In the matter of an Arbitration between:

American Federation of Government Employees
Local 2585, AFL-CIO and

and

The United States Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
Bennettsville, South Carolina

Federal Meddiation and Conciliation Service - Case Number: 08-04822

Before: Charles J. Murphy, Arbitrator

Appearances:

For the Union: Lilliam Mendoza-Toro, Esq.

For the Employer: Daniel P. Ritchey, Labor Management Relations Specialist

Place of hearing: Federal Correctional Institution, Bennettsville, South Carolina

Date of hearing: December 4 and 5, 2009.

Award: The Union's grievance is sustained and a make whole remedy is ordered.

Date of Award: April 26, 2010

INTRODUCTION

An arbitration hearing in the above-captioned matter was held December 4 and 5, 2009 at Bennettsville, South Carolina before the undersigned. The writer was selected to arbitrate the matter pursuant to Article 32 of the parties' collective bargaining agreement (Joint Exhibit 1). The parties are Council of Prison Locals, American Federation of Government Employees (Local 2585), which represents the Grievant, and the Federal Bureau of Prisons, Federal Correctional Institution, Bennettsville, South Carolina (FCI Bennettsville).

ISSUE

In cases where the Union chooses to proceed directly to arbitration regarding disciplinary actions the issue is set forth in the parties' negotiated agreement: "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"

RELEVANT CONTRACT AND STATUTORY PROVISIONS

MASTER AGREEMENT:

Article 6 – Rights of the Employee:

Section b(2). To be treated fairly and equitably in all aspects of personnel management;
Section b(6). To have all provisions of the Collective Bargaining Agreement adhered to.

Article 30 – Disciplinary and Adverse Actions

Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize 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 h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

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

Article 32,

Section h (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."

Back Pay Act – 5 USC 5596, subsection b:

(1) an employee of an Agency who, on the basis of a timely appeal or an administrative decision (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee -

1. is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect –

   (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;

BACKGROUND

The following synopsis of the case is provided for the establishment of a basic background as to the incidents leading up to the adverse action against the Grievant. It is not intended to be an exhaustive recitation of all events surrounding the matter.

On or about September 10, 2006, an Inmate (Shields) sexually assaulted the Grievant who was at work in her capacity as a clinical nurse for the Agency at its Bennettsville, South Carolina facility. According to the Inmate's affidavit, the assault occurred after he had engaged the Grievant in conversations over time. Shields' apparent design was to work his way into Grievant's good graces in an effort to co-opt her.

Shield's affidavit indicates that on September 10, 2006 he encountered the Grievant in the company of another Inmate (Carter). Later that day he inquired as to why she was "dealing with Carter" adding, "you know he ain't no good." Shields also asserted that the Grievant responded that Carter had said, "You're a snitch and a rat." (Joint Exhibit 2 Tab N page 3.) The Grievant acknowledged in two sworn affidavits that she had in fact made such statements. (Joint Exhibit 2 Tab H page 3 and Tab J page 3.)

On catching the Grievant unawares at one point Shields pressed himself up against her back with an exposed and erect penis and feigned masturbation. At a subsequent point in the same incident Shields asked whether the Grievant would "rather have sex with me or bring me tobacco." According to Shields the Grievant indicated "she'd rather bring me cigarettes." (Joint

Exhibit 2, Tab N page 6.) In his affidavit, Shields acknowledged that Grievant made it clear that she could not have sex with him because "that was a risk to her job," and that "she didn't think she could bring the cigarettes in." (Joint Exhibit 2, Tab N, page 6.) Shields acknowledged in his statement that he had told Grievant he would "speak to somebody about her giving inmate Carter stuff" if she did not cooperate with him. (Joint Exhibit 2 Tab N, page 6.) Shields' affidavit makes it clear that Grievant was playing for time and that she was indicating, in essence, that not bringing tobacco in immediately did not mean she would not do so at all and that Grievant was crying and expressed fear but that Shields had pressed her to comply with his requests. Joint Exhibit 2, Tab N, pages 6 and 7.

In her own affidavits, the Grievant contended that the events occurred mainly on one day and during a short period of time although Inmate Shields had made complimentary and suggestive comments on earlier occasions. Grievant acknowledged having indicated she would rather bring in tobacco than have sex with Shields but also made it clear that she did not think she had a choice. The Grievant's affidavits also make it plain that she had made it clear she could not sleep with Shields and did not think she could bring tobacco in. Grievant's affodavits indicate that she told Shields she would bring tobacco in because she was afraid and to get the inmate "to leave her alone." (Joint Exhibit 2 Tabs H & J.)

The Grievant was shaken by the assault and by Shields' comments. She had in the previous days reported the public masturbation of another inmate in her workplace and testified at hearing that she had not been informed of any action or changes to prevent similar conduct in the intervening days. (Tr. Pg 14 18-22.) She left the workplace after her shift ended without

reporting the assault, intending to report it to her supervisor the next day. The supervisor went home from work early, on September 11, 2007, prior to the Grievant arriving at work and Grievant therefore reported the assault on September 12, 2007. Grievant later testified, in essence, that she wanted to report the assault to her supervisor, Dr. Berrios, because she knew him and because she was embarrassed, worried about her job and frightened of what the inmate might do. Grievant knew the supervisor in that she had worked with him previously at the Agency's facility in Pensacola, Florida. (Joint Exhibit 2, Tab H, page 1-2.) Grievant's supervisor reported the matter to an Agency investigator who spoke to the Grievant and requested that she prepare a memorandum reporting the incident. Grievant believed that her report of the incident in this memorandum was a sexual harassment charge against Shields. (Tr. Page 116, 19-20.)

