DANIEL R. SALING, ESQ.

ARBITRATOR & MEDIATOR
33192 Ocean Hill Dr.
Dana Point, CA 92629

TEL (949) 496-7230
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May 14, 2010

Mr. John T. Le Master
Assistant General Counsel
United State Department of Justice
Federal Bureau of Prisons
320 First Street NW, Room 812
Washington DC 20534

Mr. Dan O. Ditto, President
American Federation of Government Employees, #1031
P.O. Box 1854
Yazoo City, MS 39194

RE: Arbitration between AFGE, Local #1031 and Federal Bureau of Prisons
FMCS File No.: 10-50193

Dear Mr. Le Master and Mr. Ditto:

It was a pleasure to meet and work with you. Enclosed is the Award based upon the testimony and evidence put forth by the parties in the one day of scheduled hearing on this matter. The fees and expenses due me are as follows:

Hearing day/research/award/travel		**$ 3,200.00**
Travel Expenses (mileage/tolls/food/office)		**$ 764.58**
	TOTAL =	**$ 3,964.58**

DUE FROM:	**AFGE, Local #1031:**	**$ 1,982.29**
DUE FROM:	**Federal Bureau of Prisons:**	**$ 1,982.29**

I appreciated the opportunity to work with you and I hope that if I can be of further service to you please contact me.

Sincerely,

Daniel R. Saling, Arbitrator
Soc. Sec. No. 560-56-2315

Daniel R. Saling, Esq

Arbitration & Mediation Services

33192 Ocean Hill Drive
Dana Point, CA 92629
Phone 949-496-7230 Fax 949-489-3395

DATE: May 14, 2010
INVOICE #
FOR: ***Arbitration Fee and Expenses***

Bill To:
Mr. Dan O. Ditto, President
American Federation of Government Employees, #1031
P.O. Box 1854
Yazoo City, MS 39194

Phone (662) 716-1020, Ext 4313 Fax (6620 716-0012

DESCRIPTION		AMOUNT
Arbitration Cancellation Fee		$3,200.00
Expenses - made prior to cancellation		$764.58
	TOTAL	**$3,964.58**
AFGE, Local #1031 $1,982.29		
Federal Bureau of Prisons, Yazoo City $1,982.29		
	Your Share of the Fee	**$1,982.29**

Make all checks payable to **Daniel R. Saling, Esq.**
If you have any questions concerning this invoice contact Daniel R. Saling, Esq.
Phone: 949-496-7230 Fax: 949-489-36954 email: SalingLaw@aol.com

THANK YOU

IN THE MATTER OF THE ARBITRATION BETWEEN

AFGE Union, #1013

and

Federal Bureau of Prisons – Yazoo City, Mississippi

FMCS 10-50193

GRIEVANCE: Suspension

GRIEVANT: Woodroe Partee

OPINION AND AWARD

DANIEL R. SALING, Esq.

AWARD DATE: May 14, 2010

APPEARANCES FOR THE PARTIES

AFGE, Local 1013:

Mr. Dan Ditto
President, AFGE, Local 1013
P.O. Box 1854
Yazoo City, MS 39194

Federal Bureau of Prisons:

Mr. John T. LeMaster, Esq.
U.S. Department of Justice
320 First Street, NW
Room 818-LRM
Washington, DC 20534

WITNESSES:

AFGE, Local 1013:

Mr. Kenneth Domino, Federal Correctional Facility Yazoo City, Mississippi
Lieutenant Arthur Richardson, JR., Federal Correctional Facility Yazoo City, Mississippi

Federal Bureau of Prisons:

Captain Debra Dawson, Federal Correctional Facility Yazoo City, Mississippi
Mr. Kenneth Domino, Federal Correctional Facility Yazoo City, Mississippi
Warden Bruce Pearson, Federal Correctional Facility Yazoo City, Mississippi
Russell Perdue, Deputy Regional Director Southeast Region, Federal Bureau of Prisons
Mr. Woodroe Partee, Grievant, Federal Correctional Facility Yazoo City, Mississippi

PROCEDURAL HISTORY

The Grievance in question, FMCS Case Number 10-50193, was submitted to the employer in writing on or about October 4, 2009, (JX 5) and thereafter processed in accordance with Article 31 & 32 of the Agreement, between the Federal Bureau of Prisons and Council of Prison Locals, America Federation of Government Employees, first effective March 9, 1998, through March 8, 2001, hereinafter referred to as the "Agreement." (JX 1) Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with Articles 32 of the Agreement. Using the services of the Federal Mediation and Conciliation Service (FMCS), Daniel R. Saling was appointed as Arbitrator on October 14, 2009.

An arbitration hearing was held at the Federal Correctional Facility Yazoo City, Mississippi, on February 24, 2010. During the course of the hearing, all parties were afforded full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. All witnesses were duly sworn.

