IN THE MATTER OF ARBITRATION

BEFORE

NORMAN R. HARLAN, ARBITRATOR

FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL IN- STITUTION - FAIRTON, NJ	) CASE NO. FMCS - 09-04056
	) GRIEVANT: DONNELL WHITE
	) RE: DISCHARGE
AND	) HEARING: APRIL 21 & 22, 2010
AMERICAN FEDERATION OF GOVERN- MENT EMPLOYEES	) BRIEFS: AUGUST 5, 2010
	) AWARD: AUGUST 23, 2010

APPEARANCES

EMPLOYER

JOHN T. LOESTER, ATTORNEY, U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, PRESENTING
ANN MARIE HINKLEMAN, EMPLOYEE SERVICES MANAGER, ASSISTING

WITNESSES CALLED:

DAVID GONZALEZ, PRESIDENT, AFGE LOCAL 3975
JERRY BYRNES, SPECIAL INVESTIGATIVE AGENT (SIA)
MICHAEL BURTON, OFFICE OF INTERNAL AFFAIRS (OIA) SPECIAL AGENT
HENRY PARTENHEIMER, CORRECTIONS OFFICER (CO)
TROY SNYDER, SENIOR CORRECTIONS OFFICER (SCO)
MANUEL A. PAGAN, JR., OPERATIONS LIEUTENANT
STEFANO IMPELLIZERI, TOOL ROOM OFFICER
SEAN NOLAN, GS-11 LIEUTENANT

UNION

EVAN S. GREENSTEIN, LEGAL RIGHTS ATTORNEY, OFFICE OF THE GENERAL COUNSEL, AFGE, PRESENTING
DONNELL WHITE, SENIOR CORRECTIONS OFFICER, GRIEVANT
PAUL SCHULTZ, WARDEN, FCI-FAIRTON, WITNESS
JACKIE WASHINGTON, SENIOR OFFICER SPECIALIST, WITNESS
DAVID RILEY, SENIOR OFFICER SPECIALIST

THE GRIEVANCE (QUOTED AS WRITTEN)

"On June 11, 2009, Warden P. Schultz, disciplined Correctional Officer, Donnell White by removing Officer Donnell White from his position or employment as a Correctional Officer with the Bureau of Prisons. The discipline imposed was excessive and does not promote the efficiency of service and is without just and sufficient cause.

This incident in question took place on the night of December 15, 2007. During this time, Officer John Jackson, was observed as the agressor by several staff members who stated that they either witnessed the incident or Officers (sic) Jackson behavior prior to the incident, this is clearly documented in the statements that is (sic) included in the Agency's investigative packet or report.

It is further documented that Officer Jackson was involved in several verbal altercation with his co-workers to include a Supervisor. Officer Jackson was even observed by the Agency Supervisor on duty, yelling profanities at his co-workers to include Officer White. It is also documented that Officer Jackson was yelling racial slurs or discriminatory remarks directly at his Co-workers who were African American and of Muslim faith documented in the Agency's report to include the grievant who is African American. These actions took place prior to the incident in question is considered a violation of the Work Place Violence policies. Never the less (sic), Officer Jackson, was still allowed by the Agency's Supervisor to remain in the workplace even though he was creating a Hostile Work Environment prior to the incident in question with Officer Donnell White. It is also a matter of record Officer Jackson was under investigation for a previous incident of work place violence where he physically assaulted an employee.

How can two somewhat similarly situated employees concerning the incident be treated so disparately by the agency? How can a discipline approximately two years old serve the officiency of the agency? How can the Warden at this institution not be held accountable pursuant to Program Statement 3713.2S the Agency condoning Discrimination and Retaliation Complaint with out (sic) being fair to both parties and processing the complaint? One Officer who was the agressor allowed to retire with full benefits and the one defending himself terminated by the Agency."

Remedy Requested:

"All attorney, legal fees and expenses incurred in the processing of this grievance will be reimbursed by the agency, should an attorney be retained at any juncture in the processing of this grievance.

That a cease and desist orders are (sic) issued to against the supervisor from further action of this nature in regards to be-

ing untimely in the handling of staff investigations.

The grievant will suffer no reprisal, harassment, or intimidation as a result of filing this grievance.

Reinstate to full duty with all back pay (sic) and seniority rights as it applies. Request Transfer to another facility with same pay grade and time of Agency Service.

That any other deemed suitable ompensations are granted and any other remedy the arbitrator deems appropriate to make the employee whole."

/s/ Donnell White Margaret Connors 7-13-09

THE ISSUE

Was Senior Corrections Officer Donnell White discharged for "just and sufficient cause" as required by Article 30 of the COLLECTIVE BARGAINING AGREEMENT (CBA)?

CONTRACTUAL REFERENCES

ARTICLE 1 - RECOGNITION

Section a. "The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71."

ARTICLE 5 - RIGHTS OF THE EMPLOYER

Section a. "Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws:

   a. to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;"

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

ARTICLE 7 - RIGHTS OF THE UNION

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." underlining added

1. ---

a. ---

b. ---

Section b. "Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

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

Section d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions."

ARTICLE 31 - GRIEVANCE PROCEDURE

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

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level be-

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union."

Section d. "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrences. . . ."

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 (3) ways:

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

ARTICLE 32 - ARBITRATION

Section a. "In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement."

Section d. "The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

Section e. "The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to the addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or

2. published Federal Bureau of Prisons policies and regulations."

BACKGROUND

The Federal Bureau of Prisons operates an extensive system of correctional facilities throughout the United States. It is Party to a COLLECTIVE BARGAINING AGREEMENT (CBA) with the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE). One such facility is identified as Federal Correctional Institution (FCI) Fairton, located at Fairton, New Jersey. It is commonly referred to by the Parties as "FCI-Fairton." It is located about fifty (50) miles south of Philadelphia. It is classified as a Medium Security Facility and has a staff of three hundred and eighteen (318) and fifteen hundred and eighteen (1,518) inmates.

Donnell White was hired in December, 2000 as a Corrections Officer. On an unspecified date he was promoted to a Senior Corrections Officer (SCO). On-or-about October 13, 2007 he was working on the day shift. He had a brief discussion with the duty Officer, Lieutenant Sean Nolan. He requested to leave early October 20th to attend the wedding of a friend. According to White the LT. said

he could try to get someone to change shifts with him. SCO White was not able to get anyone to change shifts. On October 20th he asked a fellow employee to cover for him and he left about one hour early, around 1300 hrs. He did not make entries into the Log Book that day which is STANDARD OPERATING PROCEDURE (SOP). An official investigation began February 4, 2007, at which time Grievant White was interviewed concerning the events of October 20, 2007.(See UNION EXHIBIT [UX] J, p. 3)

Recognizing it is out of chronological sequence we now review events occurring on the overlapping midnight shift of December 15 and 16, 2007. SCO White was on the midnight shift at this time. It is common for officers to eat lunch around 3:30 a.m. "in the Lieutenant's office." The Grievant and several other Officers were in the office. An argument ensued between Officer John Jackson and Officer Tracy Snyder. Jackson is Caucasian and Snyder is black and is Muslim. Jackson initiated racial and ethnic slurs. In a nutshell UX-J provides a summary of Jackson and Snyder's altercation and one which followed involving Jackson and White.

> "On December 16, 2007 at approx. 3.33 a.m. I was in the Lt's office waiting to heat up my food. I observed officer Jackson shove officer Snyder outside of the Lt's office and locked the door. I then asked officer Riley for his keys to let officer Snyder back into the office. Officer Jackson then came at me very agressively. Jackson then shoved me into the counter, and called me a punk bitch. I told Jackson to back up. Officer Jackson then began yelling at me with spit flying into my face. I tried to walk around Jackson to open the door, and he pushed me and I pushed him back. Jackson then hit me in the left side of my face I responded by hitting Jackson with my right hand, I was holding a flashlight in my hand."
>
> 16 DEC 07 D. White, Senior Officer

Subsequently White was placed on Home Leave. This will be discussed in more detail, infra.

On February 2, 2009 Cpt. Joseph Henger wrote SRO White, advising he was proposing that White be removed from his Senior Officer position "no sooner than thirty (30) days from the date you receive this letter. This proposal is based on the following charges and specifications thereto:

Charge I: Inflicting Bodily Injury on a Co-Worker

Charge II: Unprofessional Conduct

Charge III: Absence Without Leave (AWOL)

Charge IV: Failure to Follow Leave Procedures

Charge V: Failure to Follow Post Orders

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UX-A, pp. 1, 2, 3 & 4

On March 3, 2009 a meeting was held to provide the Grievant an opportunity to make an "oral response." Mr. White gave his version of what took place December 15/16, 2007. In attendance were Warden Schultz, SRO White, Sgt.-at-Arms (Union Representative) Claude Rucker and Employee Services Manager (ESR) Ann Marie Hinkleman. Rucker commented in reference to "the charges of AWOL, Failure to Follow Policy and Post orders," "White knows he was wrong." Concerning the altercation Rucker stressed White acted in self defense.

On April 6, 2009 Warden Schultz wrote to SRO White. He states in pertinent part.

> "On January 12, 2009 you were issued a notice which proposed that you be given a Reprimand for use of Profane Language..."
>
> After careful consideration, I find the charge fully supported by the evidence in the disciplinary action file."
>
> "In considering the most appropriate penalty, I considered among other factors, that you do not have any prior discipline and your work record has been acceptable. I am also taking into account the length of time which has elapsed since the incident and the fact the incident was precipitated by the actions of another staff member..." UX-I-1, underlining added.

On June 11, 2009 Warden Schultz wrote to SRO White, stating in pertinent part:

> "In determining an appropriate penalty, I considered among other factors, the charges brought against you are very serious in light of your position as a law enforcement officer. Your actions, especially and specifically relating to Charge 1, are so serious to warrant a substantial penalty. Your actions have destroyed your credibility and effectiveness as a correctional worker. This penalty is within the agency standard schedule of penalties. I have also considered your length of service and your work performance to date.
>
> It is my decision that you be removed from your position with the Bureau of Prisons. Your removal will be at midnight on June 11, 2009." UX-D-2.

On July 15, 2009 Sr. Officer White filed the Grievance quoted supra, pp. 2-4. It was timely filed under Article 31, Section (d) which affords "forty (40) calendar days of the alleged grievable occurrence." The Grievance was denied Aug. 12, 2009 and the Union invoked arbitration Aug. 12, 2009.

The Parties met at prescribed Steps of the Grievance Procedure without resolution and the Union referred the Matter to arbitration under Article 32. The Undersigned was selected as the impartial arbitrator under Section b of Article 32. The Hearing was held April 21 and 22, 2015 at at a Government owned facility outside the main Prison complex some ten (10) miles from Fairton. The Parties made Opening Statements, examined and cross examined the large number of Witnesses and entered Exhibits and Authority. The Hearing was transcribed. Upon receipt of the Transcript the Parties agreed to establish a date for the filing of Briefs. The Briefs were timely filed.

POSITION OF THE PARTIES

MANAGEMENT

A. "The Arbitrator is bound to the procedural processes identified in the CBA. The Union failed to properly invoke arbitration pursuant to Article 32 of the Collective Bargaining Agreement. Therefore, the Arbitrator does not have jurisdiction to decide this case on its merits." Management Brief [MB] p. 3.