On January 12, 2007, Captain Bowling, a member of Agency management, submitted a memorandum to Warden Pettiford reporting that Inmate Shields had made an allegation against the Grievant. (Joint Exhibit 2, Tab O.) On January 17, 2007 Warden Pettiford contacted Office of Internal Affairs reporting the Grievant's alleged misconduct. (Union Exhibit 6.) On March 8, 2007 OIA authorizes the investigation stating to have it completed in 120 days. (Union Exhibit 7.) On March 30, 2007 the Agency took an affidavit from inmate Shields. (Joint Exhibit 2, tab N.) On April 16, 2007 the Agency took an affidavit from inmate Carter. (Joint Exhibit 2, tab L.) On April 17, 2007 the Agency took an affidavit from inmate Terry. (Joint Exhibit 2, tab K.) On May 29, 2007 the Agency took an affidavit was taken from Grievant. (Joint Exhibit 2, Tab J.) On July 26, 2007 the Agency took an affidavit from Dr. Berrios, Grievant's supervisor. (Joint Exhibit 2, Tab I.) On July 27, 2007 the Agency took a follow up affidavit from the Grievant.

(Joint Exhibit 2, tab H.) On August 22, 2007 the Agency took an affidavit from Ms. Jump. (Joint Exhibit 2, tab G.) On October 19, 2007 local Agency's local investigator issued the Final report of investigation in the matter and it was received by OIA. (Union Exhibit 8.) The OIA concluded that the charges supported by the evidence were Failure to Timely Report and Inappropriate Contact.

In a letter, dated February 6, 2008, the Agency proposed Grievant's removal from her position as a Clinical Nurse. (Joint Exhibit 2, Tab F.) 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. (Joint Exhibit 2 , Tab C). 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 that she was the "victim" in the matter and requested consideration of the fact that had to suffer "a great deal of stress because of this incident and the orders that were placed upon me." (Joint Exhibit 2, Tab C.)

By letter, dated September 11, 2008, Warden Darlene Drew issued a decision to suspend the Grievant for 15 calendar days. (Joint Exhibit 2, Tab B.) 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 that 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 present 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 has 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.

ARGUMENTS AND POSITION OF THE AGENCY

The summary of the arguments contained below is intended to record the principal arguments offered at hearing and in the parties' post hearing briefs. It is not intended to be an exhaustive reiteration of every argument advanced by the parties although each argument was taken into consideration. The fact that any argument presented is not mentioned here or in the

following discussion suggests only that they were not deemed essential to the rendering of the decision herein.

The Agency argues that "the evidence/facts supporting the underlying charges, in complete and/or very large part, are the Grievants very own statements and admissions (JOINT EXHIBIT 2, TAB H, Transcript, Day 1, p 95-142, 189-190.)

The Agency argues that the Union erroneously interprets as mandatory Agency policy a memorandum (Union Exhibit 5) which is only a guideline for conducting investigations of misconduct. The Agency also contends that the arbitrator lacks "authority to establish a precise deadline for conducting misconduct investigations and proposing discipline which it argues would be contrary to the negotiated, non-specific time frame set forth in Article 30, Section d, and Article 32, Section h. The Agency also argues that the deciding official took the issue of "time" into consideration in this matter and gave appropriate mitigation on that basis. It further contends that the Grievant was not prejudiced in any manner by the delay but rather benefited from it in that this added time gave her a chance to prove herself to the deciding official, an opportunity that she would not have had if the Agency had acted earlier.

The Agency also observes that the language chosen by the parties in Article 30, Sections d and d(1) of their master agreement is not ambiguous, does not contain time limits for investigation or disciplinary decisions. It asserts that the arbitrator implying one would effectively modify, or add, to the terms to the negotiated agreement. It also argues that contrary to the suggestions of the Union regarding timeliness Article 30, Section d(1) provides that no

discipline can be proposed until the investigation has been completed and reviewed by the CEO (i.e., the Warden) or designee. (Joint Exhibit 1.)

At hearing, the Union requested the arbitrator make a finding that the Agency should be barred from taking disciplinary action against Grievant on the basis of the doctrine of collateral estoppel. The Union submitted four arbitration decisions arising from cases, between these same parties, in which delay on the order of that in the instant case formed the basis for arbitral decisions overturning the discipline. The Agency argues that the prior arbitration decisions have no precedential value. It asserts that the cases cited by the Union each have unique sets of facts and circumstances that are not present here and that the principles of res judicata or collateral estoppel cannot therefore be applied and would amount to clear legal error forming the basis for an appeal. It also argues instead that in adverse actions (suspension of more than 14 days) the Arbitrator is bound not to follow other arbitrators but rather to follow the standards established by the Merit Systems Protection Board (hereafter the MSPB or the Board). Cornelius v. Nutt, 53 U.S.LW 4837, 4840; Robinson v. Department of Health and Human Services, 30 MSPR 389.

