IN THE MATTER OF ARBITRATION

BETWEEN

U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU
OF PRISONS FEDERAL CORRECTIONAL INSTITUTION
EL RENO, EL RENO, OKLAHOMA

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCAL 33 LOCAL 171, AFL-CIO
EL RENO, OKLAHOMA

GRIEVANT ROY MERCER
FIVE DAY SUSPENSION

ARBITRATOR: Ronald G. Iacovetta (FMCS 3342)

APPEARANCES FOR THE FEDERAL BUREAU OF PRISONS

Whitney Coleman, Labor Relations Specialist, labor Relations Branch, U.S. Department of Justice, Federal Bureau of Prisons, 346 Marine Forces Drive, Grand Prairie, Texas 75051

Dennis Letter, Captain, El Reno Federal Correctional Facility

Ann Wedding, Human Resources Manager

APPEARANCES FOR THE UNION

Ronald T, Davis, Sergeant at Arms, AFGE Local 171

Mr. Donnie Boyte, President, AFGE Local 171, Post Office Box 609, El Reno, Oklahoma 73036

Roy Mercer, Correctional Officer (Grievant)

Ellen Cullin, Employee in R&D Property

Theresa Coffman, Correctional Officer

Jake Lowery, Human Resources Manager, FCE El Reno

INTRODUCTION

This case pertains to a five day suspension of Roy Mercer (Grievant) on March 4, 2011 for unprofessional conduct for an incident that occurred on April 18th, 2010. The decision letter by Warden Ledezma eleven months after the incident indicated that a 5 day suspension was appropriate in this matter. The Agency contends that the actions of Mr. Mercer on March 4, 2011 was for sufficient and just cause. The Union contends that the suspension was solely due to the Warden having a personality issue with Mr. Mercer and the suspension was not for sufficient and just cause and asks the arbitrator to rule in favor of the Union and make the Grievant whole to include that all records be expunged or removed from the record.

Arbitration in this matter was conducted on October 20, 2011 at the El-Reno Federal Bureau of Prisons , in El, Reno, Oklahoma. The Hearing was concluded same day and the parties agreed to submit post-hearing briefs to the Arbitrator in mid December but later elected to transmit via mail by January 5, 2012. A transcript of the hearing was provided by Tamara Waggoner, CSR with Steve Meador and Associates Certified Reporters in Oklahoma City. Briefs were received by the Arbitrator on January 10, 2012 representing the date for closure of argument and presentation of testimony and evidence in this case.

THE UNION SUMMARY ARGUMENT AND POSITION

The Union contends that the Mr. Mercer was not afforded due process and that the agency's delay in bringing the matter to hearing was unwarranted. In addition, the Union notes that Warden Ledezma was not available to testify to allow for determination of what was the basis for his decision. The Union also notes that Rick Rooney, the investigative Lt. was also not available for questioning and examination at the hearing. The Union has also argued that the Agency's delay in assigning the case to a representative and the delay in selecting a hearing date delayed the case and precluded that these witnesses were not available for questioning and cross examination by the Union or the Arbitrator.

The Union's position is that the 5 day suspension of Roy Mercer lacks just and sufficient cause and contends that if the incident had involved anyone else the discipline would not have occurred. The Union argues that the incident that occurred involved nothing more than Mr. Mercer doing his job and committed no violation that justifies discipline. Mr. Mercer testified that he was waiting for his Unit to be called for Recreation Move and then Evening Meal Move and when one inmate seemed suspicious and had given him a false name he waited by the door and called for the inmate who ignored him. The Union contends that He (Mr. Mercer) grabbed the inmates sleeve to get his attention and the inmate turned around in an aggressive stance with his hands clinched into a fist up toward Mr. Mercer's face and Mr. Mercer started to use his radio but when he was unable to communicate with the inmate who then turned around aggressively to face him he shoved the inmate back to keep his distance from him to lessen the threat. Mr. Mercer indicated that once inside the foyer area the inmate ended up taking him to the Ground banging him in the head several times. Mr. Mercer testified to an incident that happened the night before when he was assaulted over a narcotics

incident and that he felt his radio had malfunctioned at that time.

Captain Dennis Letter testified with respect to the video of the incident that was submitted in evidence at the hearing noting the following:

1. He only used the video to determine the discipline he was going to propose in this case.

2. The Captain testified that he only had input into the proposal but could not remember who he had worked with on the proposal which the Union contends pertains to its argument relative to how such a delay creates a loss of memory and evidence since the Captain indicated he did not create the proposal but reviewed and agreed to it.

3. The Captain's letter indicated that he used other cases to compare and used cases from other institutions without knowing what circumstances were involved in those cases conflicting with his testimony that he only used the video to determine his proposal.

4. The Captain testified that Mr. Mercer admitted to grabbing the inmate inside the foyer area once they went inside in an attempt to take the inmate to the ground but when asked why Mr. Mercer was not disciplined for than Mr. Letter stated "No, He (Roy Mercer) perceived there was a danger at that point to him." (Tr, 58, line 17 to 59, line 3).

