IN THE MATTER OF ARBITRATION BETWEEN:

FEDERAL BUREAU OF PRISONS
(FEDERAL CORRECTIONAL COMPLEX,
BEAUMONT, TEXAS)

AND

AMERICAN FEDERATION OF GOVERNMENT WORKERS,
LOCAL 1010

BEFORE: LONNIE M. STOKES, ARBITRATOR

APPEARANCES:

FOR THE AGENCY: ADAM W. BOYER, ESQ., ASST. GENERAL COUNSEL, U.S. DEPT. OF JUSTICE

FOR THE UNION: THOMAS F. MUTHER, JR., ESQ., MINAHAN & MUTHER, P.C.

This case was submitted to arbitration in accordance with the terms of the Collective Bargaining Agreement between the Federal Bureau of Prisons (hereinafter "The Agency", "Management" or "B.O.P.") and Local 1010 of the American Federation of Government Employees (hereinafter "The Union" or "The AFGE"). The Agency's Facility is the Federal Correctional Complex in Beaumont, Texas. This grievance has been designated as FMCS Case No. 111223-50316-3.

The arbitration hearing was held at the Federal Correctional Facility, Beaumont, Texas, on January 29, 2014. The cases for both parties were fully and ably presented by their respective representatives. Both parties had full opportunity to present such evidence and witnesses as they deemed necessary in making their respective cases. Both parties had the opportunity to cross-examine witnesses.

The Agency raised the question of laches (timeliness in invoking arbitration) on the part of the Union, but the parties agreed that the arbitrator would proceed to hear the merits of the parties' respective cases, then rule on the laches issue after having concluded the hearing and having received post-hearing briefs from respective counsel.

STATEMENT OF THE ISSUE

The parties agreed to frame the issue in the customary two-part form:

"Was the Grievant, , suspended for just cause? If not, what shall be the remedy?"

BACKGROUND OF THE GRIEVANCE

The facts relating to the incident which gave rise to this case are not in dispute. The Grievant, is an Education Technician, Grade GS-7, at the Federal Correctional Facility in Beaumont, Texas. At the time that her suspension occurred, she had been employed at that facility for approximately nine years. Although the specific duties of her job are not directly related to enforcement, she is still technically considered to be a law enforcement officer. Under the pertinent Federal law (the Law Enforcement Officers Safety Act) (LEOSA), law enforcement officers are allowed to carry their personal firearms in concealment.

Since the facts are not in dispute, I do not propose to recapitulate them in meticulous detail, but in fairly broad and general terms:

Around mid-day on January 4, 2010, the Grievant temporarily left the Low-security Facility in order to retrieve some items from her automobile. Upon returning to the building, she brought her purse with her. When the purse went through the metal detector, the alarm sounded, and at that moment, the Grievant remembered that her personal firearm (a 38 caliber automatic pistol) was inside it. The Grievant informed the duty officer of the presence of the weapon, and an investigation followed. The

investigators concluded that the Grievant had, in fact, brought a loaded weapon onto the grounds of the Facility, and then into the Low Security Building.

The Bureau of Prisons Standards of Conduct (Agency Exhibit 1) specifies that "The introduction of contraband into or upon the grounds of any federal penal or correctional institution.....without the Warden's knowledge or consent, is prohibited" This section goes on to define specific items which are considered contraband, including "weapons". All agency employees, including the Grievant, periodically receive copies of the Standards of Conduct.

The Agency does not dispute the Grievant's claim that her bringing of the weapon onto the premises of the Correctional Facility was unintentional. Even so, given the potentially serious consequences of that act, the Warden, after several months of study and consideration, concluded that a thirty-five (calendar) day suspension was an appropriate penalty. The suspension letter was issued on September 3, 2010.

On October 1, 2010, the Union grieved the matter, and the question ultimately reached a hearing on January 29, 2014.

DISCUSSION AND ANALYSIS

First, to the issue of laches: Having come out of the Federal Sector myself, and having arbitrated a number of cases in the Federal Sector, it has been my experience that the gears of jurisprudence tend to grind more ponderously in that setting than in the private sector. It would be purely academic to speculate on why this is so—it is simply a fact, for whatever reason. For example, I recently arbitrated a discharge case with another Federal agency; one would think that a discharge case would call for especially expeditious attention, but as of the date of the hearing, the grievant had been discharged for more than two years. Another example: I have a non-disciplinary case pending with another agency whose FMCS case number indicates that the case has been "in the pipeline" for well over three years.

While I cannot account for the length of time required to bring this matter to a hearing, I do not consider the time frame to be such a radical departure from Federal Sector custom and practice as to bar the hearing of this matter. Consequently, I will proceed to address the case on its merits.

If, on the other hand, any questions of possible back pay, interest, or attorney's fees should come into play, then I believe the question of laches as a possible mitigating or limiting factor would be worthy of consideration.