The Agency also cites in its argument a decision by the MSPB in which it considered the questions regarding the investigative process and timeliness. It observes that on September 11, 2009, the MSPB sustained the removal of a Bureau of Prisons staff member who claimed procedures detailed in a Department of Justice's Office of Inspector General report had, in so many words, created substantive investigational rights that the Agency ignored. The Board fell back on the harmful error standard. Reynolds v. Department of Justice, PH-0752-09-0220-I-1, September 11, 2009, Petition for Review Denied. Thus, the Agency argues, the correct line of

analysis here is one of harmful procedural error, absent which only a finding that the Warden's decision was, "beyond the bounds of reasonableness" would allow the Arbitrator to "usurp the Warden's decision and to replace it with his own."

The Agency also argued that the Grievant's assertions that her inaction was prompted by fear should be disregarded and that the Arbitrator should take notice that all law enforcement officers can find themselves in situations in which they are "afraid" and that they are not thereby relieved of their duties and obligations. The Agency argues that to hold differently, and to excuse the Grievant, would do great harm to the Agency and its continued orderly operations. The Agency also noted that Grievant remained at work for the remainder of the day after the assault and came back to work without first reporting the assault that she was apparently not afraid for other staff members and inmates endangered by her failure to report.

The Agency additionally argued that no evidence exists to show that the Warden did not give appropriate consideration and weight to the fact that the Grievant was a indeed a "victim" but rather that the "extreme amount of mitigation from a removal proposal to a 15 day suspension is very indicative of the Warden's reasoned determinations in this regard."

ARGUMENTS AND POSITION OF THE UNION

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 that the Agency's action was untimely, was not based on just cause, and that it did not serve the efficiency of

service. The Union also argues that the Grievant was not treated fairly and equitably in that her complaints about inmate sexual misbehavior were handled differently than those of members of management. The Union also argues that the Agency's own investigation disclosed that only the charges of failure to timely report the underlying incidents and inappropriate contact could be sustained. The Union argued further that the Agency had unclean hands in that it required the Grievant to work with the inmate who had assaulted her and that by virtue of this requirement Grievant was exposed to what amounted to double jeopardy. The Union also argued that this conduct was additionally in violation of against Agency's policies regarding the protection of staff who are sexually victimized.

DISCUSSION, FINDINGS OF FACT AND OPINION

Before addressing the main facts of this case the arbitrator feels constrained to offer findings regarding several issues which the Union raised at hearing. During the hearing, it became clear that the Union felt obliged to raise questions of double jeopardy and the Agency's handling of the Grievant's related sexual assault and sexual harassment complaints and a motion for collateral estoppel. The double jeopardy claim arose from the fact that the Agency required that Grievant provide continuing medical treatment to Inmate Shields for some 10 months after he assaulted the Grievant. The Union's claim of inaction vis a vis Grievant's report of sexual assault and sexual harassment came about as a result of the fact that, in the Union's view, the Agency did not properly handle the Grievant's complaints under its policies dealing with the prevention of sexual harassment and assault. While the arbitrator is sympathetic to this argument, the parties'

agreement limits the issue before me to the issue as stated above, as agreed to by the parties at hearing.

The Union had the opportunity in processing its grievance to choose between procedures that, as the arbitrator understands it, would have allowed the Union to raise these added issues under the contract's regular grievance procedure or under the procedure it actually utilized in which disciplinary matters go directly to arbitration. The Union chose to go directly to arbitration and I therefore deal herein only with the questions related to the adverse action taken against Grievant. To the extent that the Union argues that requiring Grievant to provide medical care to the individual who assaulted her constitutes discipline I find that the record discloses no disciplinary intent on the part of the Agency in this particular regard. I also find that no adjudicatory process occurred as a result of which it would be appropriate to find that the Agency was imposing or seeking to impose a second penalty on Grievant by requiring her to provide medical attention to Shields. I make a similar ruling as to the union's representations at hearing regarding the Agency's alleged violation of its policies regarding prevention of sexual harassment. Although no specific remedies were sought as to these issues at hearing or in the Union's briefs I find that they were outside the scope of the issue before me.

At hearing, the Union also made a motion for a ruling barring the Agency from action against the Grievant based on the doctrine of collateral estoppel. The Union provided a series of decisions in cases between the same parties in which the Union raised questions regarding the timeliness of discipline. Each of the cases cited formed the basis for arbitral decisions either modifying or overturning the Agency's actions on the grounds of timeliness. At

hearing, I took the matter under advisement and indicated a suspicion that the question of timeliness might more properly go to the question of mitigation of any penalty. Upon study of this question I find that the questions of collateral estoppel based on previous decisions overturning the Agency's action in earlier cases by reason of timeliness and a ruling of untimeliness in the present matter are distinct questions.

The Union argued that a ruling for collateral estoppel "requires that the following four elements be present: 1. The issue at stake is identical to the one involved in the prior litigation; 2. The issue has been actually litigated in the prior suit; 3. The determination of the issue in the prior litigation was a critical and necessary part of the judgment in the action; and 4. The party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding." Upon research the arbitrator finds that "The Board has applied three prerequisites for the application of the doctrine: 1. the issue must be identical to that involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination in the prior action must have been necessary to the resulting judgment." (Payer v. Department of the Army, MSPB NY0432811034(02/28/84)84 FMSR 5179 and Siegert v Department of the Army, MSPB DC07528810170 (11/09/88 38 MSPR 684).