1. "...Among the relevant provisions of this document is Article 32, Arbitration, which defines the agreed upon arbitration processes and procedures. Of specific note is Article 32(h), Joint Exhibit 1, page 70 of 91, which states in pertinent part:

> 'The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of
>
> 1. this Agreement; or
> 2. published Federal Bureau of Prisons policies and regulations.' " Id. 4

2. "Article 32(a), defines the conditions agreed upon and required to invoke binding arbitration. Specifically, this section mandates the party seeking to have an issue submitted to arbitration must notify the other par-

by in writing of this intent prior to the expiration of any applicable time limit.

> In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issues, the alleged violations, and the remedy requested in the original grievance may be modified only by mutual agreement." Article 32, Section(a)

3. The Union submits for reference and Authority Attachments 1 through 6. The Bureau supplied a copy of its Brief and Attachments to the Union. As such there is no need to add to the Record by listing every Title. They will be referred to as Attach. 1, 2, etc.

"Contrary to the Union's positions this is not the first, nor will it be the last, instance in which procedural arbitrability is presented as a threshold argument..." Id. 5, see Citations.

"...The Article does not require, nor allow, the Agency to refer to the grievance in divining the issue(s), alleged violation(s), or requested remedies. Further, the Article [32(a)] does not imply, nor create, a duty on either party to notify the other of procedural errors. While the Union may assert a procedural argument has never been successfully argued in a disciplinary action their assertion is erroneously (sic) and misplaced." Id. 6, See Attachments 5 & 6.

4. The Union failed to properly invoke arbitration since it failed to include the issues, violations and remedies. "...In the grievance the Union...alleges violations of federal statute, the creation of a hostile work environment, civil right (sic) violations, racial and religious discriminate treatment, and retaliation.." Id. The Union did not provide evidence to support the allegations.

5. "The notice to invoke filed by the Union concerns the termination of Mr. White from federal service...." and references "just and sufficient cause..." Id. It adds the lack of due process is a new issue which was

not included in the grievance. By changing issues from the Grievance to the letter of invocation the Union placed the Agency at a disadvantage.

c. "The Union's position is that one should read the grievance and the notice of invocation together ...The Union's notice of invocation is clearly defective thereby, barring the Arbitrator from considering the merits of the case." Id. 7.

B. The Agency has proven the charge by a preponderance of the evidence. Therefore, the Agency's decision must be granted deference and the penalty left undisturbed.

1. There is little disagreement over the facts as discussed supra.

a. Jackson acted unprofessionally.

b. " ...Jackson was the agressor in precursor incident with both Bartholomew and Snyder...' Id. 8. He locked Snyder out of the office.

c. White and Jackson argued and both became physical.

d. "Jackson (sic) conduct was without question unacceptable; however, his conduct is not the subject of this arbitration, it is Mr. White's actions which are subject to review." Id.

e. As shown by the evidence, to include numerous Agency Exhibits, Mr. White received extensive training dur- his nine years of employment. This includes "..training on the Standards of Employee Conduct..." Id.

f. "It is clear from the evidence and testimony presented the Agency has met its burden by a preponderance of the evidence..." Id.

g. (1) He was AWOL October 20, 2007, violated leave policies and post orders.

(2) On December 16, 2007 he argued and fought with Jackson and injured Jackson by hitting him with a weapon, a Mag flashlight. His conduct was unprofessional.

"....[T]he Agency's decision must be granted deference and the penalty left undisturbed. Id. 9.

C. The Grievant was not free from fault in this matter and cannot assert a claim of Self-Defense to shield his misconduct.

1. To claim Self-Defense a person must be "...free from fault ..." Id , see Citations.

2. Jackson started the problems Dec. 16, 2007, by locking out Snyder. White intervened, was vocal and profane. Jackson belly-bumped White and White shoved him. "...He admits to seeing what he thought was a telegraphed punch and to swinging at Jackson. Witness testimony is clear at some point White could have retreated or moved around Jackson, but he elected not to do so." Tr. Vol. 1, pg. 145. Id. (Witness Bartholomew)

3. White used inflammatory language and used unreasonable force by striking Jackson with a weapon, here a Mag flashlight. "Self-defense can not (sic) be the basis for either reversal or mitigation (sic) the charge of engaging in on-duty physical altercation resulting in bodily injury to co-worker, where employee was not without fault in causing altercation..." Id. 10, See Citations for "reasonable force" and "self-defense.

D. "White was afforded his full measure of due process throughout the disciplinary process, the Union's position is without merit."

1. The Office of Internal Affairs (Wash. DC) conducted the investigation. All witnesses and participants were interviewed under oath and White was fully informed of all proceedings. "...White and his representatives were provided a copy of the disciplinary file prior to making a statement to the deciding official." All decisions were issued in writing to White and he was advised of his appeal rights. "These steps constitute Mr. White's full measure of due process. Due process does not guarantee a result, only the process involved in making the decision." Id. 11

E. "The deciding official carefully considered each of the Douglas factors in arriving at his decision. The decision to remove White from federal service is a reflection of the seriousness of his misconduct and does not represent disparate treatment. The Agency's decision to remove the Grievant must be granted deference and affirmed."Id.

1. "The Arbitrator is required to apply the same substantive standards as the Board." See Nutt, 472 U.S. 648, 650-51. Id.

2. "The Arbitrator should not displace management's responsibility in determining an appropriate (sic) but only assure that its judgment has been properly exercised." Id.

3. Warden Schultz provided "...exhaustive testimony..." (95 pages) He reviewed all pertinent documentation. He considered both White's and the Union's responses; White's tenure, performance and clean disciplinary record.

4. The Warden considered the seriousness of the offense and the use of a weapon used to injure Jackson as significant. He concluded White's actions were detrimental to the Agency and his rehabilitation was questionable. "...The Warden considered Jackson's actions as provocation; however the Warden decided White was equally responsible for the final act and Jackson's actions did not mitigate his final decision to remove White..." Id. 12, underlining added. He reviewed the Jackson and Snyder confrontation. He noted Jackson would have been treated the same as Mr. White had he not resigned "...prior to completion of the investigation." Id.

5. Warden Schultz responded to numerous inquiries on cross examination related to his application of the Douglas Factors. He consistently applied the evidence to the Factors. He "...testified he considered the proposal letter and the information contained in the disciplinary file. The Warden reviewed the Standards of Employee Conduct in framing his decision and conversation with Mr. White." Id.

6. Law enforcement officers are held to higher standards of conduct.

7. "After careful consideration of all the factors the Warden determined the removal of White was for the efficiency of the service." Tr. Vol. II, 90. The decision is within the bounds of reasonableness, within the range of penalties for the charged offences (Br. sp) and promotes the efficiency of the service..." Id. 13-14, See Citations, re: the effect of workplace violence upon efficiency and safety at the workplace.

"CONCLUSIONS"

"Procedurally, the Union failed to meet its contractual obli-

obligations and violated Article 32(a) of the CBA. As such the

Union's notice of invocation is defective and the Arbitrator does not have jurisdiction to consider the merits of the case.

Though the Union's Counsel worked hard to deflect the Grievant's responsibility he can not (sic) escape White's poor choices. First, the Union points to Jackson's unprofessional conduct and his provocative actions on the evening in question to justify White's actions. Secondly, he attempted to characterize White's actions as self-defense, without acknowledging it was White's choices (sic) led to the physical confrontation with Jackson. Finally, he is forced to attack the decision process in an attempt to misdirect the Arbitrator's attention to someone else's decision processes rather than those of his client.

At the end of this process the Agency has proven the charged misconduct by a preponderance of the evidence. In reaching an appropriate penalty White was granted his full measure of due process and the deciding official fully applied the Douglas factors in arriving at his decision. The decision to remove White does not exceed the range of penalties for his sustained misconduct and is for the efficiency of the service. White's actions on that evening do not reflect the conduct required of a law enforcement officer. As such the Agency's decision must be granted deference and the decision to remove him from federal service affirmed."

UNION

1. In its Exhibits the Union listed a chronology of the relevant events. They appear in the Background Section and need not be repeated.

2. "There is a long history in the federal sector of a presumption in favor of cases being decided on the merits, rather than dismissed on hypertechnical interpretations of certain provisions..." Union Brief (UB) 6.

3. "The Agency argued at hearing that the Union's notice to invoke arbitration was procedurally defective because it did not contain a requested remedy.." Id.

4. "Additionally, the Agency never brought this issue to the fore until approximately two days before the arbitration hearing by email from Counsel LeMaster to the undersigned Union representative..." Id. 5. This action was teken in spite of the fact Local President Gonzalez emailed both Agency Representative Connors and Ms. Hinklenan. Management was clearly on notice that the Union sought the reinstatement of Officer White. Everyone know this. There was no confusion and no complaint by the Agency. Id. 5&6.

5. L.P. Gonzalez has been Local President over 10 years. He responded there was never any objection to his invoking arbitration. He did note in the Impellizzeri Case Ms. Connors made a timeliness objection; she was "right" and the grievance was dropped.

6. "There Exists a Strong Presumption in Favor of an Arbitration Hearing on the Merits.

> It is generally understood that there is a "strong presumption of arbitrability in federal public cases..." Id. See Warrior & Gulf Navigation, Cited Id. 7...."There is a general presumption of arbitrability unless evidence is clear and convincing to the contrary." Id. 8. See the numerous Citations supporting this premise. "In general, 'arbitrators are reluctant to find that a party has waived its right to arbitrate an issue in the absence of 'clear and unmistakeable evidence of waiver. If the language is ambiguous, conflicts will be resolved in favor of finding the right has not been waived." Id., See Citations.

7. "In the instant matter, the Agency failed to show that Mr. White has waived his right to arbitrate. The language of the master agreement does not require the dismissal of this arbitration...the only threshold issue that is spe-

cifically mentioned is timeliness..." Id. Further, the CBA does not prohibit the Union from combining the Grievance with the letter of invocation.

8 Management advised the Union it would furnish cases referencing procedural issue(s) upon which it relies prior to the Hearing. The Union received one case; FPC Seymour Johnson (ATTACHMENT 1). It addressed a portal-to-portal/overtime question, a more complicated issue than the discharge case here which everyone understands. It also shows the relief sought is to return the Grievant to work. "As a result the threshold issue must be resolved in favor of the Grievant." Id. 10.

9 Officer Bornell White was involved in an AWOL incident Oct. 20, 2007 when he left work early. Even though the CBA promotes timely resolution of problems this was not done. The Union addressed this at arbitration. Under cross examination none of Management's Witnesses gave an explanation for the "long delay." Id.

10. "The second set of charges stemmed from an alleged incident of workplace violence where Mr. White was provoked by Officer Jackson, who had a reputation for being a belligerent and sometime violent employee." Id.

11 "Bornell White was removed from federal service for five charges listed below." Id. 11. Supra, p. 8.

12. "Arbitrators have generally set up a seven prong test for just cause." Id. See fn 6. "These are:

1. Policies in effect;
2. Informing employees of the policies and "consequences for violation of the policies; Id.
3. Relevance to efficiently operating its business;
4. A proper investigation;
5. Substantial evidence the Employee violated the policy;
6. Evenhanded application of the policies; and
7. The appropriateness of the penalty.