5. The Inmate did receive an incident report for assaulting Roy Mercer during the incident.

Counsel notes that Ann Wedding provided conflicting testimony to Captain letter. She testified that:

1. She was the Human Resources Manager when researching to help formulate proposal stays within the institution locally and no further away than regionally and noted that she could not recall what circumstances or mitigating factors she considered in helping to provide information to the proposing official(s). Nor could she recall what other "like" cases she used to compare this case to noting that "I don't remember anything specific, no" (Tr. 65, Line 14). The Union noted at the hearing the fact that the witnesses could not remember specifics due to the delay in getting to a final decision on discipline (11 months) and then an additional 7 months to get the case to a hearing (for a total of 18 months) from the time of the incident. Union Counsel also notes that Ms. Wedding testified that at the bottom line it was the Captain Letter's proposal but he indicated that he did not type, draft or create the proposal but reviewed and agreed with it. Counsel noted further that both witnesses used similar case information to determine discipline although they could not remember what cases they used, locally or regionally.

Union Counsel notes that Joint Exhibit 10 illustrates two cases of unprofessional conduct. One was proposed a LOR (Letter of Reprimand) and that was the decision and the other was a proposed 1 day suspension and received only a letter of reprimand but Mr. Mercer received a proposed 10 day suspension and received a 5 day suspension.

The Union also cites the case of an employee charged with the use of profanity and refusal to follow Supervisors Instructions where a 4 day suspension proposal resulted a LOR (Letter of Reprimand) and another employee charged with a Breach of ?Security resulted in a proposed 4 day suspension but received a 1 day suspension. Union Counsel contends that these cases provide support to the claim that Warden Ledezma let his personal feelings toward Mr. Mercer dictate his decision. This is supported by the fact that Ellen Cullen in R&D Property (Tr. 96-98) testified that Warden Ledezma had commented to her that she should not let her son act like Mr. Mercer. (Tr. 97, 17-25). In addition, Correctional Officer, Theresa Coffman testified (Tr. 91-95) that Roy Mercer was singled out for "yawning" and removed form the training class that day and that it appeared to her that the Warden had a personal dislike for Mr. Mercer.

Union Counsel notes that Warden Ledezma's testimony was vital to this case and could have testified regarding what Douglas Factors he relied upon in making his decision to impose the 5 day suspension of Mr. Mercer. Union Counsel notes the following Douglas Factors and the relevance to the discipline of Mr. Mercer.

1. The nature and seriousness of the offence 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.

Counsel notes that Mr Mercer was doing his duties directly related to the supervision of inmates, following up on an inmate giving a false name, the shove in the back was to keep distance form the inmate after the inmate had displayed aggression as indicated in the video. Counsel contends that Mr. Mercer was not acting in malice; the inmate eventually assaulted Mr. Mercer and received an incident report for the assault and Mr. Mercer had not been disciplined for this type of offense prior to this incident or after.

2. The employees job level and type of employment, including supervisor or fiduciary role, contacts with the public and prominence of the position.

Counsel notes that Mr. Mercer's job level is of a line staff/bargaining unit member and does not supervise any other staff. He is a correctional officer whose main function is to keep the safety and security of the institution for staff and inmates and has no contact with the public in regards to his position.

3. The employee's past disciplinary records.

Counsel notes that Mr. Mercer in making his verbal response to the Warden was told by the Warden that "you have had discipline in the past and even though it has been pulled, I can still use it to make my determination about this case". Counsel notes that Mr. Mercer had received an LOR (Letter of Reprimand) for a comment he had made to another staff member but this had been pulled from his personnel file.

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

Counsel notes that Mr. Mercer started working for the Federal Bureau of Prisons on April 8, 1990 and has received accommodations for his work performance.

5. The effect of the offense upon the employee's ability to perform at satisfactory level and its effect upon supervisor's confidence in the employee's work ability to perform assigned duties.

Counsel notes that Union Exhibit #5 illustrates that Mr. Mercer has received and exceeds level evaluation across the board for the rating period that this incident happened and continued to receive exceeds level evaluations after the incident and has continued to work the same job as a housing unit officer after the incident which indicates that the agency had not lost confidence in his ability to perform the job or concern that a similar incident would happen again.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offense.

Counsel notes that we can only go on what is in the disciplinary log since Ann Wedding and Captain Letter have lost their memory dud to the delay in issuing the discipline and the delay in getting to a hearing. Counsel notes that since the Warden was not brought forth to testify Joint Exhibit 10 must be relied up which shows 2 other cases of unprofessional conduct with both receiving only an LOR (Letter of Reprimand) and yet Mr. Mercer received a 5 day suspension after a proposed 10 day suspension.

7. Consistency of the penalty with any applicable agency table of penalties.

Counsel notes that while there was not testimony or document to show a table of penalties Joint Exhibit 10 shows that an employee charges with the use of profanity and refusal to follow supervisors instructions received only an LOR and another employee who was charged with e breach of security received a 1 day suspension.

8. The notoriety of the offense or its impact upon the reputation of the agency.

Counsel notes that there was no impact on the agency holding that physical incidents happen on a frequent basis inside a Federal Prison and goes with the job. In addition, Counsel notes that the inmate was disciplined for assaulting Mr. Mercer.

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.

Counsel notes that Mr. Mercer testified that he had been trained to remove inmates from the area, to keep your distance and Mr. Mercer was trying to get the inmate to go back inside the housing unit

when the inmate displayed aggressive behavior toward him and he once the inmate was moving and turned around toward him he (Mr. Mercer) pushed the inmate in the back to keep him form closing the gap between him and the inmate. Counsel notes that Agency Exhibit 3 is the Bureau of Prisons's use of force model which indicates that when an inmate's action rises to a level of Passive Resistance officer Mercer responded with Containment Techniques which was the shove in the back in an effort to keep the inmate moving to an area out of the situation. Counsel contends that Mr. Responded in accordance with his training and this model.