In Siegert, however, the Board decided that "With respect to the identity-of-issues requirement, differences precluding the application of the doctrine may be in facts, subject matter, the periods of time, case law, statutes, procedural protections, notions of the public interest, or qualifications of tribunals." Gomez, The Application of Collateral Estoppel in Proceedings Before the U.S. Merit Systems Protection Board, 39 labor L.J. 3 (1988). The Board denied estoppel in

the matter of Siegert, however. And the Board noted that, "The Supreme Court has held that before a party can invoke the collateral estoppel doctrine, the legal matter raised in the subsequent proceeding must involve the same set of events or documents and the same 'bundle of legal principles' that contributed to the rendering of the first judgment." Commissioner Sunnen, 333 U.S. 591, 599 (1948.)

Having now read each of the cases cited by the parties concerning the issue I now find that the Union's motion for collateral estoppel should be denied. I find that the parties here are the same and one aspect of the related issues is the same (timeliness of the Agency's action); and the same "bundle of legal principles" applies to the cases cited. However, the cases do not share the same set of events or underlying facts and that Grievant's case involves post hiring conduct while the cases cited involved conduct at or prior to hiring.

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 that 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. The separate question as to the timeliness of discipline will be discussed below, after discussion of the charges and penalty assessed against the Grievant by the Agency.

On September 11, 2008, Warden Drew notified Grievant that she had sustained the four charges referenced in the Agency's earlier proposal of discipline against her. I will examine each of the charges ad seriatim.

The first charge, Inattention to Duty, was predicated on an allegation that on September 4, 2006 Grievant had left the outer compound door and the inner hall door of the Health Services Unit unsecured. (Joint Exhibit 2, Tab F.) The Agency proposal indicated Grievant had acknowledged in a sworn affidavit that she had not had a chance to secure the doors. An examination of Grievant's affidavit indicates that she stated, in essence, that "pill line," a period during which Grievant dispensed medications, had just ended and that an Inmate (Carter) had requested a brace which Grievant had supplied to him. Grievant's statement indicates that it was at about this time that Inmate Shields entered the medical area. Nothing in Grievant's affidavit (Joint Exhibit 2, Tab J.) or Carter's affidavit (Joint Exhibit 2, Tab L.), or for that matter in Shields' affidavit (Joint Exhibit 2, Tab N.) suggests that any undue period of time had elapsed during which the doors in question remained open. Similarly, nothing in the record indicates that any inmates other than Shields and Carter had entered, remained in, or gained access to the area and I so find.

Additionally, Shield's affidavit suggests that Grievant and Inmate Carter were involved in sexual activity (which would necessarily entail inattention to duty). I find Shields' statement not to be credible. I make this finding based both on Shields' plain bias against the Grievant, who had reported the sexual assault with the result that Shields was placed under greater restrictions, and on the basis of Inmate Carter's plausible explanation for his presence in the medical unit as well as his denial of any illegal activity with any Agency employee. (Joint Exhibit 2, Tab L, page 3.)

As part of its inquiry into the allegations against Grievant made by Shields the Agency assigned Lieutenant Ronald Profitt to conduct an investigation. Lieutenant Profitt took sworn affidavits from those known to have been present in the area at the time of the incident. In Lieutenant Profitt's report of March 8, 2007, (Union Exhibit 8.) he indicated that his investigation revealed insufficient evidence to conclude Grievant had breached security. At hearing, Warden Drew testified, in response to a question from the Agency's representative, that she is not bound to adopt the findings of the Agency's investigators in making her decision to sustain charges. (Transcript Day 2, Warden Drew, page 148-9.) It may well be the case that a deciding official may tender what charges he or she chooses but it is axiomatic that the Agency has an obligation to prove any charges it sustains and absent such proof it cannot establish just cause. 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. Social Security Administration, 104 LRP 8789, 59 FLRA 671 (FLRA 2004); See, INS, New York District Office, 91 FLRR 1-1434, 42 FLRA 650 (FLRA 1991). Council of Marine Corps Locals, 35 FLRA 108, 90 FLRR 1-1210.

As to Charge 2, Unprofessional Conduct (Joint Exhibit 2, Tab F.), the Agency charged that Grievant "told Inmate Shields that Inmate Carter had called him a 'snitch.'" Grievant acknowledged in an affidavit that she had in effect confirmed Shield's own statement to her that he had heard Carter had called him a snitch. A careful review of both Shields' affidavit (Joint Exhibit 2, Tab N.) and that of the Grievant (Joint Exhibit 2, Tab J.) as well as Grievant's

testimony (Transcript Day 1, pages 115-121.) supports the deciding official's decision to sustain Charge 2. Grievant testified, in essence, that she had been afraid to deny Shield's own statements regarding Carter's comments because she was afraid of him and because he was (apparently) already aware of them. Both Shield's affidavit and Grievant's affidavits suggest that Shield's was at the same time attacking Carter's character and that the Grievant was, in essence, implying that Carter had said similar things about Shields. Notwithstanding the context of the disclosure, it is clear that Grievant did confirm Shield's statements and it is clear that the preponderance of the evidence supports Warden Drew's decision to sustain Charge 2. It is therefore sustained. Notwithstanding this fact, it is also clear that the Agency's own investigator did not find this allegation sustained, as Warden Drew herself testified. (Transcript Day 2, page 124.)

