidelines/procedures, but such training apparently needs to include unit secretaries and other applicable employees. An accepted practice was in place which supported the employees' change of equipment and relief procedures. That only told the affected employees it was permissible to do what they did. Supervision has the responsibility to insure that proper procedures are followed. That was not done here. Even more egregious here was the fact that the events that led to Hernandez's termination occurred in January, yet he was not terminated until eight months later, having been allowed to work his normal duties for those eight months. That alone tells one that his actions in January, 2006 were of no or little consequence. The Agency's handling of

that entire matter should in itself dictate Hernandez's reinstatement with proper compensation. It does not take a leap in logic to conclude that, for whatever reason, Hernandez was singled out with his termination. The record further establishes that he had no discipline on his record, and that he was considered a good employee.

Decision

For the reasons as discussed, the removal action taken against the grievant, Officer Alfredo Hernandez, was not for just and sufficient cause and the efficiency of the service.

I must find that the aggrieved employee was affected by an unjustified and unwarranted personnel action, which personnel action has resulted in the withdrawal and reduction of the grievant's pay, allowances and differentials.


Officer Alfredo Hernandez is to be reinstated without delay to the same position he held at the time of his termination. His seniority is to be restored upon his reinstatement.

Starting from the time of his termination until his reinstatement, he is to receive full back pay, less any unemployment compensation and any outside earnings received during his time off.

His full contractual benefits are to be given him from the time of his termination forward. Any question as to his pension benefits will be subject to ERISA.

I will retain jurisdiction over this entire decision until it has been fully implemented, including the resolution of attorney fees due.

March 5, 2008  
Dallas, Texas

  
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John B. Barnard, Arbitrator