10. The potential for the employee's rehabilitation.

Counsel notes that the record is clear that the Agency did not use the 5 day suspension for corrective action and was only to punish Mr. Mercer 11 months after the incident during which time he was allowed to continue to work the same job, with no decline in performance. Mr. Mercer was injured as a result of the inmate assault and the inmate was disciplined(Union Exhibit 2).

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

Counsel notes that some of the mitigating circumstances involved in this case are the following:

A. Roy Mercer was assaulted the evening before by an inmate that he observed acting suspicious and when investigating this activity was forcibly held down while another inmate tried to dispose of drugs.

B. During the incident Roy Mercer tried to use his radio to call for backup and felt that it would not work to get assistance.

C. There had been a mass shakedown of the unit where the entire unit had their living quarters searched because of the assault on Roy Mercer the evening before.

D. The inmate had given a false name to Roy Mercer which triggered the incident. Counsel contends that if the inmate had not given the false name there would have been no incident.

E. Had the inmate not ignored Mr. Mercer when he called him outside there would have been no incident.

F. The inmates reaction to Mr. Mercer tugging on his sleeve by putting both hands up in a clinched fist in fighting stance raised the level of threat by the inmate which had to be reacted to.

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

Counsel notes that Captain Dennis Letter took corrective action the night of the incident by showing the video to Mr. Mercer. Counsel notes that Captain Letter pointed out to Mr. Mercer that "they" (not him) felt that Roy had done wrong (Tr. 193 lines 11-25, 194, lines 1-10) indicating that the Captain Letter did not have an issue even though he supposedly made the proposal but Mr. Mercer was allowed to continue to work in the housing unit and supervise
inmates with no limitation indicating that Captain Letter was not concerned that it would compromise his ability to do the job to which he was assigned.

The Union notes that the agency had the burden of proof to show that the 5 day suspension was for just and sufficient cause and holds that the Agency failed to meet this test. Union Counsel has argued through testimony and evidence and the hearing and in post-hearing brief that Mr. Mercer was treated disparately and the discipline was not for just and sufficient cause. Counsel contends that Captain Letter took the only corrective action necessary by showing Mr. Mercer the video and pointing out the push in the back which was what "they" have a problem with.

Counsel has argued that the Agency's untimely delay (11 months) in imparting discipline and the delay in agreeing to a hearing date for another 7 months is troublesome especially given the fact that the hearing date was finally agreed to 21 days after the Warden retired and could not be forced to attend the hearing. Counsel has argued that the testimony of the Warden was crucial in order to determine what was his basis for the decision in relation the Douglas factors. Counsel has argued that consideration of the 12 Douglas factors provides no just or sufficient basis for the discipline imposed by the Warden on Mr. Mercer. Counsel has argued that there were significant mitigating circumstances that led to the incident and the discipline imposed by the Warden was for due to a personal dislike of Mr. Mercer.

Counsel also questions the deterrent or corrective import or impact of discipline impose 11 months after an incident where an incident is not addressed and the officer is not only not reprimanded but job duties and responsibilities continued unchanged. In addition, Counsel notes that the testimony of Captain Letter and Ann Wedding provides no clear evidence as to how the discipline proposal was formulated and by whom or what douglas factors were was considered or deemed relevant to the determination.

Finally, Union Counsel notes that Correctional officers who do not have a weapon, baton or pepper spray to protect themselves do not have time in conflict or confrontational situations with inmates to worry about what may happen when their actions are subject to Monday Morning Quarter-backing. Counsel notes that correctional officers must make quick decisions in potentially life threatening or situation which effect the security of the institution, staff or inmates. Counsel contends that given the circumstances of this incident Mr. Mercer acted appropriately and was able to present his side of the story at the hearing. Accordingly, the Union requests that the Arbitrator sustain the grievance and officer Roy Mercer be made whole with respect to the 5 day suspension and the discipline record be expunged form his personnel file.

THE AGENCY'S STATEMENT OF THE CASE

The Agency via testimony and argument at the hearing and in post-hearing brief contends that the 5 day suspension of Mr. Mercer was for just and sufficient reason given the action taken by him on April 19, 2010 in handling a situation with an inmate at the facility. The Agency contends that the Grievant acted in an unprofessional manner which placed him and his co-workers in harm's way when he approached an inmate and grabbed him from behind. Counsel contends that when the inmate reacted the Grievant shoved the inmate more than once, resulting in an escalation of the situation to a point which disrupted the normal operation of the facility.

The evidence and testimony in this case indicates that on November 5, 2010 the Grievant was issued a notice which proposed that a 10 day suspension was recommended as discil9ine for the actions taken by the Grievant. Mr. Mercer submitted an oral response dated November 18, 2010 and an oral response on January 12, 2011. Counsel notes that in his written response the Grievant noted an incident that occurred the previous day and that inmates had indicated to him on the day of the incident how unhappy they were. Counsel further notes that during his oral response the Grievant admitted that his actions may have been affected by the situation that occurred the prior day and made a futile attempt to allege extenuating circumstances regarding this incident. Counsel notes the record indicates that on March 9, 2011, less than two months after the Grievant provided his oral response to the deciding official (the Warden) sustained the charge but mitigated the proposed ten day suspension fo a five (5) day suspension. The Union then invoked arbitration in this matter on behalf of Mr. Mercer and pursued a review of the Agency's decision to this arbitrator in accordance with the terms of the parties Collective Bargaining Agreement.