13. In commenting upon the above test the Union states:

a. The AWOL charges were not timely;
b. The evidence against the Grievant related to the workplace violence was not substantial;
c. "...[T]he policies were applied in a nondiscriminatory manner and removal was not the appropriate penalty." Id.

14 The Union stresses the following:

a. Jackson started the conflict Dec. 16 with his verbal assault of Snyder and then locking him out of the building.

b. When White attempted to get Riley's keys to let Snyder in Jackson attacked him verbally and physically.

c. Jackson cornered White, shoved him, punched him and got him in a headlock. White had a flashlight and hit Jackson on the head a couple of times from a strained position. (See Riley testimony)

d. 'Several witnesses stated they knew of Jackson being violent." Id. 12, see Tr.

e. Jackson caused problems at the start of the shift. Lt. Pagan took him outside.

f. "Lt. Nolan stated: '[Jackson] was a hot tempered type of guy. I wasn't a big fan of having him on my shift because his temper seemed to get the better of him at times.' " Id.

g. Several years ago Jackson threatened to kill Officer Impellizzeri. At the time Jackson had a gun and he was unarmed. Id., reference to TR. "He also confirmed Jackson had a propersity for violence." TR.

h. "[Lt.] Pagan said he did not feel 100 percent comfortable with his life in Jackson's hands." Id.

i. CO Bartholomew discussed Jackson's mood changes, noting he used abusive language, "was a big man and used this 'to intimidate people.' " "...Jackson was a bully." Id. 13. Jackson verbally attacked him Dec. 16. His conduct was "unprofessional." Id.

j. Snyder confirmed Jackson's behavior Dec. 16 as being "belligerent and boistrous toward Washington." Id. 14. He added; "...[A]fter having words with Jackson about his status as an observant Muslim who doesn't eat pork, Jackson pushed him out the door and locked the door."Id.

k. Bartholomew remarked White was "defensive" and "had no choice but to fight back." Snyder said; "...White was 'clearly defending himself.' " Id., See TR.

l. "The evidence is clear that Mr. White is not guilty of inflicting bodily injury on a co-worker or unprofessional conduct...." Id.

m. White had the flashlight with him. When Jackson attacked him and got him in a headlock he did hit Jackson but he couldn't take a full swing because the headlock restrained him.

n. Union ATTACHMENT 5 is a discharge case heard by this Arbitrator involving an altercation between an employee and his supervisor. He found mitigating circumstances and reduced the penalty; primarily that the grievant was provoked. He did note the grievant could have "walked away" and could have sought Union representation. Here White was cornered, was on the defensive and could not walk away. There was no insubordination since Jackson was not a supervisor. "...[J]ust as the removal was mitigated in that case, the Union believes it should be mitigated in the instant matter as well." Id. 15.

o. Management witnesses testified as a guideline; "..OIA requires all investigations to be completed within 120 days." Id. 15-16, citing Agent Byrnes testimony. He confirmed the investigation was not completed within ..." days. "Mr. Burton, another agent with no first-hand knowledge of either offense allegedly committed by the Grievant stated that local investigations take 120 days, while the time frame for OIA (or national) investigations is 180 days." Id. 16, see TR.

p. The AWOL offense took place in October, 2007. There was no disciplinary action until February, 2009. "...[No] agency representative was able to give a coherent answer as to why White couldn't be disciplined for these charges in a timely manner..." Id. 17.

q. "The Union notes 'an employer is not at liberty to resurrect months old offenses for which the employee was never disciplined. In other words, there can be no add ons to other alleged improper occurrences in the future where the Employer reaches back to undisciplined events that transpired long before, to capture what will become a multiple offenses (sic) for which the employee is then disciplined with a severe penalty." Id., fn 9, re: U-ATTACHMENT 3.

See also fn 3, U-ATTACHMENT 4, wherein; "..[A] 15 day suspension was reversed based upon the two year time lag between the causitive incident and the decision to suspend." Id.

"AN INDEPENDENT ANALYSIS OF THE DOUGLAS FACTORS SHOWS THAT WHITE SHOULD NOT HAVE BEEN REMOVED" Id. 18

The "Douglas Factors" were entered as Joint Exhibit GG and ap-

peor at the end of the AWARD as APPENDIX "A." [Douglas v. Veterans Administration, 5 MSPB 313, 5 M.S.P.R. 280 (1981)]

"The analysis below shows that, of the 12 Douglas Factors, only numbers one and nine weigh against the Grievant. Nine of them weigh, in varying degrees, in the Grievant's favor. Factor number 7 is neutral. This analysis clearly shows that removal was an inappropriate way to deal with the Grievant's alleged misconduct." Id. 18-19.

(1) "...This factor weighs slightly against the Grievant.

(2) As a C-7 CO the Grievant had little public contact. This factor weighs in the Grievant's favor." Id. 19.

(3) "The employee has no history of prior discipline. This weighs heavily in the Grievant's favor." Id.

(4) "This factor weighs heavily in the Grievants favor." Id.

a. Both Lt. Pagan and Lt. Nolan gave White good ratings.

b. "All of White's coworkers stated that he was well liked and dependable." Id. 20.

c. "White received superior marks in each of his annual performance evaluations." Id.

d. White was honorably discharged from military service and also worked for the postal service.

(5) "While the warden has stated that these offenses prevent him from having confidence in the ability of Mr. White to perform his assigned duties, the testimonies of both Lieutenants Nolan and Pagan prove that Mr. White is fully trusted by his first line supervisors. This factor weighs slightly in the grievants favor." Id.

(6) Jackson resigned and was never disciplined. "Snyder got a reprimand." Id. Bartholomew didn't report anything and was not disciplined. "This factor weighs in the Grievant's favor." Id.

(7) "This factor is neutral. The punishment appears to be consistent with the table of penalties, which gives a range of reprimand to removal." Id. 21.

(8) "Although Warden Schultz talked around this issue when questioned by Counsel LeMaster, it is clear that this offense was not notable and did not have any significant impact upon the reputation of the agency.....In fact, the only notable part of this whole incident that could embarass the agency was why BOP allowed Jackson to stay employed as a Corrections Officer for as long as they did. This factor weighs heavily in the Grievant's favor." Id.

(9) "This factor weighs against the Grievant." Id.

(10) "The grievant showed contrition and genuine concern about his job. There is nothing in his work history that suggests he cannot be rehabilitated. In fact, the warden basically stated that he could not be rehabilitated, but he refused to provide any reasons." Id.

(11) Mitigating circumstances

"The most glaring mitigating circumstance is this case with regard to the workplace violence charges is that White was provoked by Jackson. All of the witnesses, union and agency alike, testified that Jackson had a history of being a troubled employee. Impellizzeri even stated that he had a propensity for violence since he was a victim of Jackson's wrath several years before. Others, like Snyder were victims just prior to the altercation with White. It is clear there was major malice and provocation on the part of others in this matter.

This factor weighs heavily in favor of the grievant." Id. 22.

(12) "The MSPB will give little weight to an agency's zero tolerance policy if the record shows that the Grievant has a long, unblemished service record and an absence of aggravating factors. In fact, in Omites v. USPS 87 MSPR 223 (2000), the Board mitigated a removal to a suspension in a case where an employee threw a partially filled soda can against a wall, near a supervisor. The Agency's zero tolerance on violence was not enough to uphold the removal. Although an Agency is entitled to have zero tolerance policies, they must conduct a balanced mitigation analysis. In the instant matter, Warden Schultz did not properly consider several mitigating factors, including contrition, work record and provocation." Id. 22-23.

"CONCLUSION"

"The Agency's removal of Donnell White must be reversed. First,

the threshold issue raised by the Agency represents a hypertechnical interpretation of the Contract and must not be given credence by this arbitrator. The Union properly invoked arbitration and incorporated its grievance into its notice to invoke arbitration.

Second, the agency did not engage in progressive discipline in fashioning a punishment for the Grievant.

The offenses associated with the AWOL charge must be dismissed because they were not timely disposed of by the Agency.

As for the workplace violence charges, White and the Other witnesses all testified that there was sufficient provocation by Officer Jackson to, at minimum, mitigate the removal. At best, though, the entire removal should be reversed since Jackson had a propensity for violence and belligerence.

It is clear that the Deciding Official did not fully analyze the Douglas factors. It appears that he focused on the seriousness of the offense but never adequately explained why the Grievant's rehabilitation and other mitigating factors do not justify the removal' reversal.

Finally, the Agency did not show how the Grievant's discipline would further the efficiency of the service. There was also no nexus shown, as required by the Contract.

The Union asks that the removal be reversed entirely. In case the Arbitrator feels that discipline is still necessary, the Union asks that the removal be mitigated to some kind of suspension.

In the event the Arbitrator sustains the grievance, in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction for purposes of implementing the remedy should any prob-

lem arise. Finally, the Union respectfully requests that the Arbitrator retain jurisdiction over any question of attorney's fees to which the Union may be entitled based upon the Arbitrator's findings."

FINDINGS OF FACT

As summarized in the BACKGROUND Section the instant Matter involves the termination of SCO Donnell White based upon two (2) distinct and separate non-related events, namely:

1. October 10, 2007 - Charged with being AWOL, violating Leave Policy and Post Orders and;

2. December 16, 2007 - Inflicting Bodily Injury on a Co-Worker and Unprofessional Conduct.

Two separate investigations took place. The October, 2007 incident was investigated by Special Investigative Agent (SIA) Jerry Byrnes, a 29-year Bureau veteran employed at FCI-Fairton. (See TR, pp. 62-96) This investigation, requested by Warden Schultz, began in early 2008. The December, 2007 incident was investigated by Special Agent Michael Burton, employed by the Office of Internal Affairs, Federal Bureau of Prisons, Washington, D.C. It started in early 2009. (See TR, pp. 100-114)

SIA Byrnes explained violations fall into Categories 1, 2 and/or 3, with Category 1 being the most serious. He responded; "..The AWOL would be the least serious, and on the Warden's signature we can move ahead and we just notify OIA that we're working on that." TR, p.). SA Burton (or IA) was contacted "on or about December, 2007"

concerning 'allegations of workplace violence" at FCI-Fairton." TR, 101-102 His investigation began in early, 2009

The Byrnes investigation preceded the Burton investigation by about a year. However, no independent action relative to the AWOL incident was taken by Management. Instead, the Bureau combined the charges relating to both events and listed them in the Removal Letter issued June 11, 2009. (DX-D)

Because of the close proximity of the two incidents and the combining of the charges there is some overlapping of information. Also, Donnell White and Lt. Sean Nolan were both interviewed relative to each incident. This explanation is intended to add clarity and continuity to what follows. There will be some redundancy.

1. Donnell White was hired as a Corrections Officer at FCI-Fairton in December, 2000. He was subsequently promoted to a Senior Corrections Officer (SCO).

2. As required by the Agency CO/SCO White attended and successfully completed Agency-sponsored training courses. Some are required annually, others less frequently. Subjects include but are not limited to Policies, Statutes, Regulations, Communication Skills, Ethics and others. (See JOINT EXHIBITS (JX) AA through FF)

3. Testing is part of the training. SCO White performed very well, receiving above average evaluations and scores. He communicated and performed well.