A stenographic record and transcript of the arbitration hearing were prepared by and under the direction of the parties. The Arbitrator received the final transcripts on or about March 18, 2010. The parties agreed that the hearing transcripts would be the official record of the hearing.

The parties elected to file post-hearing briefs. The briefing schedule was extended by mutual agreement because of the illness of one of the advocates. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on May 10, 2010.

At the time of the hearing, the parties stipulated that the grievance and arbitration were timely and properly before the Arbitrator and the Arbitrator had the right to submit a final

and binding decision.

PERTINENT PROVISIONS OF THE AGREEMENT:

Article 3 -- Governing Regulations:

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules and regulations.

...

Article 6 -- Rights of the Employee:

...

Section b.

...

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

...

6. to have all provisions of the Collective Bargaining Agreement adhered to.

...

Article 30 -- Disciplinary and Adverse Actions:

...

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognized that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

...

Submission Statement:

The Union and Agency agreed to the following submission statement:

Whether the discipline imposed upon Woodroe Partee was taken for just and sufficient cause and efficiency of service? If not, what shall the remedy be?

FACTUAL BACKGROUND

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's decision.

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

The American Federation of Government Employees (AFGE), Local 1013, is hereinafter referred to as the "Union or AFGE." The Federal Bureau of Prisons is hereinafter referred to as the "Bureau." The Federal Correctional Facility located at Yazoo City, Mississippi, is hereinafter referred to as the "Facility or Agency." Mr. Woodroe Partee is hereinafter referred to as the "Grievant."

In a letter dated June 17, 2009, the Agency informed the Grievant that the Agency was proposing to suspend the Grievant for a period of twenty-one (21) days for the charge of Inattention to Duty, a violation of the Employees Standards of Conduct. (JX 2) The proposed letter of suspension indicated that on February 13, 2009, the Grievant was

assigned to Mobile Unit #1, during the hours of 0001-0800. This shift is also referred to as the Morning Watch. During this watch, the Grievant was inattentive to his assigned duties and was observed by Warden Pearson, hereinafter referred to as the "Warden," parked in one place for an extended period of time in violation of Agency Policy.

On July 7, 2009, the Union President, Mr. Dan Ditto, submitted a memorandum to Mr. Russell Perdue, Deputy Regional Director indicating the Union's concern over the Grievant's proposed suspension. (JX 4) The Union pointed out that the Grievant was a career officer with more than nineteen (19) years of service credit and had no disciplinary record. The Grievant had never received any type of discipline, not even a counseling letter. Further, the Grievant had received Sustained Superior Performance awards, Recruiting Awards and a Letter of Commendation for his action during a riot at the FCI Memphis, Tennessee facility.

On the Morning Shift of February 13, 2009, the Grievant was one of two correctional officers who were assigned to drive an Agency vehicle around the outer fenced perimeter to insure that inmates would not escape. The Mobile Units were assigned to travel around the institution, with one unit taking one-half of the outer fence perimeter and the second unit taking the remaining one-half of the outer fence perimeter. In addition to his patrol responsibilities, the Grievant was required to stand guard at the Rear Gate at approximately 3:36 AM, when a Unicorn truck entered the Rear Gate and departed at 3:51 AM and when a trash truck entered the compound at 3:32 AM and departed at 4:14 AM. The entry and departure time of these vehicles was placed in the Control Log and the Lieutenant's Log records. (MX 9 & MX 12) After the trash truck departed at 4:14 AM, the Grievant and Lieutenant Arthur Richardson, Jr., began to secure the Rear Gate which took 5-7 minutes. Once the Rear Gate was properly secured, the Grievant drove the Lieutenant to the front of the facility and left him at the front door. (MX 7)

The Grievant returned to his patrol responsibilities and in a short while posted-up and began checking his paperwork so he could turn the paperwork into the Lieutenant for his signature. The paperwork would then be turned over to the on-coming shift workers. It was during this time period that Warden Pearson observed the Grievant's Mobile Unit sitting stationary and not moving around the fence perimeter.

Warden Pearson indicated that the prison had averted an escape attempt in January of 2009, and therefore the entire facility was on high alert. While the attempted escape was unsuccessful, it was necessary for the Mobile Units to become involved in the apprehension of the inmate. The Warden indicated that because of the attempted escape, he decided to visit each of the three work shifts, and at approximately 4:15 AM, on the morning of February 13, 2009, he arrived at the prison facility to observe the Morning Watch. The Warden testified that he did not have a watch and had relied upon the clock in his vehicle to determine his arrival time. It was later determined that the vehicle clock was fifteen minutes slower than the institutional clock. While he testified that he arrived at the facility around 4:15 AM, it was determined later that he had actually arrived around 4:30 AM.