THE AGENCY'S ARGUMENT AND POSITION

The Agency contends that it acted properly in imposing the discipline on Mr. Mercer for his actions on April 19, 2010 and that his suspension was for just and sufficient cause and served to promote the efficiency of the service and requests that the Arbitrator deny the grievance and uphold the five day suspension that the Warden imposed. Agency Counsel notes that the Grievant does not deny the factual essence of the charge and his defense rests on the biased perception that his conduct was permissible and appropriate in spite of the training and policies that indicate to the contrary.

Counsel points out that Mr. Mercer has attempted to explain his misconduct away based on a veiled attempt to blame an alleged radio malfunction for his actions on the day in question noting that he thought his radio would not work based on his belief that it had not work the day before in spite of his testimony that it did work.

In addition, Counsel has noted that although the Grievant was admittedly agitated due to the incident the day before he did not request an assignment change or notify his supervisor that he could have difficulty in dealing with work related issues. Counsel has argued that the Grievant's actions were in not due to a response to the actions of another (the inmate) but were instigated by Mr. Mercer resulting in inappropriate and unprofessional conduct which disrupted the integrity of the institutional

unit involved and could have had more serious consequences beyond what actually occurred.

Counsel notes that the Union has argued the discipline was untimely. However, Counsel contends that no explanation was offered by the Union or the Grievant for the untimeliness of the Grievant's oral response to the proposed discipline and a decision on discipline was made by the Warden less than two months after the response was received.

Counsel has noted further that in deciding what action was appropriate, the deciding official (the Warden) considered the nature and seriousness of the charges, as noted in the first sentence of the second paragraph of the decision letter, the Agency's table of penalties and the fact that the Grievant was aware of the Agency's standards of employee conduct and policy on use of force. Counsel also notes that the Grievant's prior disciplinary record was not mentioned or considered by the Warden in determination of discipline in this case.

Counsel contends the Warden mitigated the proposed ten day suspension to a 5 day suspension in consideration of Agency standards and policy as well as the Grievant's length of service and work record. Finally, Counsel contends that the fact that the Warden retired before an arbitration hearing was scheduled has little bearing on the case since the facts relative to the decision speak for themselves as noted in the decision letter.

Finally, Counsel has argued that the Agency acted responsibly and properly in full compliance with the Collective Bargaining Agreement in this case and the disciplinary action taken was due solely to the fact that the Grievant acted unprofessionally when he approached and grabbed the inmate from behind in violation of agency policy in how to deal effectively and professionally with inmates. Counsel contends that the Agency expects employees to obey policies and rules established by the Agency and the Agency must be permitted to discipline employees who have violated such rules.

In addition, Counsel notes that the discipline of choice is normally left to the discretion of the Agency and any decision to mitigate a penalty should only be made when the penalty imposed by the Agency is shown to have been so unreasonable so unreasonable as to demand a different result. Counsel notes that this may be done only by showing the Agency failed to follow its own guidelines or failed to treat an offending employee equally with other employees who have committed like misconduct and been given lesser discipline; or where it is shown that the Agency illegally discriminated against the employee. In the instant case before the arbitrator Counsel contends the Agency followed its own guidelines, treated the offending employee equally and did not otherwise discriminate against the employee. Accordingly, Counsel contends that the Agency decision in this case should be found appropriate and for just and sufficient cause and the Arbitrator should affirm the decision of the Agency and sustain the 5 day suspension imposed on the Grievant for unprofessional conduct.

ARBITRATOR DISCUSSION AND CONSIDERATION

the Arbitrator is troubled by the evidence in this case. In particular, the Arbitrator finds the eleven (11) month delay in imposing a 5 day suspension for alleged unprofessional conduct by the Grievant

on April 19, 2010 fails to have any reasonable or valid import in promoting the efficiency of the Agency or serve to reduce or prevent such conduct which could compromise the security and integrity of the Agency. The Arbitrator has difficulty with a penalty imposed 11 month after an incident and where the officer in question was allowed to continue to work the same assignment and perform the same job duties has any meaningful import or impact to insure the efficiency or integrity of the Agency or serve to reduce the probability of re-occurrence of behavior which allegedly could have compromised the safety and security of other employees or inmates.

The Arbitrator notes that Mr. Mercer's incident affidavit (Joint Ex. 4) taken by Richard Rooney, Special Investigative Supervisor was on June 2, 2010 a little over a month after the incident in Union B on April 19, 2010. In addition the evidence (Joint Ex. 5) and testimony indicates that the proposal Letter sent to Mr. Mercer by Dennis Letter was on November 4, 2010 over six months after the incident on April 19, 2010 and over five months after Mr. Mercer's affidavit was filed with Richard Rooney. The Arbitrator finds this extended delay in proposing discipline for an incident over 6 month earlier unprecedented and indicates a failure of the institution to deal with a matter deemed deserving of discipline in a responsible and timely manner. The Arbitrator is also troubled by the fact that the deciding officer (the Warden) did not impose discipline in this matter until March 4, 2011 (Joint Ex. 8) eleven months following the incident and almost four months after Mr. Mercer's written response (Joint Ex. 7) on November 18, 2010 to the proposal letter by Mr. Letter.