4. SCO White had no disciplinary action before his removal June 11, 2009. He had no attendance problems.

5. On October 26, 2007 White was on the 6:15 a.m.-2:15 p.m. shift. He left about 1:00 p.m. to attend the wedding of a friend and was "covered" by Camp Mgr. James Bruce. Bruce agreed to cover for White if it was approved by Lt. Nolan. However, Lt. Nolan did not approve White's leaving early.

6. SIA Byrne's investigation is noted in the FOREWARD Sec-

Lieut. Byrnes interviewed:

Camp Mgr. James Bruce	Jan. 30, 2008
SCO Donnell White	Feb. 4, 2008
Lt. Jeffrey Cox	Feb. 12, 2008
Lt. Sean Nolan	Feb. 14, 2008

7. The results of Byrnes' investigation show on October 20, 2007 White was AWOL, violated Leave Policy and violated Post Orders. No disciplinary action was taken.

8. On December 15/16, 2007 SCO White was on the 10pm-6am shift. At the start of the shift Lt. Manuel Pagan briefed the CO's. During Pagan's briefing Jackson went into the next room. On his way he remarked the other officers were lazy and used profanity. The Officers left to make the count and returned within a brief period of time to receive assignments from Lt. Pagan. Jackson engaged in another vulgar verbal assault which included derogatory remarks about Pagan, which Pagan heard. Jackson had been previously warned and was clearly insubordinate. Jackson passed it off as shop talk. Lt. Pagan took no action.

9. It is common practice on that shift for Officers to take lunch around 3:15 a.m.-3:30 a.m. at the Lt.'s office/ area. SCO White arrived. Other Officers there include SC Holmes, Bartholomew, Pelusco, Riley, Snyder and CO Jackson. Jackson made derogatory remarks to Snyder, to include profanity and ethnic slurs. Snyder used some profanity and told Jackson to "leave me alone." They started outside with Snyder in front. Jackson pushed Snyder outside, closed and locked the door. White asked Snyder for his keys to let Snyder in and Jackson refused. White then asked SOS Riley for his keys. Jackson began a profane verbal assault of White and White made some profane remarks. Jackson belly-bumped or chest-bumped White and next shoved White, who shoved him back. "Officer Jackson than (sic) struck Officer White in the head with his right hand." (UX-T) White Swung at Jackson. Jackson got White in a headlock and pushed him down toward the floor. White had a Mag flashlight. To try to defend himself he swung the flashlight in an arc. (This was demonstrated.) He hit Jackson on top of the head a couple of times, breaking the skin and imposing a minor wound. Snyder, who was locked outside, saw the fight and activated a body alarm. It was picked up by Lt. Nolan, who was in the Control Room went to the lunch area. It took Lt. Nolan and two Officers to get Jackson off White.

10. Jackson washed-up in the restroom. About 4:15 a.m. SOS

Pelusa, drove Jackson to a nearby medical facility. They had a brief conversation, quoted below due to its relevance.

> "4. As I was departing the institution parking lot with Jackson, he stated, 'if he was here and I had a gun, I would shoot him right between the eyes.' While Jackson did not specifically use anyone's name, I believed due to the circumstances, he was referring to White. During the trip to the hospital, Jackson also stated that if he lost his job, he would just have to go on a hunting trip to North Jersey. He then stated, 'You didn't hear me say that.' Again, he did not articulate what he meant. However, after were (sic) at the hsopital, Jackson commented that he knew White lived in North Jersey." UX-P, AFFIDAVIT of John R. Peluso, p. 2, 3-31-09.

11. On February 2, 2009 Captain Joseph Henger issued SCO White a letter proposing to remove him from employment based upon five (5) charges. (supra, p. 8)

12. During the investigation Management secured Affidavits and Statements from:

a. SCO White (UX-J)	b. CO John Jackson(UX-K)
c. SOS K. Bartholomew(UX-L)	d. CO Troy Snyder(UX-M)
e. Lt. Sean Nolan (UX-Mc)	f. Lt. Manuel Pagan(UX-N)
g. SOS J. Washington(UX-O)	h. SOS John Pelusco(UX-P)
i. SOS David Harkcom(CO-Q)	j. SCO Wm. Holmes(UX-R)
k. SS P. McIntosh(UX-S)	l. SOS David Riley(UX-T)

Donnell White wrote Warden Schultz expressing regret for his actions. He also explained briefly the events of December 15/16, 2007. He was remorseful. On March 2, 2009 a meeting was held attended by Warden Schultz, Donnell White, Union Representative Claude Rucker and Ann Marie Hinkleman, ESM/Recorder. The Warden read the charges. White responded. The letter noted above was given to the Warden. Mr. Rucker remarked White concedes he was wrong related to the AWOL, Failure to Follow Policy and Failure to Follow Post Orders. Rucker reviewed Jackson's history of violence and his past

record of belligerence. He commented; "Lt. Pagan should have sent Jackson home."

On June 11, 2009 Warden Schultz wrote SCO White, detailing the events of Oct. 10, 2007 and Dec. 15/16, 2007. He reviewed the findings of the investigation and the conclusions reached by the Agency, supra, p. 9. The Grievance filed July 13, 2009 is quoted supra, pp. 2-3. On August 10, 2009 Regional Director D. Scott Dodrill wrote to AFGE Local President Gonzalez. In Paragraph One he acknowledges receipt of Whites' Grievance. In Paragraph Two he lists the charges appearing supra, p. 8, re: Captain Henger and notations that White had "...a flashlight in his hand during the struggle." He adds:

> "Not only did Mr. White perpetuate the situation with Mr. Jackson when he began using profanity, but also used his flashlight and hit Mr. Jackson over the head causing him to be treated at the outside hospital. At no time prior to engaging in the debate and/or scuffle with Mr. Jackson, did Mr. White attempt to notify any supervisor of the escalating situation. The incident was actually reported by another Correctional Officer who notified the Lieutenant when he saw Mr. Jackson and Mr. White with their arms around each other and blood on the floor.
>
> The Standards of Conduct Program Statement contains a table which includes examples of offenses and a guide to determine an appropriate penalty. The range of penalties provided for a first offense for "Inflicting Bodily Injury" is "Official reprimand to removal." Additionally, while progressive discipline is normally applied, there are offenses so egregious they warrant the most severe penalty even for a first offense. Engaging in a physical confrontation with another employee and using a weapon ("mag" flashlight) to inflict injury, demonstrated such egregious behavior to warrant removal from his law enforcement position with this agency."
>
> ---

As you have not presented any evidence to show there were any violations, your grievance is denied." UX-G.

Local President Gonzalez responded to Mr. Dodrill's letter of August 10 on August 12, 2009.

> "This Memorandum is in response to the Agency's denial of the grievance filed by AFGE Local 3975 to your office on the behalf of Officer Donnell White, concerning his termination of employment from the BOP. The Agency response date was August 10, 2009.
>
> Pursuant to the Master Agreement Article 32, this is to inform you that AFGE Local 3975 is hereby invoking arbitration. AFGE Local 3975 contends that the Master Agreement and 5 USC has been violated due to the suspension taken was not for just and sufficient cause and the employee was denied his due process. The grievance was filed properly and in accordance with the Master Agreement.
>
> In addition, per the Master Agreement, please respond to me within three days to jointly submit a Federal Mediation and Conciliatory (sic) Service(FMCS)form to request a list of arbitrators.
>
> Thank you in advance for your anticipated cooperation in this matter. A prompt response to this request would be greatly appreciated."
>
> cc: Margaret Conners, HRM, NE Regional Office
> Paul Shultz (sic), Warden FCI Fairton
> Bill Jiletto, NEPVP, CPL-33
> Ms. Marie Hinkleman, Employee Services Mgr., FCI FAirton
> Kurt Bolfonti, A/W Programs FCI Fairton
> File (UX-G)

He also Emailed Ms. Conners:

> "Attached below is a letter that I am submitting invoking arbitration concerning your response dated August 10, 2009. If at all possible I would rather submit the R-43 form through our Local Employee Services Department it is much easier for both parties involved. Please respond and advise me of receipt of this document." (The R-43 Document refers to the FMCS request for a panel of arbitrators.)

By Email of August 12, 2009 Ms. Conners advised Mr. Gonzalez she would be traveling on official business and he could contact Connie Scobel, Regional Employee Services Specialist.

PROCEDURAL MOTION BY THE DEPARTMENT OF JUSTICE

ALLEGED VIOLATION OF SECTION a OF ARTICLE 32, quoted supra, p. 5

> "A. The Arbitrator is bound to the procedural processes identified in the CBA. The Union failed to properly invoke arbitration pursuant to Article 32 of the Collective Bargaining Agreement. Therefore, the Arbitrator does not have jurisdiction to decide this case on the merits." EMPLOYER BRIEF (EB), p. 3.

As the moving Party on the Motion the Employer is required to prove by a preponderance of the evidence that the Union violated the CBA, specifically 32a, cited above. It contends in part:

> "... In this case the issues presented on the notice to invoke are substantially different from those articulated in the body of the grievance which a violation of Article 32(a)...In the grievance the Union, among other claims, alleges violations of federal statute, the creation of a hostile work environment, civil right violations, racial and religious discrimination, disparate treatment, and retaliation...." Id. 6.

The Bureau submitted six (6) Arbitration Awards to support its arguments which are listed in APPENDIX B at the end of the AWARD. All are Bureau Cases. All have been read and analyzed for applicability to the Motion and are identified in APPENDIX B as "ATTACHMENTS."

ONE (or 1) FCI-Forrest City, AZ

> Each Party made numerous charges against the other. The Arbitrator found each Party guilty of Procedural violations, more by the Union than by Management. He asked rehtorically; "Is the grievance arbitrable?" He found; "...[T]he instant grievance is procedurally and substantively defective." Paramount in his decision is the following:
>
> "In conclusion, it is this Arbitrator's opinion

that the Union was notified of the grievance's lack of specificity...on 6 June 2001 and, despite the notification, the Union invoked arbitration on 27 June 2001. The nonspecificity prevents the Agency from knowing specifically of what it is being charged...' (underlining added at 3).

TWO (or 2) Yazoo City, Mississipi

Page 3 is missing. Consequently it would not be prudent for the Arbitrator to address this Award.

THREE (or 3) (1FC) Seymour Johnson, Goldsboro, N.C.

The Agency contenced there were six (6) threshold Issues. The Arbitrator decided to address one;

Did the Union follow informal resolution processes before filing a formal grievance?

Since the Agency dropped this contention at Hearing it is not necessary to review this Case further. It is not on point.

FOUR (or 4) FCI-Milan, Michigan-FLRA 61 FLRA 118-61 FLRA No. 23-0-AR-3495

"The Union filed a grievance, which the parties could not resolve, and the matter was submitted to arbitration." It filed a letter of invocation which states:

"The Union wishes to invoke arbitration on the issue...'Re: Grievance Response" does not meet the requirements of the Master Agreement."