The Warden indicated that upon his arrival he parked in front of the administrative building and noticed that Mobile Unit #1, the Unit driven by the Grievant, was parked. The Warden saw that Mobile Unit #1 was stationary and not patrolling the outer fence perimeter and he thought that was unusual. The Warden drove his personal vehicle down the perimeter road to see if there were any abnormal activities at the Rear Gate. Having found nothing unusual at the Rear Gate, the Warden parked his vehicle and observed Mobile Unit #2, driven by Mr. Kenneth Domino, sitting stationary approximately half way down the perimeter fence in the back of the institution. The Warden testified that he sat in his vehicle for approximately five minutes waiting to see if Mobile Unit #2 was going to move and to see if Mobile Unit #1 was making the full rotation while Mobile #2

was stationary. The Warden indicated that he did not see Mobile Unit #1 and therefore determined that it was not making full rotation and therefore was not fully performing his assigned duties.

The Warden indicated that he did not see movement from Mobile Unit #2 and he drove his vehicle down the perimeter road and approached the vehicle with his headlights on. When the Warden reached Mobile Unit #2, he observed Mr. Domino asleep in the vehicle. The Warden walked up to Mobile Unit #2 and knocked on the window, awaking Mr. Domino. The Warden directed Mr. Domino to take his vehicle to the front of the institution and to stay there until the he arrived. Additionally, the Warden directed Mr. Domino to radio Lieutenant Arthur Richardson, Jr. and have the Lieutenant meet them at the front of the institution.

The Warden left Mr. Domino and proceeded around the perimeter road to check on the Mobile Unit #1. The Warden found that Mobile Unit #1 was very close to where it was observed by the Warden earlier. The Warden instructed the Grievant to drive Mobile Unit #1 to the front of the institution and remain there until the he arrived. The Warden drove to the front of the institution and met with the two officers that had been assigned to the Mobile Unit and indicated that he believed them to be inattentive to their assigned duties. The Warden held a private conversation with Lieutenant Richardson, Jr. and instructed him to have both Mobile Patrol officers relieved of duty and sent home. Both officers were placed on administrative leave with full pay.

On July 8, 2009, following receipt of the Union's memorandum dated July 7, 2009, a meeting was held in the Regional Director's office, where the Grievant was provided an opportunity to present his oral response to the proposed twenty-one (21) day suspension for Inattention to Duty. (JX 3 & JX 4) In addition to the Grievant and Deputy Regional Director Russell Perdue attending the meeting, the Grievant was represented at the

meeting by Mr. Ditto and Mr. White from the Union. Michele Owens, Regional Employee Services Specialist, sat in on the meeting as the recorder.

During the July 8, 2009 meeting, Deputy Regional Director Russell Perdue informed the Grievant and his representative that he would be the Deciding Official in the matter since the charges were being made by the Warden, who was ineligible to sit as the decision maker. The Grievant gave his statement and answered several questions for Mr. Perdue. At the conclusion of the meeting, Mr. Perdue indicated that he would take into consideration the evidence contained in the disciplinary action file, as well as the oral and written responses. (JX 3)

Deputy Regional Director Russell Perdue, acting in his capacity as the Deciding Official, rendered his decision regarding the proposed suspension in a letter dated September 2, 2009. (JX 4) The charges against the Grievant were sustained and the Agency stated that the evidence supported its conclusion. Mr. Perdue indicated that the Grievant's long career with the Agency and his discipline-free work record were mitigating factors and therefore the proposed twenty-one (21) day suspension was reduced to ten (10) days. The reduced suspension was effective on September 7, 2009 through September 16, 2009. The notice of decision indicated that the Grievant could appeal Mr. Perdue's decision under the negotiated grievance procedure or a formal complaint with the EEO. (JX 5)

On October 4, 2009, the Union President, Mr. Dan Ditto, sent a letter to Warden Pearson requesting arbitration, indicating that the Grievant and Union were appealing the Grievant's ten (10) day suspension. (JX 6) An arbitration hearing was held at the Federal Correctional Facility located at Yazoo City, Mississippi on February 24, 2010.

AGENCY'S POSITION

It is the Agency's position that the ten (10) days suspension of the Grievant was discipline that was based on just and sufficient cause and not on the efficiency of the service. The conduct of the Grievant while on duty showed he was inattentive to his assigned duties. The proposed suspension of twenty-one (21) days was reduced to ten (10) days because of the Grievant's long- term career with the agency and his discipline free work history and therefore the reduced suspension is a fair and just discipline for a serious breach of duty.

It is the position of the Agency that the Arbitrator must follow the specific factor outlined in *Douglas* [5 M.S.P.R 280 (at 305-6), 1981 MSPB Lexis 886 (at 38-9)], rather than the seven part test developed by the Arbitrator Carroll Daughtery. [Enterprise Wire Corp., 46 Lab. Arb. (BNA) 359 (1966)] Further, the Agency believes that the Arbitrator should apply the same substantive rule or standard as those applied by the Merit Systems Protection Board, hereinafter the "Board", if it were hearing the case.