The failure of the Agency to take prompt action (impose discipline, and re-assign the officer to other duties or responsibilities outside the Unit involved) indicates to the Arbitrator that the action of the Grievant was not considered so serious that it compromised the safety or security of employees or inmates or compromised the security, integrity or efficiency of the agency. This conclusion is crucial to this case and the Arbitrator is compelled to give this reality due consideration in rendering a finding in this matter. The Arbitrator notes that Section g, of Article 30 in the Master Agreement (Disciplinary and Adverse Actions) states that "The employer retains the right o respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee form the institution pending investigation and resolution of the matter...."

In the considered judgement of the Arbitrator had Captain Letter or the Warden believed that Mr. Mercer's action's compromised the security, integrity or efficiency of the institution (or, as the Warden alleged in his discipline letter, that such action could jeopardize the safety and security of the institution and that Mr. Mercer's action "caused a disruption to the orderly running of the facility") the Warden or designated supervisor should have invoked the right to reassign Mr. Mercer to other job duties within the institution pending investigation and discipline resolution in this matter. However, the institution failed to take this action allowing Mr. Mercer to continue the same job assignment and duties for close to a year before discipline was imposed which indicates that there was no real concern about any compromise to the security, safety or integrity or efficiency of the institution. In addition, discipline imposed almost one (1) year after an incident cannot have any real or meaningful corrective value or benefit in preventing or modifying behavior of a correctional

officer or serve to insure the safety, security, integrity or efficiency of the institution.

The Arbitrator is also troubled by the testimony of two witnesses who allege that The Warden made statements indicating a dislike for the Grievant and this dislike. Ellen Cullen, an employee of 17 years and in SIS for five years (Tr. 96-100) testified that Warden Ledezma made a comment to her to the effect that she should tell her son, who was a correctional officer, not to be like Roy Mercer and indicated that it was a couple of months or so after the B Unit incident and before discipline was imposed.

Correctional Officer Theresa Coffman, testified (Tr. 91-96) testified about an incident at a Correctional Officers Retreat in May where Warden Ledezma got upset with the grievant for yawning while he was speaking at the meeting and he became very upset and said "get him out of here, get him out of here now" at which time Mr. Mercer was escorted out the door. Ms. Coffman testified that she raised her had at the meeting an asked "what did he do? Can you tell us what he did? And then she indicated she heard form someone on Mr. Mercer's side of the room that he yawned while the warden was speaking. Ms. Coffman indicated that at that point someone brought up that "most of us in the room had less than a seven hour turn-around from our shift that we were required to be back" and Ms. Coffman indicated the Warden told her to be quiet and behave when she asked the question about what did Mr. Mercer do.

Ms. Coffman indicated that it seemed that the Warden had a personal issue with Mr. Mercer and that he was not the only one yawning at that meeting at 7 a.m in the morning. The meeting was on May 7th approximately a year and a half after the incident. While Agency Counsel Coleman questioned how this incident could have any bearing on the discipline imposed on the Grievant prior to this event Union Counsel contends that it serves to affirm that the Warden had a strong dislike of Mr. Mercer which affected his decision in imposing the earlier discipline.

The Arbitrator is also troubled by the Agency's extended delay in agreeing to a date for Arbitration (an additional seven months to set a hearing date or 18 months from the incident) and the failure or inability of the Agency to compel Warden Ledezma to testify in recognition that his appearance was crucial to this case since the burden of proof rests with the Agency to provide evidence and testimony to support and affirm that the imposition of discipline was for just and sufficient cause in compliance with the terms and conditions of the Memorandum of Agreement between the parties, past practice considerations, and determination in such cases. Rick Rooney, the investigative Lt. Was also not available to testify. In the considered judgement of the Arbitrator the fact that the Warden and Mr. Rooney were not present to testify and be subject to questioning and cross examination with respect to the basis for the charge of unprofessional conduct and the basis for the discipline proposal and discipline decision in this matter significantly weakens the Agency position in this case. As indicated in testimony in this case the Union made concerted attempts to get the case scheduled for Arbitration before Warden Ledezma and Lt. Rooney retired with no success (Tr. 137-138).

The Arbitrator must also take into account past practice in disciplinary cases. The Arbitrator notes that a review of the Disciplinary/Adverse Action Log for October 2011 (Jt. Ex. 10) that only one

charge of unprofessional conduct received a 5 day suspension. Two cases of unprofessional conduct received only an LOR (Letter of Reprimand). The Union also cited the fact that an employee charged with the use of profanity and refusal to follow supervisors instructions was proposed for a 4 day suspension but received only received an LOR and an employee charged with a breech of security was proposed a 4 day suspension but received only a 1 day suspension.

Captain Letter testified that he considered the institutional video of the incident to determine his discipline proposal but also indicated that he only had input into the decision but could not remember who he worked with and noted that he did not create the proposal but only agreed with it. Captain Letter also testified that he used other cases from other institutions for comparison representing conflicting testimony where he indicated he only considered the video. Captain Letter also testified that Mr. Mercer admitted to grabbing the inmate inside the foyer area once they went inside once they were inside in an attempt to take him to the ground but when asked why the Grievant was not disciplined for this action he stated that "No, He (Roy Mercer) perceived that there was a danger at that point to him." Tr. 58, line 17; 59, line 3).