"The Arbitrator found that the grievance was not arbitrable because the Union's attempt to invoke arbitration did not meet the requirement set forth in Article 32(a) of the parties' agreement that the party seeking to submit an issue to arbitration must give the other party a written notification that 'must include a statement of the issues involved, the alleged violations, and the requested remedy."

The Union appealed to the Federal Labor Relations Authority.

"The Union excepts to the Arbitrator's Award on two grounds. First, the Union asserts that the Arbitrator exceeded his authority by adding a requirement to the parties' agreement that the arbitration notice 'repeat the grievance on the same piece of paper.' " ---------- at 2.

'Second, the Union alleges that the award is contrary to 5 U.S.C. Section 7121(b)(1) because the parties' grievance procedure is not 'fair and simple.' " ----------Id.

The Arbitrator found that the Grievance "specifically identified the sections of the rules, regulations, or the parties' agreement that were allegedly violated and the grievance was timely." The Authority did not address this since it was not on appeal. It found the invocation lacking under Article 32(a). Id. 5.

FIVE (OF 5). DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, FLORENCE, COLORADO, Employer and AFGE, LOCAL 1500, FMCS CASE NO. 00-12039, Michael D. Rappaport, Sept. 3, 2003.

"A hearing was scheduled on January 25, 2001. At the start of the hearing the parties stipulated on several points as follows:

1. The Union was involved with discussions leading to a settlement agreement and was aware of those discussions.

2. The Union advised the Grievant not to sign the settlement agreement.

3. The Grievant signed the settlement agreement of his own volition against the advise (sic) of the Union.

4. The Union did not sign the settlement agreement, and, thus, is not a party to said agreement.

5. The parties also stipulated to 17 joint exhibits." EE. 1.

Before commencement of the substantive case, the Bureau raised several objections regarding the arbitrability of this matter. ..[I]t was agreed that the case should be bifurcated and that the arbitrability issues should be resolved before moving forward with the hearing." Id.

The Arbitrator determined "...[T]he Union was clearly in violation of Article 31g of the grievance procedure." Id. 5.

Even though this disposed of the Matter he ruled upon the Union's "invocation." He noted the only notice of arbitration by the Union was in a memorandum stating:

> "Local 1300 has opted to take one of several grievances to arbitration. The case involves punitive action against Louis Vigil SOS."

"...The Arbitrator also finds that the Union was in violation of Article 32, the arbitration clause, in the manner in which it attempted to bring the matter to arbitration.. Id. 5.

SIX (6) FEDERAL BUREAU OF PRISONS, UNITED STATES PENITENTIARY FLORENCE, CO, AGENCY and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301, FMCS NO. 01-08667, Josep W. Duffy, September 10, 2001

THE ISSUE: TIMELINESS

Section d of Article 31 of the CBA states:

"Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."

The Arbitrator found that the Grievances were untimely.

There is no Timeliness Issue in the instant Case. This Case is not on point.

The Union strongly disagrees with the Agency's MOTION. It emphasizes the specificity of the Written Grievance, which incorporates the reinstatement of SCO White as well as identifying "due process" as an issue. Both appear in the Invocation letter. It entered five (5) Arbitration Awards for support which are listed in APPENDIX B at the end of this AWARD.

ONE (or 1) FCI-Forrest City, AZ

This is the same AWARD as the Agency's ATTACHMENT 1, supra, pp. 29-30. The Agency contended the Union did not follow informal resolution procedures before filing a formal grievance. The Agency dropped this claim at the Hearing of the instant Case. It is not on point.

TWO (or 2) Merit Systems Protection Board

This is a discharge issue appealed to the Board. The Board addresses the merits. There are no Procedural issues.

THREE (or 3) FCI-Tallahassee, Fla.

"At issue is whether given all of the due process issues, and if necessary, the merits, whether the Agency established just and sufficient cause under Article 30(a) for the suspension, and if not, what is the proper remedy?" p. 2.

"First, there are two issues raised by the Agency for its claim that the grievance is not arbitrable. It argues that the Master Agreement, Article 31(f), requires the Union to file its formal grievance on the Bureau of Prisons 'formal Grievance' form. According to the Agency, the Formal Grievance Form requires the Union to detail alleged violations with specificity. The grievance form filed by the Union, the Agency maintains, has been altered from the original, which specifically states the grievance is to be specific. It argues that this grievance fails to state in what way(s) the agency violated 5 U.S.C. Sections 7101, 7106, 7114, 7117, 7116(a), 1, 2, 5, 7 and 8, Title 7 and EEO rules, regulations and laws in relation to discrimination. It contends that blanket assertions and presuppositions fail to provide appropriate detail in the grievance to give the Agency fair opportunity to rebut the allegations. A matter can become non-arbitrable, the Agency argues, if there is a due process violation or a violation of a CBA." p. 5.

The Arbitrator found that the Grievance is specific. "...The upshot is that the evidence is more than sufficient to both inform the Agency and the arbitrator of what is being grieved." Id.

FOUR (4) FCI-Bennettsville, S.C.

The Grievant (female) was sexually assaulted in September, 2007 by a male inmate. She did not immediately report the incident but reported it two days later. In January, 2008 the inmate filed a charge against the Grievant.

> "In a letter, dated February 6, 2008, the Agency proposed Grievant's removal from her position as a Clinical Nurse...This proposal included four distinct charges: Charge - 1 Inattention to Duty, Charge 2-Unprofessional Conduct, Charge 3-Failure to Timely Report (with four separate specifications), and Charge four-Failure to Exercise Sound Correctional Judgment. The Agency called Grievant into the warden's office to provide an oral response to the charges to the Warden but due to a misunderstanding as to the purpose of the meeting declined to give an oral response at that time. Later in a response, dated February 22, 2008, Grievant provided a written answer to the charges...In this written response Grievant wrote that the proposed removal was 'unnecessary and excessive.' She wrote that, 'I am not trying to say my actions were correct when I failed to immediately report the sexual assault against me." She represented that she was the 'victim' in the matter and requested consideration of the fact she had to suffer 'a great deal of stress because of this incident and the orders that were placed upon me."
>
> By letter, dated September 11, 2008, Warden Darlene Drew issued a decision to suspend the Grievant for 15 calendar days...In her decision, the Warden indicated that she had considered, among other things, the (1) Grievant's response, (2) all of the evidence, (3) the seriousness of the charges for a federal law enforcement officer, (4) that the Grievant's misconduct could have compromised the Agency's ability to accomplish its mission vis a vis the safety of staff and inmates, (5) that law enforcement officers are held to a higher standard, (6) the fact 'there have been no further incidents of this nature in over a year' and (7) the Grievant's 'good/acceptable behavior' in the intervening time. The warden added that

she believed that a 15 day suspension would achieve the desired corrective effect although she believed the sustained charges would normally warrant removal.

It is important to note the presentations of the parties at the arbitration hearing in this matter reflect a basic disagreement between the parties as to how the Grievant's case should have been handled. The Agency clearly believes that the matter is solely disciplinary in nature and the Union believes that the matter should have been handled as a sexual assault. The Agency in its approach to the matter considered the Grievant as culpable and the Union in its approach sees Grievant as a victim who has been violated not only by Inmate Shields but also now by the Agency." pp. 7-8.

"At hearing and in its post hearing brief the Union argued that the action taken against the Grievant was precluded under the doctrine of collateral estoppel. It alleged the Agency's action was untimely, was not based on just cause, and that it did not serve the efficiency of service...Id. 12.

"The motion for collateral estoppel is denied. I also find, however, that the Union's claim that the Agency acted in an untimely manner has merit and while the doctrine of collateral estoppel cannot be applied in this case the question of timeliness is pertinent and an examination of the issue is required in the interests of justice...." Id. 15. See Item 9, supra, p. 17.

The Arbitrator addressed the four (4) charges appearing supra, p. 34 in detail. The key points of his findings appear below.

"...I find that there is no evidence to support charge 1, that none existed at any point in the investigative or decision-making process as the deciding official knew or should have known. I also find that the preponderance of the evidence does not support a finding that Grievant was inattentive to her duties. Charge 1 is not sustained, Grievant is blameless in this regard, and no discipline is justified concerning it..." Id. 17. underlining added.

"As to Charge 2...the Agency charged that Grievant 'told Inmate Shields that Inmate Carter had called him a snitch.' " Id. 18. The Grievant admitted this. "The Warden first identified the Grievant's conduct as falling under Offense 36 'conduct which could lead others to question an employee's impartiality. She also testified that the conduct might fall under Offenses 42, 45 and 47, which call for penalties ranging from 5 days, 3 days and written reprimand...up to removal. I find, for the record, that the Grievant's disclosure was a solitary action and one offense - not two or more offenses...' Id. 18. Underlining added. "...I find that it is a single offense falling within the ambit of both charges 28 and 36 for which the possible penalty for a single offense could be a written reprimand to removal.." Id. 19

"As to Charge 3...the Agency relies on four (4) specifications of failure to timely report..." Id.19. The Arbitrator notes:

> "In assessing the evidence bearing on Charge 3 there is no dispute that the Grievant was the victim of a sexual assault." Id. 30.

"...Although the Grievant's failure to report must be understood to be the result of mitigating circumstances the charge is nonetheless sustained. I find that notwithstanding the fact that the charge contains four specifications, it is the result of a single offense. This conduct falls within the ambit of charge 31 on the schedule of offenses and penalties of the Agency's disciplinary policy for which the possible penalty for a first offense could be a written reprimand to removal.." Id. underlining added.

"As to Charge 4...the Agency charges that the Grievant which asked by Shields to bring tobacco into the facility had agreed to do so..." Id. 22. The Grievant admitted to this but it was taken out of context by the Agency. In fact the Agency's investigator did not uphold the charge.

The Union stressed the Agency's history of untimely action and entered four (4) Arbitration Awards by four different arbitrators "in which the Agency's decisions in adverse action cases, taken under the same contract, and same language were overturned by reason of untimeliness similar to that in the instant case....." Id. 31.

"Given both the Agency's prior history in this regard and by its lack of any plausible explanation for 14 of the 24 months of delay in this matter I find that the discipline in this matter was not taken for just and sufficient cause or for any cause that would promote the efficiency of the service..." Id. He found the Agency's actions untimely.

"...I find that the Grievant was innocent of Charges 1 and 4 of the proposal to remove her and that she was only technically guilty of Charges 2 and 3 thereof and that her conduct regarding these Charges was fully explained by the fact that it occurred while she was bring (sic) sexually assaulted and that she was therefore substantially innocent thereof. I find that the Agency knew or should have known that Charges 1 and 4 were totally unfounded based on the information contained in its own files at the time discipline was imposed, and I find that in making the decision to suspend Grievant based on those charges the Agency was guilty of bad faith, and acted in a manner that was arbitrary and capricious. I find that the Agency knew or should have known that it could not therefore prevail on the merits, given the deciding official's lengthly service as a management official and particularly as a personnel officer..." Id. 32.

"The Union's grievance in reference to Grievant's suspension arising from the events of September, 2006 is sustained in its entirety. The grievant is to be made whole for all lost pay, interest, allowances and benefits pursuant to the Back Pay Act within 30 days. The Union is the prevailing party in the matter and is entitled to reimbursement of its reasonable legal fees in this regard in the interest of justice. All record of the suspension is to be expunged from grievant's personnel records with the Agency. The arbitrator will retain jurisdiction in regard to any request for clarification of the award, questions as to attorney fees and disputes, if any, regarding payments due to grievant pursuant to this award. Arbitration costs shall be distributed equally among the parties." Id. 33.