The Agency contends that where all the substantive charges filed by the Agency have been sustained, the arbitrator must review an agency-imposed penalty only to determine if the Agency considered all of the relevant factors and exercised management discretion within tolerable limits.

The affidavits and the testimony of the Warden were inconsistent with the testimony of both Union and Agency witnesses with regards to the timeline on February 13, 2009. (MX 3) The reason for the discrepancy was that the Warden on February 13, 2009, was not wearing a watch and relied upon the clock in his vehicle to determine the time of his arrival at the facility. It was later determined that the vehicle's clock was running approximately 15 minutes slow and instead of arriving at the facility at 4:15 AM, the

Warden actually arrived at approximately 4:30 AM.

The Warden testified that he did not observe either the Unicor truck or the trash truck when he positioned his vehicle at the Rear Gate and therefore it was confirmed that he was at the facility later that he indicated during the grievance investigation. From the Control Log and the Lieutenant's Log it is clear that the last truck had left the facility at approximately 4:14 AM and the Grievant and the Lieutenant had not fully secured the Rear Gate and left the area until sometime around 4:30 AM. Therefore it is clear that the Warden did not arrive at the Rear Gate until 4:30 AM or later. (MX 9 & MX 12)

The Union's assertion that the Grievant was performing duties at the Rear Gate between 3:36 AM and 4:14 AM were most likely true. The Warden first observed the Grievant's Mobile Unit #1 at approximately 4:35 AM. Later the Warden determined that Mobile Unit #1 had not proceeded on his rounds and at approximately 4: 49 AM, the Warden observed the Grievant still in the general area where he had been observed at 4:35 AM. The charge of inattentiveness to his duties occurred after the Grievant had ended his duties at the Rear Gate (4:14 AM- 4:19 AM) and occurred between 4:35 AM, when he was first observed by the Warden sitting in his vehicle and 4:55 AM when he was directed by the Warden to go to the front of the institution.

The Agency contends that the Post Order for the Mobile Patrol positions is clear with regard to the meaning of a roving patrol. The Agency indicated the reason for a roving patrol is to protect the institution and prevent escapes. (MX 5 & MX 6) Under the Specific Post Orders, (MX 6) the policy states that the Outside Mobile post is a roving post that is responsible for the perimeter security of the institution.

The Grievant acknowledged that he had read Post Orders prior to assuming his duties in Mobile Unit #1 and that over the years he had on numerous occasions served with the

Mobile Patrol Unit. It is clear that the Grievant should have been aware that the Mobile Unit was a roving unit and that he was not to remain stationary because this would not provide him with the opportunity to maintain perimeter security for the institution.

The Post Order and Specific Post Order do not expressly state that the roving will be constantly roving but only states that it will be roving. Yet, the Warden in his testimony stated that the Agency expects the Mobile Units to be moving and they are to stop only for good reasons. While the Agency does not expressly define roving in the Post Orders to be continuously moving along the perimeter, it is understood that the Mobile Units are to remain in continuous motion.

Officer Domino testified that he was only aware of three reasons for a Mobile Unit not to be continuously moving around the perimeter of the facility. The three reasons are 1) to check an alarm; 2) to write an entry in the log book; or 3) for relief. The Grievant agreed with Mr. Domino but added a fourth reason, the scanning of Post Orders. Yet, in reviewing the Grievant's log book for February 13, 2009, there are no entries in his log book between 3:33 AM and 5:00 AM; there was no alarm and the Grievant had not requested relief. (MX 10)

The Agency believes that the Grievant remained stationary and not roving, in direct violation of the Post Order and Specific Post Order provisions. ((MX 5 & MX 6) The Grievant testified that he was not sure how long he was stationary but indicated that it could have been for up to 10 minutes. The Agency believes that the Grievant remained stationary from 16-21 minutes. Whether the Grievant remained stationary for 10 minutes or 21 minutes is not the issue, by stopping his Mobile Unit and not continuously roving, he violated Agency Policy.

The decision to suspend the Grievant was done only after the Deciding Official

considered all the relevant factors and exercised his discretion within tolerable limits. Deputy Regional Director Perdue applied the principles outlined in the Douglas Factors and determined the appropriate level of punishment. Additionally, Mr. Perdue looked into mitigating factors and decided to reduce the proposed twenty-one (21) day suspension to a ten (10) day suspension. The conduct of the Grievant was a serious violation of Agency policy that could have caused substantial harm to the institution and to the community had an inmate escaped while the Mobile Unit was stationary and not roving.

The Grievant is a law enforcement officer and is held to a higher standard of conduct than other employees. The Agency has significant discretion to determine the reasonableness of a penalty and the Arbitrator should give due deference to the Agency's penalty. In the instant case, the Grievant was inattentive to his duties while on Mobile Patrol, because he stopped his Mobile Unit and sat stationary for at least 10 minutes instead of patrolling his assigned area. The Agency did not exceed the range of permissible punishment established in the Table of Penalties. (JX 7) It is the Agency's request that the Arbitrator deny the Grievance.