The Agency's proposal letter and Charge 2 draws its language from the Agency's disciplinary policy but elides the language of several separate offenses. In testimony at hearing, Warden Drew testified that the Schedule of Offenses is not intended to be limiting but that an offense might fit into more than one category. 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 (respectively) 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. The schedule of penalties contained therein suggests that the range of penalties applicable for a first offense in cases of Offense 28 "preferential treatment of inmates" and Offense 36 "conduct which could lead others to question an employee's impartiality" for which the recommended penalties range from written reprimand to removal. The language

utilized in the proposal for misconduct is based on Offenses 28 and 36 and I so find. (See Joint Exhibit 2, Tab A, page 33, Offenses 28, 36, 42, 45, and 47.) In terms of the penalty which might attach to this finding I find that her conduct, while a clear technical violation of the Agency regulations, represented a truthful confirmation of Shields' own remarks in a situation which indisputably involved no small danger for the Grievant, which can in no way be deemed to have been voluntary and that it occurred in response to her harassment and sexual assault by Inmate Shields. 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 first offense could be a written reprimand to removal. (Gunn v. USPS, 63 M.S.P.R. 513 (1994), Wolak v. Department of the Army, 53 M.S.P.R. 251 (1992) and Delgado v. Department of the Air Force, 36 M.S.P.R. 685,688 (1099).

As to Charge 3 – Failure to Timely Report, the Agency relies on four (4) specifications of failure to timely report. In Specification A the Agency allege Grievant failed to report: Shields' sexually suggestive remarks to Grievant, his request for sex and his offer to let her control any relationship; in Specification B: his request that Grievant provide him with tobacco; in Specification C: Shields hugging Grievant and squeezing her buttocks and; in Specification D: Shields placing his "erect penis" against her back, telling her he was "going to jack off" to her and Grievant's failing to turn around out of fear of what she might see. (Joint Exhibit 2, Tab F.)

The Grievant has not contested the technical accuracy of the charge that she did not timely report the fact that Shield assaulted her. However, in her response to the proposal against her the Grievant wrote, "I am not trying to say my actions were correct when I failed to immediately report the sexual assault against me. I was the victim in this situation and was afraid.

Furthermore, the only one I felt comfortable talking to about the incident was Dr. Berrios. As stated in my Affidavit, I reported what happened, to Dr. Berrios on the first day he returned to work. Dr. Berrios advised me to report the incident to Lieutenant Outlaw, and I did." (Joint Exhibit 2, Tab C.)

Grievant also wrote that after her meeting with Dr. Berrios, and after Berrios reported the incident she was interviewed by a Lieutenant Outlaw and instructed to prepare a memorandum reporting what had happened. She wrote that, "Lieutenant Outlaw instructed me to submit a memo; I believed at this point all necessary steps had been taken to ensure the appropriate handling of the incident." (Joint Exhibit 2 Tab C.)

In assessing the evidence bearing on Charge 3 it is important to note that there is no dispute that the Grievant was the victim of a sexual assault. I find that the conduct by Inmate Shields, which Grievant is alleged not to have reported, would constitute sexual assault and "quid pro quo sexual harassment" as any reasonable person would define them. The real dispute here is as to the question of whether Grievant's delay in reporting justifies disciplinary action. The Union, in essence, asks why the Agency would charge Grievant for misconduct on the basis of a failure to report an act or acts of sexual assault or sexual harassment against herself. The simple answer is that there can be no real dispute that employees need to timely report sexual assault or harassment not merely in their own interest but in the interest of their colleagues and the efficient operation of the Agency. It is also clear that the Grievant's delay (of approximately 36 to38 hours) in reporting the harassment, and assault, and the vagueness of her initial memo, did not further the Agency's actions to either protect her or her colleagues or any effort to correct and

control Inmate Shields' behavior. This is not to suggest that Grievant's report and memo did not represent the best effort(s) she could then make. In this regard, it is entirely reasonable to conclude that she was still upset about what has occurred. While neither the Grievant nor the Agency handled the matter as aggressively as they should have, neither is exclusively at fault. Grievant should have reported more quickly and the Agency should have investigated her allegations more aggressively.

From a careful reading of Shield's affidavit (Joint Exhibit 2, Tab N.) and the Grievant's affidavits (Joint Exhibit 2, Tabs H and J.) it becomes very clear that the Agency did not, in Charge 3, make clear the extent to which Shields went to corrupt and intimidate the Grievant. This is not to criticize the Agency for not charging the Grievant with failing to also report Shields' attempts to coerce Grievant by threatening her job. However, I find that Shield's threats in addition to the actual sexual assault could readily frighten, if not terrorize, many officers. It is no secret that inmates frequently attempt to corrupt corrections officers in exactly the manner that Shields attempted to corrupt Grievant.