FIVE (or 5) KANAWHA RIVER TERMINALS, INC.

This is a discharge Matter. The Record is devoid of any Procedural Issue(s). Consequently it is not relevant to the Agency's Procedural Motion.

OPINION

EMPLOYER'S PROCEDURAL MOTION

The Positions of the Agency and the Union have been stated as well as the Findings of Fact and analyses of the Authority entered by the Parties. The redundancy is regretted but minimization has been difficult.

The Written Grievance lists a number of Subjects, Charges and/or Remedies;

a. To reinstate CO White and make him whole;

b. To transfer Mr. White to another facility;

c. "Disparate treatment; re: CO continued working for several months, was never disciplined and left the Agency via resignation;

d. Racial and ethnic discrimination; re: Jackson's verbal assault upon Snyder;

e. Hostile work environment caused by Jackson but with the inference it could have been avoided or lessened if the Supervisor who was on duty and heard Jackson's remarks at the beginning of the shift had addressed the problem;

f. "Not being fair to both parties and processing the complaint;"

g. Due process. Discipline about "two years old.

In its invocation letter the Union states:

> ".....[T]he suspension taken was not for just and sufficient cause and the employee was denied his due process."

These are the only subjects appearing in the invocation and they are the only subjects which will be addressed.

The Agency contends the invocation filed by the Government Workers does not comply with Section (a) of Article 32 which says in part,

> "...The notification must include a statement of the issues involved, the alleged violation, and the requested remedy..."

Both of the ATTACHMENTS entered by the Parties address the need for specificity, particularly in the Written Grievance. The Agency argues that the issues, even if specific in the Grievance, may be repeated or expanded in the invocation. We note the Remedy requested appears in detail. It is lengthly and specific. Supra, 2-3. The Issue is clearly stated: "The discipline imposed was excessive and does not promote the efficiency of service and is without just and sufficient cause." The alleged violations are: CO White was not disciplined for "just and sufficient cause" and his due process rights were violated.

Management contends simply stating just cause and due process does not meet the specificity test required by 32(a). Standing alone a reasonable person might reach the same conclusion in respect to due process. However, the Grievance asks rhetorically;

> "...How can a discipline approximately two years old serve the efficiency of the Parties...?"

It is abundantly clear the Union is referring to the period of time from the dates the incidents took place, in October and December, 2006, until CO White's removal June 11, 2007. Two years overstates the time period, but it was some twenty months from the first inci-

dent and seventeen months from the second incident. On the one hand the Agency argues Section (a) of Article 32 stands alone, separate and distinct from Article 31, GRIEVANCE PROCEDURE. It argues at the very least the invocation lacks specificity. Continuing, it submits this alleged lack of specificity places the Agency at a disadvantage because of the lack of clarity. On the other hand Management stresses the Arbitrator is bound by the four corners of the CBA, opining he lacks authority to deny the Motion and the Agency is entitled to due deference. To be perfectly candid, the Grievance is one of the most detailed this Arbitrator has seen, and he has seen several thousand. In addition the Agency had all of the Affidavits, with accompanying Documents. It had the Invocation letter. It has a copy of the CBA. It employs professional Human Resource personnel and Staff. It has support from the National Office of the Department of Justice. Mr. Schultz testified:

> "I've been a warden since 1999. After my first job as warden, I was a senior deputy regional director in the western region, was associate warden; was the assistant administrator-assistant administrator -- of inmate monitoring in the central office, unit manager, case manager. I guess I was counsellor (sic) for two years, so I'll count that, correctional counsellor (sic); and a correctional officer for two years." TR, 71, April 22, 2007.

Ms. McConnell, an experienced administrator who previously and properly acted a grievance as untimely, raised no procedural objection at any time. The Agency lodged its Procedural Motion "about a week ago. ." when Johnsolen LeMaster contacted Counselor Greenstein. TR, 6. The Union argues this delay constitutes a waiver. Management disagrees.

We will review the addressing of due process in the ATTACHMENTS entered by the Parties. In FCI-Forrest City (Mgt. 1) the Arbitrator found the Grievance was procedurally defective. (supra, pp. 28-29). He noted the Agency notified the Union "...on 6 June 2001 that the Grievance lacked specificity." In spite of the notice the Union invoked arbitration June 27, 2001. In the instant Grievance the Agency waited some nine (9) months AFTER the invocation to allege lack of specificity. In FCI-Milan (Mgt. 4) the Union invoked arbitration, identifying as the issue; "Grievance Response." The Arbitrator found the grievance was not arbitrable. On appeal to the FLRA the Authority upheld the Award. at 30-31. This Arbitrator has no disagreement with the Award and FLRA. The invocation was nebulous. In FCI-Florence (Mgt. 5) the Union submitted a "memorandum" to invoke arbitration which is non-specific as to the Arbitrator denied the grievance under 32(a) and under 31(g) as well. This Arbitrator agrees. supra, 31-32.

In FCI-Tallahassee (U-2) the Agency contested the specificity of the grievance. The Arbitrator found in part; "...[T]he evidence is more than sufficient to inform both the agency and the arbitrator of what is being grieved." supra, 33. In FCI-Bennettsville a nurse was sexually assaulted in September, 2006 by an inmate. She waited two days to report the incident. The inmate filed a complaint against her in January, 2007. On Feb. 6, 2008 the Agency proposed that she be removed. On Sept. 11, 2008 the Warden reduced it to a 15 day suspension. (Id) The Union took exception to the suspension. "...It alleged the Agency's action was untimely, was not based on just cause, and that it did not serve the efficiency

of the service ..." supra, 35. In part the Arbitrator found that the Agency provided no "plausible explanation for 14 of the 24 months delay in this matter..." supra, 37.

Labor and Management advocates commonly cite HOW ARBITRATION WORKS as being informative on a broad range of subjects, to include waiver:

> "Waivers, because they result in defeat of the rights of the parties without consideration of the merits, are not lightly inferred by arbitrators. Thus, two grievances filed in a dispute over the issuance of reprimands and involuntary transfers were held to be arbitrable, despite the contention that the union had waived the right to process them in the course of responding to the employer's request for clarification, because the union never explicitly withdrew them." Elkouri & Elkouri, HOW ARBITRATION WORKS, Alan Miles Ruben, Ed.-in-Chief, 6ed, 2003, BNA Books, DC, p. 312, underlining added.

> "Questions of timeliness in the pursuit of grievance and arbitration procedures continue to be a major factor in arbitral decisions on waiver issues. The failure to act on a timely basis has been held to be a waiver. However, there are a number of cases rejecting claims of waiver. An employer may not stipulate to arbitrability and then raise timeliness, and a denial based on timeliness may be defeated where the merits are discussed later without expressly preserving the timeliness challenge, or where the parties agreed to hold a grievance in abeyance pending bargaining. However, processing a grievance does not waive a timeliness argument where the objection is expressly preserved.
>
> In many cases, a claim of procedural waiver has been denied because the claim was first advanced at arbitration or at an advanced grievance step. As one arbitrator recognized:
>
> > Parties often evolve their own system for dealing with grievances, at variance with the literal terms of their collective bargaining agreement. Of course, such a change has evolved,

> party may still insist that the literal requirements of the agreement be followed. But if it decides to so insist, it must give advance warning to the other party of its intent to demand strict adherence to the terms of agreement, lest the other party be 'sandbagged' by its reliance on the assumption that the actual practice, rather than the literal terms, would continue in effect." Id. 562-563.

Finally, we will touch upon the "four corners of the COLLECTIVE BARGAINING AGREEMENT" as it applies to the Procedural Motion under review. In the PREAMBLE it states in part:

> "... The parties recognize that the administration of an agreement depends on a good relationship. This relationship must be built on the ideals of mutual respect, trust, and commitment to the mission and the employees who carry it out..." p. 1.

ARTICLE 2 is entitled: "JOINT LABOR MANAGEMENT RELATIONS MEETINGS." Its obvious intent is to resolve mutual problems.

Section 2(a) of ARTICLE 30 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." p. 70, underlining added.

It states in part in ARTICLE 31 - GRIEVANCE PROCEDURE:

> "The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under USC 7121." p. 73, underlining added.

The language found in ARTICLE 36 - HUMAN RESOURCE MANAGEMENT is in concert with the good faith commitments appearing above.

> "The Union and the Employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and

> the Employer to fulfill the mission of the organization.
>
> This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in the daily routine, or during extraordinary cooperation. the Union and the Employer commit to these principles. at 82

There are some similarities between the Record in Union ATTACHMENT NUMBER 3 and the instant Matter. It was not by accident that this Arbitrator gave such attention to FCI-Bennettsville. Arbitrator Murphy "took off the gloves" in his findings. (See Paragraph 2. supra, p. 37.) It is not suggested the Arbitrator's findings (at 37) are totally applicable here. What is applicable is, like the Management at FCI-Bennettsville the Bureau has all the resources and all the information available to make an informed decision. The Arbitrator had no problem, whatsoever, in understanding the Grievance and its nexus to the Invocation under Article 31(a). The brevity in the Invocation did not prejudice the Agency in the least. The action of Management in making a last minute Procedural Objection is in direct conflict with agreed-to language intended to produce good faith bargaining and resolution of problems at the earliest time, which serves the mutual interests of the Parties. In FCI-Bennettsville; "The Union stressed the Agency's history of untimely action.." Supra, 36. No such history is shown here. However, in the instant Matter the last-minute Procedural Objection is linked to the Agency's latent evaluation of its case on the merits.

Based upon the foregoing the Buroau's Procedural Motion is denied.

THE MERITS

THE "AWOL" CHARGE

"CO Donnell White was charged with:

"Charge I Inflicting Bodily Injury on a Co-Worker
Charge II Unprofessional Conduct
Charge III Absence Without Leave (AWOL)
Charge IV Failure to Follow Leave Procedures
Charge V Failure to Follow Post Orders" supra, p. 8.

We will address first the AWOL Charge. The incident occurred October 20, 2007. Charges III, IV and V are specific to the discharge.

We do not intend to be abrupt. We do intend to be informative and as brief as possible. The Record clearly shows what occurred October 20, 2007 and the events subsequently related to the AWOL. CO White left over an hour early without permission and did not complete the log until the next day, in violation of Post Orders and Leave Policy.

There are three (3) categories of Misconduct offenses. Category Three is considered the least serious. TR. 64. SIA Byrnes testified:

> "...The AWOL would be the least serious, three being the least serious, and on the warden's signature we can move ahead and we just notify OIA that we're working on that." TR. 10.

Mr. Byrnes was "called upon in October, 2007 to investigate allegations of misconduct by Mr. White." TR.63. In spite of the fact the agency had the authority and the autonomy to address the AWOL at

that time, it did not do so. Mr. Byrnes did not begin his investigation until February 4, 2008 , about fourteen weeks after the incident. (Sec U-2) Considering he had other duties and considering Management considered this a minor offense this was not an unreasonable period of time

The Union stressed the total amount of time from the date of the incident until any action, noting:

a. The AWOL incident occurred October 20, 2007

b. Management took no action until it included the AWOL charge in the Proposal to Remove Letter issued Feb. 2, 2009.

c. The Agency took no "official" disciplinary action until the Removal Letter which was issued June 11, 2009.