UNION POSITION

The Union contends that the ten (10) day suspension of the Grievant was unjust and unfair. The Grievant is a nineteen (19) year career officer who has a discipline free work history. Further, the Grievant has Superior Performance awards, Recruiting Awards and a Letter of Commendation for his action during a riot at the FCI Memphis, Tennessee facility. The incident on February 13, 2009, that resulted in his suspension was not a violation of an established policy and therefore he should not have been disciplined. Even if he had violated an established rule or regulation, a suspension for a first time offense is too excessive and does not constitute progressive discipline. The Union requests that the Arbitrator expunge or mitigate the Grievant's discipline and make him whole.

The Union believes that the standard of review that must be applied to the Grievant's case is the rules promulgated by Arbitrator Carroll Daughtery in the Enterprise case. (**Enterprise Wire Corp.**, 46 Lab. Arb. (BNA) 359 (1966)) Arbitrator Daughtery listed seven (7) rules to assist arbitrators to define and apply the concept of "Just Cause" to discipline cases. Without the standard of Just Cause, the only standard that an arbitrator could use to decide a case would be what a reasonable man, mindful of the habits and customs of the workplace and the standards of justice and fair dealing would do under similar circumstances. It would be under this standard that the arbitrator would have to determine if the conduct of the disciplined employee is defensible and the disciplinary penalty just.

The Union contends that the Grievant was not given forewarning of the possible or probable disciplinary consequences of not continually keeping his Mobile Unit moving around the outer perimeter fence. While the Post Orders and Specific Post Orders were established by the Agency, there is no expressed term that states that the Mobile Patrol officer cannot stop his Mobile Unit from time to time. (MX 5 & MX 6) While the Agency has attempted to define the term "Roving" to mean continually roving or moving, there are no express terms in any regulation that require continuous moving of the Mobile Unit.

The language of the Post Orders and Specific Post Orders is unclear and ambiguous. (MX 5 & MX 6) Lieutenant Richardson, Jr. testified that he had observed Mobile Units sitting stationary and that he did not know of any officer that had been disciplined or relieved from duty for stopping his Mobile Unit while on roving patrol. Additionally, Lieutenant Richardson, Jr. testified that to his knowledge, officers had not been trained to understand that while on roving patrol officers were to be continuously moving and not allowed to stop their Mobile Units. It is clear that the Grievant had not been provided with notice that by stopping his Mobile Unit that he would be subject to discipline.

In determining if the Grievant is subject to being disciplined for violation of Agency rules or regulations, it is necessary to determine if the rules or regulations are reasonably related to the orderly, efficient, and safe operation of the Agency's mission. The Union understands that the Agency has the right to promulgate reasonable rules and regulations, but the rules must be communicated to those who will be disciplined if the rules or regulations are violated. The Grievant in his nineteen (19) years with the Agency had never disobeyed an order or refused to follow the Agency's rules or regulations. The Grievant was not aware that the Warden had determined that the Mobile Units while roving were not permitted to stop. Therefore, the Grievant believes he has been punished for disobeying unwritten rules or regulations that were never communicated to the staff serving with the Mobile Patrol.

Prior to the time that the Grievant was given his suspension, it was incumbent on the Agency to investigate the alleged violation fully. The Grievant's case was investigated by Captain Dawson, but she relied upon an incomplete disciplinary file and did not consider any exculpatory evidence. The investigative officer did not check the Control Room Log (MX 9) or ask the lieutenant on duty what the Grievant was doing at the time. On the morning of the alleged violation, the Agency did not ask the Grievant if he had stopped his Mobile Unit and if so, for what reason. The Grievant has the right to know with reasonable certainty what offense he is being charged with and be allowed to defend his behavior.

Another element of Just Cause is that the investigation undertaken by the Agency must be conducted fairly and objectively. Yet, in the Grievant's case, there was no effort made by the investigating officer to secure physical evidence, such as camera tapes, that would have shown the Grivant's location on the night of February 13, 2009.

The Agency must apply the institutional rules and regulations in a fair and just manner. Discipline must be administered even-handedly and without discrimination. The Agency has been lax in enforcing its rules and regulations, with regard to the Mobile Units being allowed to stop while on Mobile Patrol. Lieutenant Richardson, Jr. testified that he had observed Mobile Units on numerous occasions being stopped while on patrol and that he

was not aware of any officer having been disciplined for having stopped his Mobile Unit while on patrol.