I also find that Shields' conduct adequately explains Grievant's reaction, emotional trauma and delay in reporting. This is not to say that the charge is unfounded. It is sustained, but in the view of this arbitrator the Grievant's conduct was an involuntary response to coercion and the trauma of the assault on her. The Agency's policy on Sexually Abusive Behavior Prevention, to which the Union adverted at hearing, is both enlightening and pertinent here. (Union Exhibit 1.) It makes it clear that "While some victims will be clearly identified, most will probably not come forward with information about the event." (Union Exhibit 1, Attachment A, page 1.) As a

result, it should not come as a surprise that Grievant did not come forward and it puts her behavior, as a victim, in context. The policy itself suggests that assault victims may be identified by virtue of abrupt personality changes, withdrawal or suicidal behaviors. While policies regarding employee discipline and prevention of employee sexual abuse may not normally need to be read in the same context, it is helpful to realize that both parties here find need to rely on to them. This same reliance explains the Agency's discontent with Grievant's behavior and the Grievant (and Union's) discontent with the behavior of the Agency in regard to Grievant. 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. (Gunn v. USPS, 63 M.S.P.R. 513 (1994), Wolak v. Department of the Army, 53 M.S.P.R. 251 (1992) and Delgado v. Department of the Air Force, 36 M.S.P.R. 685,688 (1099).

As to Charge 4 – Failure to Exercise Sound Correctional Judgment, the Agency charges that the Grievant when asked by Shields to bring tobacco into the facility had agreed to do so. The Agency adds that, "Your agreement to bring the tobacco into this facility, coupled with your delay in reporting this incident, reveals a gross lack of correctional judgment. Even if you agreed to initially bring in the tobacco out of fear, letting this inmate remain in general population with this understanding for several days could have resulted in the inmate collecting monies, debts and making promises to other inmates which he would not be able to keep. Broken promises,

assurances, and debt collection between inmates commonly end in disruptive behavior among them such as fights and assaults."

The Grievant has admitted, in her affidavits, that she did make such a statement. The Agency, however, fails to present the Grievant's answer to Shields question in context, fails to quote Grievant accurately, and ignores the plain evidence regarding the remainder of the exchange between them. The establishment of the entire context, the Grievant's exact responses to Shields request, as well as a full understanding of the remainder of the exchange between their responses are key to the resolution of the charge. It is also of note in this regard that that Warden Drew acknowledged in her testimony at hearing that Charge 4 was not found to be sustained by the Agency's investigator. (Transcript Day Two, Page 124-5.) This is to say that, in the opinion of this arbitrator, the Agency investigator put Grievant's conduct in context and found it did not support a finding of misconduct although the evidence was in the record.

This arbitrator's careful reading of the affidavits of both Shields and the Grievant discloses that Shields asked Grievant whether she was going to have sex with him or bring tobacco into the prison. The affidavits of both Shields' and Grievant indicate that Grievant said she would prefer to bring in tobacco, in response to which Shields, affidavit indicates he laughed and asked her why she did not want to sleep with him, to which Grievant responded that it could get her fired. Shields purportedly then responded that bringing in tobacco could get her fired too, in response to which Shields' affidavit establishes that Grievant said that she didn't think she could bring tobacco in either. Thus, the affidavits of both the Grievant and her assailant indicate that Grievant quickly told Shields that she would not sleep with him or bring him tobacco. Both

also indicate that Shields was insistent about the matter of the tobacco and Grievant's affidavit indicates she said that she did not believe she had a choice in the matter. (Joint Exhibit 2, Tab J, page 5.) The record makes it clear that Shields threatened to report that Grievant was supplying Inmate Carter with medical supplies. (Joint Exhibit 2, Tab N, page 6.) The record also makes it clear that Shields had represented to Grievant that he had had a previous relationship with a female officer at another prison and that he had, after tiring of the relationship, exposed her and had her fired. (Joint Exhibit 2, Tab H, page 2.)

I find that Grievant's response to Shield's "which is it going to be" question was both clear and unequivocal. The record contains no credible evidence to suggest that she agreed to bringing Shields tobacco but it does suggest she told him that would be her preference, rather than having sex with him. In the opinion of the arbitrator the record reflects that Grievant played for time so as to escape the situation. I find that Grievant never agreed to bring contraband into the prison. Grievant's initial response, when presented with the Hobson's Choice, of sex or tobacco, was to choose tobacco. Her more comprehensive response was that she would neither have sex with Shields nor bring him tobacco. Shields' response was to threaten her.

It is appropriate to inquire here as to why Grievant might respond to Shields, question at all and the simple answer is that she was being sexually assaulted and that all of these events transpired in a few minutes time. It is impossible from Grievant or Shields' affidavits or from Grievant's testimony at hearing to determine exactly what words passed between them in what exact order. This is a function of the Agency's reliance on narrative form affidavits. And while the Union did not advance this defense at hearing it is plain to this arbitrator, as a former law

enforcement officer, that Grievant's comments were not indicative of poor judgment but of the opposite. Self defense is usually an instinctual response. It can occur as a matter of reflex rather than conscious thought. Grievant's behavior was clearly defensive in nature, and her conduct meets the tests for self-defense. It occurred in a moment of danger and was reasonable given all the facts. No one, officer or otherwise, operating in a dangerous situation who plays for time while offering an honest response but evasive to an either or question, when being forced to choose among equally unacceptable alternatives, can be found to have been culpable of poor judgment. I find that the preponderance of the evidence shows Grievant's actions in regard to the first allegation underlying Charge 4 were blameless and that she is therefore innocent of any misconduct in this regard.