Ann Wedding, Human Resources Manager providing somewhat conflicting testimony noting that when researching to help formulate proposals she stays within the institution locally or no further away than regionally and she could not recall the circumstances or mitigating factors considered in helping to provide information to the proposing official in this case and could not recall what other "like" cases she used to compare this case to stating "I don't remember anything specific, no (Tr. 65, line 14). She also testified that the discipline proposal was the Captain's proposal even though Captain Letter testified that he did not type, draft or create the proposal and only reviewed and agreed with it. The Arbitrator concurs with the Union that the testimony of Captain Letter and Ann Wedding illustrates that witnesses could not recall specific considerations relevant to this case which has something to do with the length of time that has passed (11 months) from the time of the incident and an additional 7 months to get to arbitration.

The Arbitrator is also troubled by the Agency depiction of the events on April 19, 2010. The Agency has argued that Mr. Mercer acted improperly when he grabbed the inmate's right sleeve o get his attention and pushed the inmate towards the entrance of Unit B as indicated in the video of the incident. However, in the judgement of the Arbitrator the Agency failed to take into account the fact that Mr. Mercer indicated in his Affidavit (Jt. 4) that he had (at around 4:30 p.m) asked the inmate his name while he was sitting on a stair railing in Unit B and was given the anser "Peterson" and when asked if he had ever had a conversation with him (officer Mercer) he said no "NO" and walked away.

The Grievant noted that after letting the inmates out for recreation he went back to the office and tried to look up "Peterson" on the Unit Roster noting that no such name was there and decided to find out who he was when the Unit was let out for chow. Then, according to the testimony of Mr. Mercer at 4.44 p.m he opened the unit for chow and stood in the Unit B front entrance as the inmates left the Unit. When seeing the inmate (later determined to be inmate Shepard) who said he was Peterson Mr. Mercer called out "Peterson" more than once as the inmate walked by and continued to ignore him

and as he (the inmate)walked through the outside doors Mr. Mercer stated he went after him and called for him to stop and with no response Mr. Mercer took hold of his right sleeve and the inmate spun around and faced him and was told to go back into the Unit entrance and the inmate told Mr. Mercer not to touch him.

The Grievant testified that he then moved the inmate towards the entrance (the Video shows that Mr. Mercer pushed him toward the entrance). And after getting to the entrance the inmate put his hands up in a defensive posture and he got the3 inmate over to the North West corner of the entrance way away from other inmates and the inmate spun around and pushed him (the grievant) back and he (Mr. Mercer) then atte3mpted to take the inmate to the ground but was knocked down instead and the inmate kept pushing him down when he tried to get up knocking his eyeglasses off and radio knocked loose. When Staff arrived the Inmate (Shepard was taken dow2n, handcuffed and escorted out of the unit.

The Arbitrator finds this sequence of events compelling indicating that Officer Mercer was doing his job to identify an inmate who had given him a false name and was concerned and when the inmate refused to respond to repeated requests grabbed his sleeve to get his attention and ordered him to go back inside Unit B and the inmate resisted doing so resulting in some shoving of the inmate by Officer Mercer (as indicated on the video) in order to get the inmate back into Unit B to determine who he was. In the judgement of the Arbitrator this action was due to an initial passive lack of response to Officer Mercer's request followed by active resistance to the inmate when ordered to go back into the Unit. Passive resistance called for some form of containment technique (to get inmate back in the Unit away from other inmates) and some compliance technique to get the inmate to do what he was told in the face of active resistance. In the judgement of the Arbitrator Officer Mercer's actions were reasonable in response to the behavior and action of an inmate who chose to refuse to comply with Officer Mercer's requests.

While Officer Mercer could have handled the situation differently and waited for backup he was, in the judgement of the Arbitrator, doing what he felt he needed to do given the circumstance and the evidence that the inmate was not who he portended to be (for whatever reason). The Federal Bureau of Prisons USE OF FORCE MODEL is a guide based on Reasonable Officers Perceptions. In the judgement of the Arbitrator Officer Mercer felt there was sufficient Passive Resistance and Active Resistance by the inmate to respond with reasonable Containment and Compliance Techniques. And, it is clear that once inside Unit B Officer Mercer perceived that the inmate was assaultive and responded with Controlling/Defensive Tactics which was not considered a violation of professional conduct by the Agency. In addition, the Arbitrator notes that the evidence and testimony relative to whether Mr. Mercer attempted to use his telephone to call for assistance is disputed and cannot be considered relevant to this consideration.

The question is whether the Grievant's perceptions of the actions of the inmate were reasonable and were the responses reasonable based on those perceptions. Given the evidence and testimony in this case it is the judgement of the Arbitrator that they were reasonable and did not represent a failure which unduly compromised the safety, security or integrity of the institution and did not constitute

sufficient or compelling evidence that the Grievant's behavior was unprofessional or that he violated rules of conduct or policy in the action(s) that he took on April 19, 2010 in dealing with inmate Connell Shepard. In the judgement of the Arbitrator Officer Mercer was attempting to perform his professional responsibility to identify an inmate who had given him a false name and was concerned when he discovered that the name given did not correspond to the roster of inmates in Unit B.