While the Union did not openly acknowledge that some sort of disciplinary action was warranted in this case, much of the discussion from both sides of the table dealt with the question of the fairness or appropriateness of the penalty assessed by Management. When the issue to be decided deals with the question of fairness or reasonability , it is often difficult to render that judgment on a purely objective basis, since fairness and reasonability, like beauty, frequently reside in "the eye of the beholder".

Since their introduction, the Douglas factors have become a valuable aid to triers of fact, enabling them to assign a kind of loose qualitative value to the various aspects of a given case, and thereby, to render judgment on a more objective basis than might have previously been possible.

The Douglas factors which I would deem to be especially relevant in the case at hand are as follows:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

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

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

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

Regarding Factor 1: Given the possible serious consequences of bringing a personal firearm into the secure area of a correctional facility, there is no doubt that this is a serious offense, and that, unless there are significant extenuating circumstances, some sort of disciplinary action is warranted, even on the first occurrence. (We will address the question of an appropriate penalty hereafter, when we consider Factor 12).

It should be kept in mind that, when considering the potential consequences of a particular situation where a firearms infraction is involved, one should consider not only the possibilities, but the probabilities as well. If one is inclined to do so, it is not difficult to come up with a worst case scenario (for example, the disastrous incident at the Tallahassee Correctional Facility). But realistically, where a firearm is brought into the secure area of a correctional facility, there is very limited probability that the results in the majority of cases will be as tragic and devastating as they were in Tallahassee.

Factor 1 also raises the question as to whether the infraction was deliberate, or whether it was inadvertent. When questioned by Counsel for the Agency, Warden Martin made a rather vague reference to "the investigating authorities" as having jurisdiction over that question. When cross-examined by Union Counsel, the Warden initially seemed rather unresponsive, but finally acknowledged that, given the potentially serious consequences of the infraction in this case, he did not deem the question of inadvertence versus intentionality to be relevant (i.e., even if the incident were found to be unintentional, he still would not deem that to be legitimate grounds for possible mitigation of the penalty.) Thus, in formulating his decision, he had not considered that particular section of Factor 1.

I think it doubtful that when the Merit Systems Protection Board formulated the Douglas Factors, they did so with the intent that Management would have the option to veto or disregard any portion thereof that didn't meet their specifications. Even so, I would not consider Management's error in disregarding this question to be sufficiently egregious as to render their case null and void in its entirety.

On the subject of Factor 4 (past work performance, etc.): The Grievant has received at least one Sustained Superior Performance Award in recent years. She also testified that most of her yearly performance appraisals fell in the "exceeds" category, and Management did not attempt to refute that testimony. Given that record, I found it curious that Warden Martin referred to the Grievant no less than three times as "a pretty good employee" (TR pgs 59-60). On reading the transcript, my first reaction was to speculate that the Warden might have been "damning (the Grievant) with faint praise" (i.e., rendering a compliment so half-hearted that it came across as a negative assessment rather than a positive one). But on second reading, I noted that Warden Martin had also mentioned that the Grievant had been the recipient of several performance awards, so he appeared to be sending mixed signals on the subject of her past work record.

Over the years, I have noted that many people will embellish their everyday speech by throwing in gratuitous adverbs and adjectives that aren't really intended to change the general meaning of the conversation. (Native Southerners seem especially prone to do this, and I will acknowledge having done it myself on more than one occasion). Most of us don't do this consciously, but simply as a matter of habit. Consequently, I must give the Warden the benefit of the doubt, and conclude that his references to the Grievant as "a pretty good employee" were probably a characteristic of his everyday conversational style, rather than an effort to denigrate the Grievant.

About Factor 6 (consistency of the penalty imposed with those imposed in similar situations): In the three cases cited by the Union and the two cases cited by Management, the penalties imposed for

similar offenses covered a fairly broad spectrum, from written reprimands at one end to twelve day and thirty day suspensions at the other. Of particular interest is the fact that in the Pena case (cited by the Agency), wherein the Grievant was given a thirty day suspension, that decision was rendered several years after the Grievant's thirty-five day suspension was imposed in the present case. Consequently, it is clear that the Pena decision did not exert any precedential influence over Management's decision to suspend I for a roughly similar period of time.

Before addressing Factor 12, we need to consider Warden Martin's characterization of the Grievant's attitude as "cavalier" (TR, pg 55), and his statement in the suspension letter that she "had failed to show remorse for her actions".