The Warden testified that the institution was on high alert due to the prior month's attempted escape by an inmate. For that reason, when Mobile Unit #1, driven by the Grievant, was seen stopped and when it was discovered that the other Mobile Unit #2, driven by officer Domino, was stopped because Mr. Domino had fallen asleep while on duty, the Grievant was held to a higher standard that other employees that had in the past stopped their Mobile Units while on patrol. It is clear that there has been disparate treatment with regard to the discipline that was given to the Grievant as compared to other employees.

In addition to having to find that the Grievant did commit a violation of a known rule or regulation, the punishment issued to the Grievant must be reasonably related to the seriousness of the proven offense and the Grievant's work history with the Agency must be considered to see if it mitigates the level of punishment. Under the just cause standard of review, even if the Grievant is found guilty of the alleged misconduct, the punishment must be designed to fit the seriousness of the offense. It is the duty of the Arbitrator to determine if the Grievant committed the act for which he is being disciplined and to insure that the punishment fits the crime.

In demonstrating just and reasonable cause exists for discipline, the burden of proof rests with the Agency. The Agency must prove by clear and convincing evidence that the Grievant committed the infraction for which he/she is being disciplined and that the discipline meted out by the Agency was for just and sufficient cause.

The Union does not believe that the Agency has proved by clear and convincing evidence that the Grievant violated established rules or regulations by stopping his Mobile Unit while on Patrol. The Union requests that the Arbitrator sustain the Grievance and make the Grievant whole in every aspect of the law, by the issuance of back pay and expunging his personnel file, with regards to the alleged violations of Agency rules and regulations on the morning of February 13, 2009.

DISCUSSION

The Grievant has been an employee with the Federal Bureau of Prisons for more then nineteen (19) years. Throughout his career the Grievant has been free of any form of disciplinary action and in fact has received outstanding evaluations and awards for his service.

On the morning of February 13, 2009, the Grievant was assigned to Mobile Unit #1 and was on roving patrol of the institution's external perimeter fence. It was the Grievant's job to move along the fence line and to be responsible for the perimeter security of the institution, the protection of government property and the safety and well being of the employees, visitors and inmates. (MX 5 & MX 6) Under the provisions of the Post Order, the Mobile Unit is to maintain a patrol route around the institution at a speed of not greater than ten (10) miles per hours. (MX 5) The only mention that the Mobile Unit was a roving patrol appears in the Specific Post Order. The Specific Post Order states, "[T]he Outside Mobile post is a roving patrol." There is no definition or explanation as to what is meant by the term "roving" in the document. (MX 6) While there are statements contained in the Specific Post Order with regard to responding to fence alarms, directing officers not to get out the Mobile Unit to inspect fences and other duties, there is nothing that explains what "roving" means.(MX 6)

One must look to see what the environment was like at the institution on February 13, 2009, when the Grievant was alleged to have violated Agency policy. The institution was on heightened alert because in January of 2009, the institution had experienced an escape attempt. The Warden testified that the individual attempting to escape had stayed in the recreational yard after it had been cleared and closed. It was later determined that the officers assigned to the area had not properly cleared the yard. Later in the evening,

during a bed check, it was discovered that there was a dummy in the inmate's bed in the housing unit and again the staff assigned to count bodies had failed to account for the absent inmate. With these breaches of duty the Warden was very concerned about the staff's performance and was critically observing the staff's performance to determine if there were other areas of concern.

Following the attempted escape, an investigation revealed severe weaknesses in the staff performance and violation of Post Orders. The Agency began to evaluate how the staff was to perform their assigned job functions and what improvements were needed in existing policies and procedures.

The Warden testified that the attempted escape was very traumatic and that he personally took on the responsibility to visit each of the three work shifts to observe staff performance. On the morning of February 13, 2009, at approximately 4:30 AM, the Warden made an unannounced visit to the facility to observe the Morning Watch. It was during this visit that he observed Officer Domino asleep in his Mobile Unit #2 and determined that the Mobile Unit #1, driven by the Grievant, was not continuously roving and therefore determined the Grievant was being inattentive to his duties.

Deputy Regional Director Perdue testified that he was the Deputy Warden assigned to the Federal Correctional Facility located at Yazoo City, Mississippi on February 13, 2009, when the attempted escape occurred. Mr. Perdue indicated that the facility was on alert and there was a heightened sense of security due the escape attempt. Further, Mr. Perdue testified that he had been employed at USP Leavenworth, when there had been an escape. The escape had a tremendous impact on the institution and the surrounding communities. To capture and recover the escaped inmate, the Agency had to involve the Marshals, FBI, local, state and county police forces. The Agency spent over $5 million within a ten (10) day period to recapture the escaped inmate. Mr. Perdue testified that the Agency takes

very seriously any escape attempt and that there is always a heightened awareness that follows an escape attempt. There is little doubt that the discipline administered to Mr. Domino for falling asleep would have occurred even without the escape attempt. The fact that the Grievant was issued initially a suspension as severe as that given to Mr. Domino for stopping his Mobile Unit indicates that the Warden may have been overreacting to the sense of heightened awareness.