The Union opines that this is in direct conflict with the language of Section 2 of Article 33, which endorses "...the concept of timely disposition of investigations and disciplinary/adverse actions."

Less than five (5) months after the AWOL incident Management had irrefutable, conclusive evidence that SCO White was guilty of Charges III, IV and V. There is no evidence between March, 2008 and February 1, 2009 the incident was ever mentioned until the Proposal to Remove issued February 2, 2009. This covers a period of seventeen months from the date of the incident and at least eleven (11) months from the time Management knew it had a mountain of evidence to support disciplinary action on the AWOL charge.

The Agency sat on its rights (doctrine of laches). Simply defined it means a delay caused by one Party is prejudicial to the other

Party. There was no reason given during the two-day Hearing for this delay. The delay is not only in direct violation of Section (d) of Article 30 but also conflicts with either express or implied language appearing supra, pp. 43-44. SIA Byrnes testified this was a site matter subject to the jurisdiction of the Warden.

Management made a conscious decision to let the AWOL incident lay dormant for at least eleven (11) months; resurrected it in the Proposal to Remove issued February 2, 2009 and piggy-backed it onto the Removal issued June 11, 2009, seventeen (17) months later. Surely the framers of the LABOR AGREEMENT did not intend that their labor would result in a cavalier application of the "four corners of the Collective Bargaining Agreement."

The Arbitrator cannot think of a reason for such an unreasonable delay. In respect to the AWOL incident Management "held all of the cards." The investigation was complete. The Grievant admitted his errors, was remorseful and placed himself at the mercy of the Agency. It did nothing. In Article 30, Section c it states in part:

> "The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior..."

To permit the Agency at this time to do an "add-on" would sanction blatantly ignoring this language and other provisions and would sanction such action. The Arbitrator has no authority under Section h of Article 32 to "...add to, subtract from, disregard, alter or modify any of the terms of this Agreement." Management clearly and consciously violated express and implied language of the CBA. As a consequence of its violating the CBA the following are dropped

as part of the discharge action against Donnell White:

Charge III — Absence Without Leave (AWOL)

Charge II — Failure to follow Leave Procedures

Charge I — Failure to follow Post Orders.

INFLICTING BODILY INJURY on a CO-WORKER
UNPROFESSIONAL CONDUCT

The Report is quite detailed. This includes the events of December 15/16, 2007. The evidence is conclusive that:

a. [illegible] Jackson made a profane and ethnically charged verbal assault upon Troy Snyder. He also pushed Snyder, blocked an outside door and locked him out.

b. Donnell White attempted to get a key from CO Riley.

c. Jackson verbally assaulted White. White responded with profane remarks. Jackson body-bumped him and he did the same. Jackson struck the first blow. White swung at Jackson and Jackson got White in a headlock. At the time White had a Mag flashlight in one hand. He could not escape from the head-lock. He swung the flashlight in an arc and hit Jackson a couple of times on the head, causing a minor wound, but he could not escape. Snyder, who was still locked outside in the rain, activitated a body alarm. Lt. Nolan and others responded. Jackson would not release White until Lt. Nolan assured him White would not hit him again.

d. White was interviewed Dec. 16, 2007. He was placed on paid home leave from Dec. 18-07 to March 1,/08.

e. Jackson was taken to a local hospital to have his wound checked. White had a bruise and swelling on the left side of his face and bruised knuckles on his left hand.

f. Jackson resigned April 10, 2008.

g. White worked his regular duties until his Removal/discharge June 11, 2009.

H. The Proposal to Remove Letter was issued 02/02/09.

I. White was interviewed by SIA Byrnes Feb. 21 and March 6, 2009.

The history of the events from Feb. 2, 2009 forward are in the Record, probably at least twice in different Sections. A list of the Officers interviewed and Affidavits appears supra, p. 26. The testimony and Affidavits overwhelmingly establish that John Jackson has a history of workplace violence. We will summarize, listing the officers who stated this under oath with brief quotes. The briefest way to do this is to use the Union Exhibits in the order entered.

J. Officer White's Affidavit and testimony, supra.

K. John Jackson (addressed briefly, infra)

L. Kelly Bartholomew - In reference to Dec. 16th he said: "...Snyder and Jackson made several comments back and forth and then Jackson got up and went over to Snyder and dared him to say anything now..."

M. Troy Snyder - Jackson was "...using the same threatening behavior, but this time towards Officer Bartholomew. I then said to the Officer stop being a bully.." "Jackson ran toward me in a threatening manner." He backed out of the office. It was raining. Jackson pushed him out of the office and locked the door. Jackson pushed White in the face and I pulled the body alarm.

Mc. Lt. Stan Nolan - Staff was used to separate Jackson and White. There was a verbal altercation which escalated. "Officer Jackson sustained two lacerations to the head and was subsequently escorted to the hospital by Officer Pelusco. Officer White sustained a cut to the knuckles of his left hand and swelling to his left cheek."

N. Lt. Manuel Pagan - On Dec. 15th during a briefing at the beginning of the shift Jackson was talking down to other Officers. He cursed Washington. He later said; "...you know what F--k you Pagan, you're friends with all of them, yeah F--k you too..." Pagan took him outside. "I informed Officer Jackson that it was unacceptable behavior and he was not to do it to anyone else.."

O. Jackie Washington - He summarized what Lt. Pagan said.

P. John Peluseo - He took Jackson to a local hospital Dec. 16th after the incident. Jackson stated; "If he was out here and I had a gun I would shoot him right between the eyes..." Later he said if he lost his job he "...would have to go on a hunting trip in North Jersey" and then said "...You didn't hear that." Again he did not articulate what he meant. However, after the hospital, Jackson commented that he knew White lived in North Jersey."

Q. David Harkcom - He was not in the office during the altercation. He responded to the body alarm

R Phillip McIntosh - Safety Specialist - He was not at the altercation. Jackson reported his injury to him as a work related injury. He said that he pushed Snyder out the door.

S David Riley - Dec. 16th - when I entered the Lt.'s office Jackson was yelling at Snyder, calling him names and berating him. He made ethnic remarks about eating pork. Snyder is a Muslim. Snyder walked away and opened the door to the outside. Jackson pushed him and locked the door. White asked Jackson for his keys. Jackson refused and White asked for my keys. Before I could give them to him Jackson referred to White as a "punk bitch." White said not to try to push him around. Jackson chest-bumped White, White shoved back. "Officer Jackson then struck Officer White in the head with his right hand."

Kerry Bartholomew - TR. 130 - In reference to Jackson: "I know he had an incident with an inmate over a couple of onions at the, what used to be the east gate..."

"The other incident that I was familiar with was an incident with Officer Impellizzeri." TR., 131.

Stefano Impellizzeri - TR. start p. 205 - He reported to work about 5:50 a.m. Jackson was on duty until 6:15 a.m. He wanted to be relieved early and got on the radio giving orders. He is not a Supervisor. Shortly thereafter he spoke to Jackson and "...called him a choice name." 206 In the vehicle Jackson grabbed his shirt and shook him. He said to Jackson; "I'm not out there for a fight and he said; 'I don't care about this fing job, I'll kill you..." The Officer added when this took place; "He had a 9 millimeter bureau issued weapon on his side.'" Impellizzeri said he felt "threatened." "Oh definitely, because of his statement and I know of his past..he's a big guy, but like a strong crazy guy..I think he's a nut, to be honest..... That's my opinion, but I think the guy's nuts and being nuts and strong are two bad combinations." 209

Lt. Sean Nolan - he described his involvement with the Dec. 15 incident to include his investigation. He took photos of Jackson and White. He responded on direct examination in reference to White:

> "[H]e was a decent officer...I don't particularly have a problem with Officer White."

In reference to Jackson he responded:

> "[H]e was a guy that was hot tempered. He was a hot tempered type of guy. I wasn't a big fan of having him on my shift because his temper seemed to get the better of him a lot of times." "I guess Jackson was a little bit of a liability. I always kept an eye on Jackson because he seemed to -- he seemed to not always get along with other staff." TR. 229-230.

The preceding clearly establishes that John Jackson had a history of workplace violence. He is a bully. For some unknown reason his repeated behavior and violation of Rules and Policies were tolerated. Other officers did not like to work with him. Lt. Nolan was uncomfortable having him on his shift. The morning of the incident when Polusco took him to the hospital he said if he had a gun he would shoot White "between the eyes." Previously he told Policemen he would kill him. He told a number of lies when he was interviewed. He profanely attacked several Officers Dec. 15 and 16, to include Lt. Pagan, who took no action in spite of Jackson's blatant insubordination.

We will now apply the evidence to the Douglas Factors, which appear at the end of the AWARD as APPENDIX "A."

> (1) The AWOL Offense has been dismissed, leaving Inflicting Bodily Injury and Unprofessional Conduct. White had a flashlight with him, not as a weapon but as a necessary piece of equipment on the midnight shift. During the fight he struck Jackson on top of the head a couple of times as an act of self defense. It was an act of despera-

tion. Jackson had him in a strong headlock. Officers did not break the headlock. He only let White go because Lt. Nolan said White would not hit him with the flashlight. Jackson clearly provoked White, but White's verbal reply does fall within the scope of Unprofessional Conduct. The net result favors White because his physical actions were defensive, rather than offensive. In its Brief the Union candidly remarked: "This factor weighs slightly against the Grievant." at 19. However, the Union included the AWOL charge in its analysis which the Arbitrator dismissed.

(2) There is no evidence White caused any public relations problem for the Agency. He was not a high-ranking official. He did not live in the immediate vicinity of the Institution.

(3) White had no prior discipline during seven (7) years of employment. This is a major mitigating factor.

(4) There is no evidence of absenteeism. The evidence shows no problems with fellow Officers. Lt. Nolan said he was a "decent officer." Lt. Pagan said he was dependable and a "good guy/cyed." This is another plus for White.

(5) White was placed on paid home leave from Dec. 18, 2007-March 3, 2008. He performed his regular duties until his Removal June 11, 2009. There is no evidence his work performance impeded the efficiency of the operation. This is a plus for the Grievant.

(6) Consistency of the penalty is difficult to assess. There are no other Removal incidents at FCI-Fairton of such violence with which we can compare. Jackson has a documented history of workplace violence with no discipline. We do not know why. Shop talk was mentioned, particularly by Jackson. It is a stressful line of work. The Arbitrator has heard a lot of prison cases. Verbal exchanges are not uncommon and it is not uncommon that very few are reported. The scenario on Dec. 15/16 prior to the initiation of violence by Jackson supports this. Jackson started his antics on Dec. 15th during Lt. Pagan's briefing. Pagan made no report. This also supports the "shop talk" atmosphere and the reluctance of Officers working as a team to report each other. The failure of Management to address an escalating problem with Jackson mitigates White's failure to immediately report Jackson. However, even though it would have been distasteful, White had a window where he could have walked away and could have taken alternative action before the altercation. White knew the Policy. This favors the Agency.