A Teamster colleague in Memphis used to say that, in an adversarial situation, "Everybody's got to take their best hold." Human nature dictates that when we have our backs to the wall, our first instinct is to defend ourselves as best we can. In a situation where the facts relating to the offense are not in dispute, a grievant has two options: (1) to plead guilty, and to throw oneself on the mercy of the deciding authority, or (2) to acknowledge one's culpability, but at the same time, to try to put the best possible face on what is already a less-than-ideal situation. In that hypothetical situation, it is my best guess that nine out of ten individuals would take option 2, as the concept of "culpa mea" tends to have greater currency in the religious setting than in the secular one. For defensive purposes, one takes whatever comes to hand: if one is lacking a strong defense, it may be necessary to offer a rather marginal one. As long as one does not lie, there is nothing inherently dishonest about offering "a different perspective" in order to try to make the best of a bad situation, and choosing to do so does not necessarily mean that the offender is callous or unrepentant; it's just human nature at work. Moreover, while the Warden regarded the Grievant's statement (that she forgot the gun was in her bag) as "trying to make excuses" for her mistake, her statement could just as easily have been regarded as a simple statement of fact. While I was not present when Warden Martin interviewed the Grievant, and do not know what her demeanor was at that time, I strongly suspect that the Warden may have simply read too much into her efforts to defend herself, and thus, believing her to be callous and unremorseful, may have judged her more severely than her real attitude warranted.

Finally, to Factor 12 (the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others):

To put this factor in a slightly different context: what this language seems to suggest is that any penalty which goes substantially beyond one which would be adequate in deterring future misconduct is, by definition, an excessive one.

After forty-five years in the labor relations field, it has been my experience that, in circumstances where the offence is a relatively serious one, any penalty which does not involve the loss of income is likely to have limited deterrent value. Consequently, notwithstanding the cases cited by the Union, I would be extremely reluctant to endorse the reduction of this suspension to a written reprimand. Likewise, based on past observation, I would have to conclude that a suspension of two days' duration would also have relatively limited deterrent value. In my view, these three decisions probably represent, at best, a well-intentioned effort to "temper justice with mercy".

That having been said, we are left with suspensions of fifteen days, thirty days, and, in the instant case, thirty-five days. How many days are adequate, and how many are excessive?

The conventional wisdom tells us that, in the United States, the poorest segment of the population lives from paycheck to paycheck. It has been my observation that, in today's economic climate, many Americans in the economic middle class also live from one paycheck to the next.

When I first entered the Civil Service around a half-century ago, I did so as a GS-9, which is one or two pay notches above the Grievant's present grade of GS-7. Even so, at that time, if I had missed being compensated for even one single pay period, I would have regarded the lack of that paycheck as a significant financial setback, and if I had missed that paycheck through some event of my own making, I believe it is extremely unlikely that I would have been rash enough to commit the same offense a second time. In other words, it is my belief that, for most employees, the economic trauma of being deprived of income for one pay period (fourteen days) would have sufficient deterrent value to make any future recurrence of the offense unlikely. (Keep in mind that we are dealing with a line of cases in which the commission of the offense was unintentional, and did not result in any serious harm, and consequently, that the foregoing suggested limitations on the scope of the penalty would probably not be appropriate in cases where the offense was an intentional and more egregious one).

Consequently, in reviewing the cases submitted by the parties for my consideration, it is my conclusion that, out of the cited cases where suspensions had been imposed under fairly similar circumstances, the case in which I believe that Management came closest to imposing a penalty which was adequate in terms of deterrence, but at the same time, not excessive in terms of fairness or reasonability, was the Davis case, in which a fifteen-day (roughly equivalent to one pay period) suspension was imposed.

Since there will be partial recovery of back pay, it is necessary to return to the question of laches: I would deem the Agency to be correct in their assertion that the payment of interest on any sum recovered would not be appropriate under the prevailing circumstances.

The question of attorney's fees is a more complicated matter. In the overall scheme of things, three weeks' back pay at the GS-7 level is a relatively modest amount of money. In contrast, while I haven't an exact notion of the current range and scope of attorney's fees in civil matters, I strongly suspect that they are not insubstantial. Notwithstanding the criteria set forth in Baxter v. Bureau of Veterans Affairs , if the Grievant were required to pay most (if not all) of the recovered amount to her attorney, and thus were left empty-handed, the cause of justice (or equity) would not have been served. But again, the question of an equitable remedy is tempered by the Union's delay in bringing this matter to a hearing. Consequently, I would conclude that an equal division of reasonable Union attorney's fees between the Grievant and the Agency would be appropriate. (I would hope that the question of reasonability vis-à-vis attorney's fees can be worked out between Counsel for the respective parties, without the necessity of any further involvement by the Arbitrator.)

DECISION AND AWARD

In light of the foregoing considerations, it is my decision that the suspension imposed upon the Grievant shall be reduced from thirty-five calendar days to fourteen calendar days. Accordingly, the Agency is instructed to pay the Grievant twenty-one calendar days' back pay (the equivalent of one and one-half pay periods), at the rate of pay which prevailed at the time of her suspension.

Due to the inordinate amount of time that it took to bring this matter to a hearing, the Agency shall not be required to pay any interest on the back pay awarded the Grievant.

Reasonable Union Attorney's fees shall be equally divided between the Grievant and the Agency.

The Arbitrator will retain jurisdiction until such time as these matters are finalized.

SO ORDERED, THIS TWENTY-THIRD DAY OF MAY, 2014

Lonnie M. Stokes, Arbitrator
Knoxville, Tennessee