In the judgement of the Arbitrator the video does not depict how the inmate responded to Officer Mercer verbally or how his behavior and body language raised concern when Officer Mercer directed him to go back inside the Unit. The Arbitrator finds the testimony of Mr. Mercer compelling in indicating that he felt he was fulfilling his responsibility to deal with an inmate that was not responding to his request, was duly concerned as to why the inmate had given him a false name, and was attempting to find out who he was in order to insure the integrity and safety of the Unit. While Officer Mercer could have, in hindsight, handled the situation differently by calling for backup support, it is clear to the Arbitrator that Officer Mercer was only attempting to establish the inmate's identity and did not anticipate that his attempt to do so by getting his attention and directing him to go back into Unit B, and resorting to containment and compliance techniques when the inmate balked and became passively and actively resistant would result in the altercation that took place inside the foyer when the inmate became assaultive and Officer Mercer resorted to appropriate Controlling/Defensive tactics. In consideration of the video and the testimony of Officer Mercer the Arbitrator does not find sufficient or compelling evidence that his response to inmate Shepard constituted unprofessional conduct (albeit questionable in the view of the Agency) .

The PROGRAM STATEMENT on Standards of Employee Conduct (Jt. Ex. 3) indicated under "General Policy" on page 6 that employees of the Bureau are governed by the regulations published in 5 CFR Part 2635 while noting that this program statement "..does not and cannot specify every incident which would violate standards of conduct" noting that "In general the Bureau expects its employees to conduct themselves in such a manner that their activities both on and off duty will not discredit themselves or the Agency and notes under "Personal Conduct" on page 7 that it is essential that employees conduct themselves professionally and notes multiple categories of activity that may represent unprofessional activity including alcohol/ drug abuse, sexual relations with inmates, providing or accepting unauthorized favors, articles or services, show favoritism, use brutality or physical violence toward inmates beyond what is necessary to subdue, engage in profane or obscene language, improper involvement with inmates, avoid situations which give rise to a conflict of interest or participate in conduct which would lead a reasonable person to question the employees impartiality. In the judgement of the Arbitrator none of these categories noted herein or the fifty two (52) offense categories cited on pages 3-17 of Attachment A relate in any meaningful way to the behavior of the Grievant on April 19, 2010.

The Arbitrator also notes that under the "Standard Schedule of Disciplinary Offenses and Penalties" (Attachment A, page 1 of Jt. Ex. 3) indicates in item 2 that "ordinary penalties imposed should be within the range of penalties provided for the offense" and in item 3 it is notes that the deciding official will consider relevant circumstances including mitigating and aggravating factors when determining discipline" and "The range of penalties provided for most offenses is intentionally broad,

ranging from official reprimand to removal" but that "While the principles of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal (and) this is especially true where there is no indication that the employee would be corrected by a lesser penalty, or if the offense is of such a nature that reoccurrence of the conduct could jeopardize security or bring disrepute on the Bureau of Prisons".

In the Review of the Federal Bureau of Prisons Disciplinary System ((Union Ex. 1) it is noted that a review of system wide dispositions in disciplinary cases that in the Adjudicative phase, the institution HR staff received the investigative file from the CEO and reviews the content to recommend appropriate discipline and this recommendation is based on the specifics of the case, the discipline previously imposed in similar cases by the current CEO at that institution and the range of discipline described in BOP's Standards schedule of Disciplinary Offenses and Penalties and the Institutions HR staff and the proposing official determines the appropriate discipline. Tim Davis. Sergeant at Arms AFGE testified that the both federal regulations and BOP guidelines state that deciding officials must provide reasons for mitigating penalties in the decision letter (Tr. P.106) and such factors would be part of the Douglas Factors. Mr. Davis noted that the Warden's Decision Letter states that, " among other factors, because you have been employed with this Agency for almost 21 year and your performance has been acceptable, it is my decision that a five calendar day suspension should have the desired corrective effect" noting that this letter was on March 4, 2011 eleven months after the incident.

Mr. Davis notes in reference to the Federal Bureau of Prisons Review of the Disciplinary System (Union Ex. 1) under RESULTS IN BRIEF on page one where it says "...deciding officials (which would be the Warden) often fail to document their reasons for mitigating disciplinary proposals; the independence of the investigative and adjudicative phases of the disciplinary process can be compromised because the Chief Executive Officers (CEOs) have a role in both phases."

Mr. Davis noted that both federal regulations and internal BOP guidelines state that deciding officials must provide reasons for mitigating penalties in the decision letter which would be part of the Douglas Factors. Upon being directed to look at the Decision Letter (Joint 8) Mr. Davis notes that the Warden only cites the work history for the mitigation but does not refer to other Douglas factors in support of his decision to impose a 5 day suspension. Union Counsel referred to Appendix III in this document noting Harry Lappin's response to the Office of Inspector Generals OIG report, "Review of Federal Bureau of Prisons Disciplinary System" where he concurs with recommendation number 3 which states: "Ensure that when the deciding official mitigates the proposed discipline the decision letter contains an adequate explanation of the reasons.

Union Counsel asked Mr. Davis whether the Warden's decision letter provided an adequate explanation of the reasons for mitigating the proposed discipline or reflect what Director Lappin indicated he would ensure happens? Mr. David responded "No, it does not". When asked why not, Mr. Davis replied that " it says ensure that when the deciding official mitigates the proposed discipline the decision letter contains an adequate explanation of the reasons. There was more

mitigating factors other than his length of service and his - - let me make sure exactly the way he did. Acceptable performance. There's more mitigating factors than that, that he did not consider that he is not here to testify to." Mr. Davis also indicated that out of 12 douglas factors the Warden only considered two factors, years of service and performance. In the judgement of the Arbitrator the Proposal Letter should have indicated which Douglas Factors were critical to the discipline and the Warden's Decision Letter should have indicated what factors were relevant to a mitigation of the discipline along with factors deemed relevant in justification of the discipline.