It is the Agency's position that the Arbitrator must follow the specific factor outlined in the *Douglas* case rather than the seven part test developed by the Arbitrator Carroll Daughtery, known as the "Just Cause." standard. [*Enterprise Wire Corp*., 46 Lab. Arb. (BNA) 359 (1966)] Further, the Agency believes that the Arbitrator should apply the same substantive rule or standard as those applied by the Merit Systems Protection Board when he hears a discipline matter. Yet, the Union believes that the Arbitrator is obligated to follow the provisions of the Just Cause Standard and not the Douglas Factors.

Under the Merit System Protection Board in its landmark decision, Douglas vs. Veterans Administration,5 MSPR 218, hereinafter referred to as the "Board or MSPB," there is established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. These twelve factors are commonly referred to as "Douglas Factors" and have been incorporated into the Federal Aviation Administration (FAA) Personnel Management System and various FAA Labor Agreements. Under the expressed terms of the FAA Personnel System and those FAA Labor Agreements that have incorporated the twelve factors, the factors must be considered in determining the severity of the discipline.

The "Douglas Factors" apply only to MSPB cases but are often used in many agencies for disciplinary cases of all types, both major and minor offenses. The majority of the cases within the Board's jurisdiction are appeals of adverse actions: removals

(termination), **suspensions of more than 14 days**, reeducation in grade or pay, and furloughs of 30 days or less. Also, there are a number of other types of actions that may be appealed to the Board. (Emphasis added) See the Board's regulation at 5 CRF, section 1201.3 for a complete list of actions that can be appealed to the Board.

The Deciding Official in this case, Mr. Purdue, determined that the Grievant should be suspended for a period of ten (10) days. Since the discipline was for less than 14 days, this would bar an appeal to the Board. Therefore the rules and regulations governing the administrative process for an appeal from a suspension do not apply. Instead of using the Douglas Factors to determine whether a discipline action should have been taken, the determination of what is the appropriate penalty must be evaluated under the Just Cause Standard.

"Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge, the existence of a reasonable relationship between an employee's misconduct and the punishment imposed and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

In the present case, the Grievant agreed that he had stopped his vehicle while on Mobile Patrol but stated that he was not aware that he had violated any Agency rules or regulations. The Grievant was aware of the Post Orders and the Specific Post Order, but did not understand that the orders prohibited him from stopping his Mobile Unit. Further, the Grievant had worked on the Mobile Patrol numerous times and had never been told

that by stopping the Mobile Unit that he was violating any rule or regulation. Additionally, the Grievant was never given any training or provided any information that would indicate that the term "roving patrol" was considered by the Agency to be a "continuous roving patrol."(MX 5 & MX 6) Even the testimony of Lieutenant Richardson, Jr. indicated that he was aware that Mobile Patrols would stop from time to time on the perimeter road and that he was not aware than any officer had ever been disciplined for having stopped his Mobile Unit.

If the Agency wishes to define that a roving patrol is a continuously moving Mobile Unit, they should modify the Post Order and the Specific Post Order to more clearly state the Agency's expectations. Additionally, the orders should reflect with clarity when a Mobile Unit is permitted to stop and for what time period. The Agency should provide clear communications and training to staff serving with the Mobile Patrol so that all are aware of their duties and responsibilities and what the consequences are for beaching those duties.

The second element of just cause is that the employee knew or reasonably could be expected to know ahead of time that by stopping his Mobile Unit that such conduct would result in him being disciplined. In reviewing the Post Orders and the Specific Post Order, there were no references to a prohibition regarding the stopping of a Mobile Unit while on Mobile Patrol. During the hearing, testimony was provided that indicated that the Mobile Units do stop from time to time and that no one had been disciplined for having violated the "roving patrol" provision of the Post Order or the Specific Post Order. (MX 5 & MX 6) The language found in the Post Order and Specific Post Order is unclear and ambiguous with regard to the meaning of the term "Roving Patrol." Clearly there is no mention that the roving must be continuous and that if the Mobile Unit stops, this would constitute a violation of the Agency's rules and/or regulations and could subject the employee to disciplinary action. The Grievant believed he was entitled to stop

the Mobile Unit for a period of time and he had never been directed not to stop the Mobile Unit. Therefore it does not appear that the Grievant knew or reasonably could be expected to know that by stopping his Mobile Unit that such conduct could result in him being suspended.

Just cause requires that an employer administer discipline even-handedly. The Union contends the evidence shows suspension of the Grievant constitutes disparate treatment. The essence of disparate treatment is differently disciplining similarly situated employees. But administering different punishment to differently situated employees is not disparate treatment; on the contrary, if all other elements were equal, one would expect an employee who had engaged in serious misconduct to be disciplined more rigorously than one who had committed a minor transgression. The testimony given at the hearing indicated that no other employee working on the Mobile Patrol had ever been disciplined for stopping his Mobile Unit. Even though the Grievant believes that he was disciplined for stopping his Mobile Unit while on patrol when other officers were not punished for the same thing, this is not disparate treatment. Rather, it is unfair treatment.