The second part of Charge 4 couples the Grievant's statement, regarding the tobacco, with her failure to timely report Shield's request that she bring it into the prison. This question has been dealt with in Charge 3. I repeat here my previous finding that Grievant's conduct in relation to Charge 3 was a technical violation of the Agency's regulations and was clearly involuntary. In addition, the Agency may not, in the opinion of this arbitrator, use an element of one charge, even though sustained, in order to prove a second charge in which the primary allegation has not been proven. In this respect the two charges resulted from a single act, the failure to report, and the Agency ought only to have assigned one charge on that basis. In the case of Charge 4 since the primary element of the charge, Grievant's erstwhile agreement to bring tobacco into the prison has not been sustained and the charge of poor judgment based on it can therefore not be sustained. Delgado v. Department of the Air Force, 36 M.S.P.R. 685, 688 (1988). I therefore find that based on a preponderance of the evidence Charge 4 is not sustained.

The Agency's letter reducing the proposed removal to a fifteen day suspension indicates that the deciding official considered the delay in discipline and passage of time since the underlying incident, the seriousness of the charges for an employee held to a higher standard of behavior (as a law enforcement officer), and the fact that the charged conduct could have compromised the Agency's ability to accomplish its mission as well as the fact that the Grievant's actions caused her superiors to question her credibility, her effectiveness as a correctional worker, and her ability to be forthcoming. In her oral testimony, the deciding official also testified that she considered the Grievant's fear and the fact that she was sexually assaulted. Nothing in the notice of decision or the deciding official's testimony credibly reflects, however, that the Warden considered alternative sanctions as an alternative to a suspension. When asked this direct question by the arbitrator the deciding official responded in the negative. (Transcript Day 2, Warden Drew, page 175.) When questioned on redirect by the Agency's representative Warden Drew testified that she considered fifteen days the appropriate penalty and that she felt the fifteen day penalty was the lowest penalty she could give in light of the fact that the original proposal was for removal. (Transcript Day 2, Warden Drew, pages 174-176.)

I also find in relation to Charges 2 and 3 that the Grievant's conduct represents at most an involuntary and technical violations of the Agency's regulations and that the violations occurred as a result of a sexual assault upon her person. Based on my finding that Charge 1 and Charge 4 are not sustained but that Charges 2 and 3 are sustained.the penalty must therefore be further examined as to both its severity and timeliness. I find that the imposition of discipline as to Charges 2 and 3 was appropriate. I find however that the sexual assault on Grievant was the primary cause of her misconduct and that she was blameless as to it. I therefore find that the

penalty assessed by the Agency on the basis of that fact was beyond the bounds of reasonableness. I find therefore that the discipline in this matter was not based on just and sufficient cause in that the penalty applied was excessive and that the question of an appropriate penalty is properly before me. Social Security Administration, 104 LRP 8789, 59 FLRA 671 (FLRA 2004); See, INS, New York District Office, 91 FLRR 1-1434, 42 FLRA 650 (FLRA 1991). Council of Marine Corps Locals, 35 FLRA 108, 90 FLRR 1-1210.

The Union challenges the appropriateness of the penalty based on its severity and argues that the Agency may not "stack the deck" by making charges it can not sustain. The Agency asserts it objectively considered the potential penalties. Based on the deciding official's own testimony, in response to questions from the Agency's representative, it is clear that she had to repeatedly justify to her superiors why she was opting to suspend the Grievant and not simply upholding the proposed removal. It is also clear that her thinking in relation to the penalty was not what fair or lesser period of suspension, or what non-disciplinary penalty, would correct Grievant's performance. It seems clear that her concern was as to what period of suspension would satisfy her chain of command. (Transcript Day Two, Warden Drew, pages 39-41.) I find that the deciding official was more concerned with satisfying the chain of command (and with the command influence it exerted) than with remediating the employee's conduct. Higher levels of Agency management may not fix the scales of justice by pressing for certain penalties and deciding officials ought not to be subjected to such pressure. I find the deciding official's testimony that she believed a fifteen day penalty to be appropriate is disingenuous and I find, therefore, that the decision to apply a fifteen day suspension was arbitrary and capricious in that it

did not adequately weigh either the disciplinary alternatives or the fact that Grievant's misconduct was involuntary, all things considered. I also find the fact that the Agency based its penalty determination on charges not sustained by its own investigation. Taken together that fact and the fact that it failed to consider other penalties constitute sufficient reason(s) to find that it abused its discretion thereby justifying mitigation of the penalty imposed.

I find no evidence in the record to suggest that alternative penalties should not have been considered, or were adequately considered. I also find no evidence that a lesser penalty would not have remediated Grievant's behavior. The maximum reasonable penalty for technical misconduct by an employee of long service, with performance exceeding expectations, and an otherwise clean record whose erstwhile misconduct resulted from a sexual assault is most assuredly not adverse action. I find that the correct action in this case would come in the form of an alternative penalty such as training or counseling and that a written reprimand would otherwise be appropriate but for the Agency's failure to act in this matter in a timely manner.

The Agency acknowledges, however, that the length of time the it took to investigate and propose discipline in this matter could be elements which would bear upon potential mitigation of the penalty and it does acknowledge that such a determination is within the Arbitrator's authority. As to timeliness the Union argues that employees are entitled to enforcement of all of the provisions of the collective bargaining agreement, and, that the agreement provides, in essence, that while the facts of cases may vary discipline should be timely. (Union Brief, page 26.) It is widely held, however, that arbitrators have the authority to reduce penalties when not all of the

charges against an employee are sustained and when delays in imposing discipline destroy the corrective effect of discipline.