The testimony of Captain Letter is inconsistent indicating that he took into account only the video to determine the discipline he proposes but also indicated he looked at other cases at the facility and from other institutions but that he did not create the proposal. Ann Wedding, Human Resource manager testified that she helped formulate discipline proposals within the institution locally or regionally but did not recall the circumstances or other factors she considered in helping to provide information to the proposing official and could not recall "like" cases she used for comparison (Tr. 65, line 14) and noted that it was Captain letters proposal even though he indicated he did not type, draft or create the proposal and only reviewed and agreed with it.

In the judgement of the Arbitrator there was a lack of recall as to what or who was responsible for the proposal or what factors were considered in creating the proposal which clearly represents a failure of the Agency to provide compelling and sufficient evidence to justify the proposal. The Arbitrator also notes that the Review of the Federal Bureau of Prisons Disciplinary System (Union Ex. 1) notes that "...it is presumed that like penalties will be imposed in like cases" (Union Ex. 1, p. 28) it notes that "Some regional HR staff stated they reviewed disciplinary cases across the region in an attempt to ensure consistency and continuity. However, the regions did not have a systematic process for such reviews and did not always use reliable information to check for consistency." (Union Ex. 1, bottom p. 20). The Arbitrator notes that in this case it is not clear what comparisons were made or what Douglas factors were considered relevant in rendering a discipline proposal or adjudication which weakens the Agency position in this case.

The Arbitrator duly notes that the Agency proposal and the Wardens final discipline determination did not give due review, notice or consideration to the 12 Douglas Factors that management needs to consider and weigh in deciding an appropriate disciplinary penalty. Finally, it is clear from the Review of the Federal Bureau of Prisons' Disciplinary System that timely disposition of cases is important and that most cases investigation and adjudication are completed in a timely manner. According to the OIA chief investigations conducted by OIA should be completed within 90 days and local investigations within 60 days (P 38) and the Average number of days to complete adjudication was 97 for disciplinary actions. Clearly the time from Investigation to Adjudication in this case far exceeded these averages and represent unacceptable delay rendering mute any corrective value of discipline imposed or any value in insuring or protecting the security, integrity or efficiency of the Agency. The Department of Justice review of the Federal Bureau of Prison's Disciplinary System indicates in recommendation # 9 that the Bureau should establish written time guidelines for the investigative and adjudicative phases of the disciplinary Process.

or compelling to a consideration of this case since no evidence has been presented to indicate that the deciding official (the Warden) egregiously influenced or compromised the investigation in this matter.

The Arbitrator, as indicated earlier herein, concludes that the Agency had little or no concern that Mr. Mercer's actions jeopardized the security, safety or efficiency of the Agency or concern that such action could re-occur and jeopardize the security, safety or efficiency of the Agency when no action was taken to change Mr. Mercers work duties and responsibilities in any way and with no discipline imposed for 11 months following the incident. In the judgement of the Arbitrator the Grievant should have been issued (at most) a Letter of Reprimand (LOR) in compliance with past practice and in recognition of the Grievant's good work record. In the Judgement of the Arbitrator this would have served to appropriately notice the Grievant that the Agency believed the situation could have been handled in a more passive, less confrontational manner with such notice issued in a timely fashion to achieve the desired corrective effect. In the judgement of the Arbitrator (as noted in previous discussion) imposing any form of discipline eleven months after the incident on April 19, 2010 has no meaningful or viable corrective value or serve in any way to promote the efficiency, security or safety of the institution.

ARBITRATORS FINDING AND AWARD

In consideration of all the testimony and evidence in this case, past practice, the failure of the Agency to produce a Key witnesses (The retired Warden and Rick Rooney the Investigative Lt) to be subject to questioning and cross examination relative to the basis for the discipline imposed, testimony that indicates the Warden's personal dislike of the Grievant and the lack of viable testimony by investigative witnesses as to what formed the basis for the initial proposal, or what comparisons or factors were considered, and the fact that discipline was imposed 11 months following the incident on April 19, 2010 the Arbitrator does not find sufficient or compelling evidence in support the Agency position in this case. Given the excessive time delay in adjudicating this case , the Arbitrator finds that the 5 day suspension imposed by the Warden had no credible value to insure the security, safety, integrity or efficiency of the Agency and had no corrective value with respect to the Grievant or serve to prevent future actions which could compromise the security, safety, integrity or efficiency of the Agency. The Arbitrator is also troubled by the lack of sufficient and compelling evidence that the actions of the Grievant were so egregious to require the discipline imposed. Given the considerations and rationale noted herein the Arbitrator finds the Agency's disciplinary action lacked sufficient and just cause. Accordingly, the Arbitrator sustains the Grievance of Officer Roy Mercer and he shall be made whole with all record of the suspension removed and be reimbursed for all wages and benefits lost.

Respectfully Submitted

Ronald G. Iacovetta 1/17/12

Ronald G. Iacovetta, Arbitrator (FMCS 3342)