(7) Snyder was issued a Written Reprimand because he did not report Jackson's actions against him. The Reprimand is consistent for a Category Three offense. Discharge for workplace violence is within the Guidelines. This favors the Agency.

(8) Notoriety and Impact - This overlaps somewhat with Factor 2. There is no evidence the incident harmed the reputation of the Agency. It was an "in house" matter which was handled in house. No newspaper articles were introduced showing any printed exposure to the public. This favors the Grievant.

(9) Clarity of Rules and Employee Awareness - The extensive training made available by the Bureau and Officer White's experience confirm he was well trained and aware of the Rules. This favors Management.

(10) Potential for Rehabilitation - There is no evidence which explains Management's inference that Donnell White was a lost cause. If this were true, why would it return White to work at all? It could have retained him on home leave, conducted an expeditious investigation and made a reasoned decision. Instead, it returned him to work. He worked from March 1, 2008 to June 11, 2009 without incident. He was discharged June 11, 2009. He had no cause for discipline until the Oct. 20, 2007 AWOL incident. He clearly defended himself when attacked by Jackson. He had no record of absenteeism. He got along well with fellow Corrections Officers and Supervisors. Why White would not be candidate for Rehabilitation is an enigma. This factor favors Officer White.

(11) Mitigating Circumstances - Provocation - The evidence is overwhelming that Jackson initiated a series of events which led to the altercation with White, beginning with his demeaning Washington during Lt. Pagan's briefing, followed by his insubordination toward Lt. Pagan. He provoked and laid his hands on Snyder. He provoked White, verbally abusing White and physically assaulting him. White simply wanted to let Snyder in out of the rain, which likely was a cold rain on Dec. 16, 2007. Snyder and White were both victims of an Officer with a history of workplace violence. Jackson struck the first blow and White defended himself. Obviously this Factor favors White.

(12) Alternative sanctions to defer future conduct - Management has the authority and published Rules and Policies to address both verbal assaults and workplace violence. Apparently the large majority of employees "get it," since the evidence reveals there is (or was) only one Jackson at FCI-Fairton. White has a proven record of satisfactory service; no discipline,no absenteeism, was provoked and defended himself against a bigger, stronger and violent man. The fact that the Agency could breathe easier when Jackson resigned ten months prior to the beginning of the formal investigation cannot serve as a reason to go after White. If Management truly believed White had negatively effected the efficiency of the operation, it had eleven

months to positively enhance his perceived deficiencies through additional training. It could have offered assistance under the EMPLOYEE ASSISTANCE PROGRAM (EAP) under Article 34 if it believed he had an emotional problem. There is no evidence of counseling. At the same time there is no evidence of any deficiency in his job performance from March 1, 2008 to February 1, 2008. Obviously this favors Donnell White.

The Douglas Factors are not weighted. Since Management is the moving Party we will simply give a plus (+) where the Factor is aggravating, favoring Management and a minus (-) where a Factor is mitigating, favoring the Union/Grievant.

1.	(-)	(7)	(+)
2.	(-)	(8)	(-)
3.	(-)	(9)	(+)
4.	(-)	(10)	(-)
5.	(-)	(11)	(-)
6.	(-)	(12)	(-)

Based upon the Douglas Factors the Agency did not establish a prima facie case. It failed by a wide margin to carry its burden of proof under the preponderance of evidence rule.

CONCLUSIONS

SCO White was charged with Unprofessional Conduct. The Agency proved this charge by a preponderance of the evidence. While there are mitigating circumstances, initially White had the opportunity to walk away. The Arbitrator made a similar observation in Union Exhibit 5. See APPENDIX B. Relative to this Charge it would be

an abuse of the Arbitrator's authority to substitute his judgment for that of Management

In Steelworkers v. Enterprise Wheel & Car Corp., the U.S. Supreme Court spoke of the remedy power of arbitrators:

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." Elkouri & Elkouri, HOW ARBITRATION WORKS, Alan Miles Ruben Ed.-in-Chief, BNA, Wash. DC, 6ed, 2003, pp. 1188-1189.

Troy White was issued a Written Reprimand for Unprofessional Conduct. This falls within the Guidelines for a Category Three Offense. It is consistent to apply the same discipline to SCO White.

The Charge of Inflicting Bodily Injury on a Co-Worker was proved. However, it was clearly and convincingly an act of SELF DEFENSE. The Agency conceded correctly in its Brief:

> "...From eye-witness testimony it is clear Jackson was the agressor in precursor incidents with Officers Bartholomew and Snyder." Agency Brief, p. 8.

The same Witnesses and others collectively testified and/or signed Affidavits establishing that Jackson was the agressor in multiple incidents both December 15 and 16, 2007, to include the altercation with White. Jackson's version of what occurred in his Affidavit is not credible, specifically the following: "I did not swing my fist at White until he struck me first.." UX-K. If there had been no Witnesses, whom would a reasonable person believe?

> Jackson, an insubordinate, vulgar bully who threatened to kill two fellow officers, and whose fellow SO's and Lieutenants (Pagan and Nolan) shunned working with him, or
>
> White, an officer with a clean record prior to the October 30 and December 16 incidents, very good evaluations, no history of workplace violence and an Officer whose peers and Supervisors considered as a welcome team member.

Management failed to consider the overwhelming mitigating circumstances. How it failed to acknowledge self defense is an enigma. It would be an extreme miscarriage of justice to uphold the Removal of Donnell White based upon the testimony and documentary evidence. Application of the Douglas Factors, viewed in the light most favorable to Management, finds only three (3) favoring the Bureau. Clearly there is not just and sufficient cause for the discharge of SCO Donnell White.

Section (h) of Article 32 has its roots in Enterprise Wheel & Car. The same is found in most if not all collective bargaining agreements today. The AWARD draws its essence from the Collective Bargaining Agreement, does not conflict with any provision of the CBA and is consistent with the principles established in Enterprise.

AWARD

1. The Employer's PROCEDURAL MOTION for alleged violation of Section (a) of Article 32 is denied.

2. The charges of Absence Without Leave (AWOL), Failure to Follow Leave Procedures and Failure to Follow Post Orders are dismissed based upon the Agency's unexplained delay of seventeen (17) months in acting upon the Charges.

3. The Charge of Inflicting Bodily Injury on a Co-Worker is dismissed based upon the overwhelming evidence that the Grievant acted in self defense in an attempt to avoid serious bodily harm or worse from a fellow Officer who had a history of workplace violence and who initiated the altercation. The Agency did not establish just and sufficient cause by a preponderance of the evidence.

4. The Charge of Unprofessional Conduct as part of the Removal action is reduced to a Written Reprimand.

5. Mr. Donnell White is reinstated and made whole for all losses, but for the unjust discharge. This includes, but is not limited to backpay, overtime available but for the discharge, allowances such as Annual Leave, Holiday Pay, and full restitution of seniority. Full backpay will be paid within thirty calendar days of receipt of the AWARD.

6. The Grievant will be reimbursed for all out of pocket medical expenses for which he would have been eligible but for the unjust discharge. He will be reimbursed for insurance premiums paid independently, to include deductible amounts, applying the same procedures normally and customarily required by the Agency's Plans.

7. Officer White is to be recalled immediately by Registered mail. It is permissible to contact him by email or telephone but there must be a a form of written confirmation. In the event he is employed he is afforded a reasonable period of time to report, not to exceed thirty days unless this period is extended by mutual agreement or unless Mr. White is temporarily not available due to medical reasons.

8. SCO White is required to successfully complete the Agency's standard return to work physical examination.

9. Interest will be paid at a rate agreed to by the Agency and the Union. Absent agreement within fifteen (15) days of receipt of the AWARD the Parties will jointly and expeditiously give the Arbitrator written notification which will include each Parties "bottom line," based upon the rate being paid for an eighteen (18) month Certificate of Deposit by banks in the Philadelphia area. The Arbitrator simply wants the Rates, not a Brief nor an explanation. He has resources to do "the math." Apply July 1, 2009 to fix the rate.

10. All Statutory and Contractual deductions will be made, to include but not limited to Union dues.

11. The Arbitrator retains jurisdiction only for the purpose of finalizing the monetary damages.

Norman R. Harlan, Arbitrator

Montgomery, West Virginia

August 25, 2010

DOUGLAS FACTORS
(checklist)

...

In Douglas, the Board made a distinction between the determination whether any action should be taken and the determination of what is the appropriate penalty. To support taking any action there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. To determine what penalty would then be appropriate the agency must consider all relevant factors (Douglas Factors) both mitigating and aggravating:

_____ (1) The 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;

_____ (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

_____ (3) The employee's past disciplinary record;

_____ (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

_____ (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

_____ (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

_____ (7) Consistency of the penalty with any applicable agency table of penalties;

_____ (8) The notoriety of the offense or its impact upon the reputation of the agency;

_____ (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

_____ (10) Potential for the employee's rehabilitation;

_____ (11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

_____ (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

APPENDIX B

EMPLOYER ATTACHMENTS (AUTHORITY)

1. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL UNION 922 AND U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, FORREST CITY, AR (sic) "AR" is the abbreviation for Arkansas. The Institution is in Forrest City, Arkansas. FMCS-01/14974, M.J. Fox, Jr., 6 August 2002.

2. American Federation of Government Employees, Local 1013 Federal Correctional Institution, Yazoo City, Mississipi, Union and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Yazoo City, Mississipi, FMCS Case No. 01-11952-3, Sheldon B. Adler, 5-15-03.

3. U.S. Department of Justice, Federal Bureau of Prisons, Federal Prison Camp (FPC) Seymour Johnson, Goldsboro, N.C. and AFGE Local 3977, 3-AR-4111, 05-50524, Louis M. Thomson, June 21, 2006.

4. U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Milan, Mich. and American Federation of Government Employees, Local 1741, 04-57126, Dr. Jack Stieber, February 14, 2005.

5. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, FLORENCE, COLORADO, Employer and AFGE LOCAL [illegible] Union, FMCS CASE NO. 00-12039, Michael D. Rappaport, Sept. 2, 2002.

6. FEDERAL BUREAU OF PRISONS, UNITED STATES PENITENTIARY, FLORENCE, COLORADO and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL [illegible], FMCS NO. 01-08667, Joseph W. Duffy, Sept. 10, 2001

UNION ATTACHMENTS (AUTHORITY)

1. Same as Management ATTACHMENT 4.

2. Merit Systems Protection Board, GILBERT M. HORN v. UNITED STATES POSTAL SERVICE, DAC 7528110061, Feb. 26, 1982.

3. U.S. Department of Justice, Federal Bureau of Prisons, FCI-Tallahassee, Fla. and AFGE Local 1570 - 071026-50576-3-0-AR-4631, Robert S. Hartman, January 10, 2010

4. American Federation of Government Employees, Local 2585, AFL-CIO and Linda Everitt, Grievant and The United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Bennettsville, South Carolina, Case Number 08-04822, Charles J. Murphy, April 16, 2010.

5. KANAWHA RIVER TERMINALS, INC. AND UNITED STEELWORKERS OF AMERICA, LOCAL [illegible], Norman R. Harlan, January 8, 1995.