Just cause requires that there be a reasonable relationship between an employee's misconduct and the punishment imposed for that misconduct. But an arbitrator does not have unlimited discretion to substitute his or her judgment for that of management, with regard to the magnitude of a penalty given. Rather, an arbitrator must determine if the penalty imposed by management was within the bounds of reasonableness. If the arbitrator is persuaded the punishment was so excessive as to be beyond that limit, he or she not only may but must reduce the punishment. On the other hand, if the arbitrator is persuaded that the punishment imposed was reasonable—even if the arbitrator would have imposed a less severe punishment if he or she had the power to do so—the arbitrator must find the punishment was within the employer's managerial discretion and for just

cause. In reviewing the reasonableness of punishment imposed, an arbitrator must look at all relevant circumstances including the seriousness of the offense and the employee's work record.

Article 30 of the Agreement, -- Disciplinary and Adverse Actions, section (c) states, "The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognized that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal." Yet, the Grievant was given a ten (10) day suspension for having allegedly violated an unwritten rule regarding stopping his Mobile Unit while on Mobile Patrol for a first offense.

Unless otherwise provided for in the Collective Bargaining Agreement, discipline for all but the most serious offenses must be imposed in gradually increasing levels. This incremental dispensing of discipline is most often referred to as "Progressive Disciple." The primary objective of discipline is to correct rather than punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. Yet, some offenses are sufficiently serious to justify serious discipline for a first offense. These include theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer's time or premises. While some Collective Bargaining Agreements list the offenses that are punishable by immediate discharge, most do not. If an Agreement is silent as to what constitutes a serious offense, the arbitrator must determine which are dischargeable offenses by using common sense, past practice, and company, industry, and societal standards.

The principle of progressive discipline benefits employers as well as employees. With positively increasing penalties, employees have an opportunity to conform their

performance and conduct, to the employer's reasonable expectation. Rehabilitating the employee is less expensive and less disruptive than hiring a replacement.

In the Agreement the bargaining parties have endorsed the concept of progressive discipline designed primarily to correct and improve employee behavior. The Grievant having been an employee for more than 19 years and having a clean record showing that he had no disciplinary actions taken against him, should not have been suspended for a first offense. However, in accordance with progressive discipline, if it was determined that the Grievant had breached a clearly established rule or regulation, he should have either been warned or been issued a reprimand. The issuance of a suspension for a first time offense, when the Grievant had not been informed that by stopping his vehicle, he would be subject to a suspension is too harsh of a sentence. Even within the Change Notice (JX 7), the list of possible discipline for Inattention to Duty ranges for a first offense from an official reprimand to removal from service. In light of the Grievance discipline-free work history and long career with the Agency and the fact that other employees had stopped their Mobile Units without being suspended or disciplined, the issuance of a ten (10) suspension is too severe.

With positively increasing penalties, employees have an opportunity to conform their work performance and conduct, to the employer's reasonable expectation. Rehabilitation and not punishment is the goal of progressive discipline and the issuance of a ten (10) day suspension to the Grievant appears to be more punitive than rehabilitative.

Based upon the evidence and having heard the testimony, this Arbitrator believes that the Agency has failed to show by a preponderance of the evidence that the Grievant is guilty of the alleged charges of Inattention to Duty because he had been observed being stopped in his Mobile Unit and not on continuous patrol. It is therefore the ruling of this Arbitrator that the Grievant did not violate the work rule and was not inattentive to his

duties and therefore the grievance is sustained. The Grievant is to be made whole for all lost pay, benefits and rights.

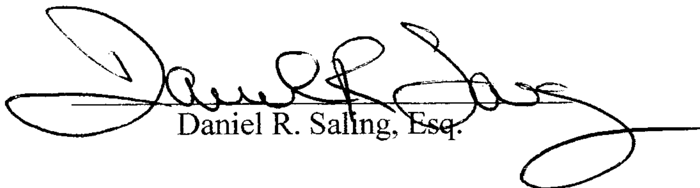
THE AWARD

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial arbitrator in this matter, do hereby find and decide that the Agency did violate the just cause provisions in suspending the Grievant.

1. The Grievant's suspension is hereby rescinded and the Grievant is to be made whole.
2. The Grievant's personnel record shall be expunged with regard to all charges filed regarding this matter.

The Arbitrator hereby remands the issue of the precise value of the monetary remedy to the parties for resolution but retains jurisdiction over this matter for sixty (60) days following the date of the Award for the purpose of resolving any disputes arising out of the parties' interpretation or implementation of the Award.

For these reasons the grievance is sustained.



Daniel R. Saling, Esq.

May 14, 2010
Date