The causative incident here occurred on September 10, 2006 and the Agency did not issue its decision to suspend the Grievant until September 11, 2008. A review of the time line in the case reflects that unexplained delays totaling more than 14 months elapsed between the various stages of the investigative and disciplinary processes. Only about ten of the twenty-four months between the incident and imposition of discipline in this matter can be reasonably explained, and those were the time that the investigation was actually pending between mid-January 2007 and early March 2007 when the investigator submitted his report and the time between May 2009 and September 11, 2009 when Warden Drew assumed her duties at Bennettsville.

The Agency argues that the contract's unequivocal language states that the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions but that they recognize the circumstances of individual cases will vary and yet that there is specific no time deadline. The arbitrator understands the language of the contract to mean not that the arbitrator may apply strict deadlines but that the arbitrator is to examine the circumstances of individual cases to insure that the Agency acted in a reasonably timely based on the intricacies of any given case. But this arbitrator does not construe this language to imply that a decision of untimeliness may not be made and doing so would suggest that the parties included a meaningless provision in their agreement. In fact, a number of arbitrators have held that adverse actions taken by the Agency have been untimely, and those Arbitrators have overturned that discipline on that basis. Some investigations may be highly complex, for example, or they may involve potential criminal

prosecution of inmates or employees and might therefore require that investigative or disciplinary action be delayed until after the completion of grand jury or other prosecutorial action.

This arbitrator finds no such justification for the delay here. The investigation was not complex and it was completed roughly according to the Agency's guidelines (which, although not policy, serve as a reliable indicator of what might otherwise be deemed reasonable timeframes), the witnesses were all local and although the Grievant was interviewed twice the investigation was seemingly in all respects routine. It was after the local investigator completed his work, however, that delay ensued. No action was taken on the matter from March 8, 2007 until October 30, 2007 when the report apparently left the investigations program. No other action in the matter occurred for another three months until Dr. Berrios proposed Grievant's removal. Grievant responded to the disciplinary proposal in a timely manner on February 22, 2008 and the Agency again failed to act. After Warden Pettiford retired, an acting Warden also took no action and Warden Drew took no action on the matter for four months after assuming control of the prison.

I find that the time utilized in the conduct of the actual investigation was reasonable and that Warden Drew's explanation for her delay in acting on the matter was somewhat reasonable given that she was greeted by a series of disturbances in the prison population as and after she assumed her new duties. I find the remaining 14 months (or so) of the delay to be violative of the intent of the agreement. The Agency produced no evidence of any value to explain this delay. The claim by the Agency that its action is intended to promote the efficiency of the service is effectively belied by its failure to act. While another penalty might be appropriate in this case were discipline to have been effected in a timely manner it can not be held that a long and

unexplained delay does anything but destroy the corrective effect that timely discipline might entail.

In its argument for collateral estoppel the Union argued, to great effect, that the Agency has a long history of untimely disciplinary action and while estoppel may not be appropriate in this matter, a finding of untimeliness is indisputably supported. The Union buttressed its timeliness arguments by identifying four different Arbitrator's decisions 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. AFGE Local 3562 and BOP, (Chicago) FMCS, 06-058934, August 15, 2007; FDC Miami and AFGE Local 501, Miami, FMCS-07-51043, April 26, 2007; AFGE Local 919 and Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas, 92 FLRR 2-1620. It is axiomatic that arbitration decisions are not precedential but it is also understood that the thinking of other arbitrators has persuasive value.

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. I find that the Agency's action is in violation of the contractual requirement that discipline be taken for just cause and that discipline be timely, Article 30, Disciplinary and Adverse Actions, Section a, c and d. I find that the Grievant was affected by an unjustified and unwarranted personnel action. I also find that she suffered a loss of pay, allowances or differentials and that she is entitled to be made whole pursuant to the Back Pay Act, and subject to an appropriate deduction from such payments as may be required should Grievant have found

outside employment during the period of her suspension, and I so order. I find that her loss of pay, allowances and differentials would not have occurred but for her improper suspension. The Union is the prevailing party in this matter and the payment of such reasonable legal fees as it may have accrued in the representation of the Grievant is in the interest of justice and is hereby ordered. 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 those Charges was fully explained by the fact that it occurred while she was bring sexually assaulted and that she was therefore substantially innocent thereof. I find that the Agency knew or should have know 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 these 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 lengthy service as a management official and particularly as a personnel officer. Allen v USPS 80 FMSR 7015 2 MSPR 420 (MSPB 1980). Red River Army Depot, 91 FLRR 1-1122, 39 FLRA 1215 (FLRA 1991).

In addition, I order that all record of the Grievant's suspension be expunged from her personnel records. I also order, pursuant to the Back Pay Act, that she be made whole for all losses of pay, including any overtime she would normally have worked as well interest on back pay, and that this order be put into effect not later than 30 days after the date of this award. Department of Housing and Urban Development, 90 FLRR 1-1612, 38 FLRA 600 (FLRA 1990); Department of the Air Force, 85 FLRR 1-1286, 19 FLRA 260 (FLRA 1985). As to the matter of

the enforcement of this award or any disputes as to its meaning or the reasonableness of attorney fees or back pay ordered herein I will retain jurisdiction.

Award

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.

Charles J. Murphy
Arbitrator

April 26, 2010