In Re Arbitration

American Federation of Government Employees, Local 1110 (L. Calvillo)	*	**David E. Walker**
	*	**Arbitrator**
Union	*	
and	*	**FMCS No. 12-51 533-3**
	*	
Federal Bureau of Prisons	*	**March 27, 2013**
Employer	*	
	*	

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DECISION OF THE ARBITRATOR

A. STATEMENT OF THE CASE

The Federal Bureau of Prisons (hereafter referred to as the "Agency"), operates a large Federal Correctional Complex (Low Security) on the outskirts of Beaumont, Texas. In accord with a Master Agreement first effective on March 9, 1998[1] (hereafter referred to as the "CBA") with the Council of Prison Locals of the American Federation of Government Employees the Agency recognizes Local 1010 of the A.F.G.E. as the exclusive bargaining representative of all employees at the Beaumont F.C.C. pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. 7101, et seq. The Grievant, a member of the bargaining unit at the F.C.C., was classified as a Correctional Officer.

On October 12, 2011 the Warden of the F.C.C. as Deciding Official issued a disciplinary suspension of eight days to the Grievant based upon his failure to follow post orders. The Grievant grieved the disciplinary suspension under Article 31 and the matter was processed to arbitration as allowed by Article 32 of the CBA. The parties at hearing agreed that there were no substantive or procedural due process issues outstanding that would bar binding arbitration of the grievance.

An arbitration hearing was held at the Beaumont F.C.C. on March 27, 2013. Grievant was represented by the President of Local 1010, and the Agency was represented by inhouse

[1] Renewed annually thereafter and in effect through the date of this arbitration.

counsel. Witnesses were called, testimony transcribed and briefs timely filed.

B. STATEMENT OF FACTS

The Grievant was first employed by the Agency in May 2009 and on January 3, 2011 he was working as an Escort Officer assigned to an outside hospital duty post on the "Morning Watch" (0000-0800 hours). He was accompanied by a fellow Officer named [redacted]. [redacted] was the Officer-In-Charge because he was senior by six years to the Grievant. The duty of the two Officers essentially involved supervision of an inmate that had been referred to Harbor Hospice, an outside medical facility used for the care and treatment of inmates.

The Agency issued a separate set of Special Instructions and Specific Post Orders applicable to "Escort/Outside Hospital/Medical Trips"(J. Ex. #11 and #12). Those rules, inter alia, require that the Officer's personal protection vest be worn at all times and that periodic watch calls be made back to Agency supervision using a cell phone that could be checked out of the Control Center. In the Special Instructions and Post Orders for these assignments Escort Officers were cautioned against distractions from their duty:

> "DISTRACTIONS:
> While assigned as coverage for an inmate on an escorted trip, it is important that you not become distracted in any manner. The safety and security of staff and the inmate depends on the diligence and alertness of the staff involved. There will not be watching of television, listening to a portable radio, or reading of newspaper or magazines."[2]

At some point in late 2010 representatives of the Harbor Hospice complained that unidentified Escort Officers from the Correctional Center were being inattentive to their charges. In response Deputy Captain Wilson made an unannounced inspection visit on January 3, 2011 to the Hospice. Arriving shortly after 0600 hours Wilson surprised Officers [redacted] and the Grievant in the hospital room as they attended the inmate/patient.

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[2] Subsequent to the incident arbitrated here the Agency has proposed to amend this paragraph by adding the following sentence: "At no time will staff have in their possession a personal cellular telephone, laptop computer, electronic game or any other electronic device." (Union Ex. #1)

Wilson reported that the Grievant was not wearing his protective vest.[3] He also reported that the Grievant was operating a laptop with a cell phone that provided him with internet access. The Grievant disputed this testifying that the Hospice had "wi-fi" access to the internet.

Wilson found [redacted] to be asleep, apparently having fallen asleep while watching a movie on a his laptop. He woke the sleeping Officer.

Immediately thereafter the two Officers were subject to a more detailed investigation of their conduct on the morning of January 3rd. Affidavits were taken with the basic facts being undisputed.

The affidavit dated February 16, 2011 given by the Grievant appears to be contradictory. He first claimed he "did not know" he could not use his personal cell phone to make watch calls, but then ends the affidavit saying he was aware he could not have the laptop and personal cell phone while at an outside hospital. When asked at the hearing to explain this he testified that he first learned of these rules after being told that by Captain Wilson on the morning of January 3rd. Wilson apparently explained that those devices were prohibited under the "Distraction" paragraph of the Post Orders.

At the conclusion of the investigation Officer [redacted] was disciplined by receiving a fourteen day suspension, reduced to twelve days by the Deciding Official, Warden Mark Martin of the LOW FCC Beaumont. Officer [redacted], like the Grievant, was (1) not wearing his bullet resistant vest, (2) was using a laptop computer to watch movies, and (3) was in possession of his personal cell phone. In addition [redacted] was also asleep while on duty.

The proposal letter applying to the Grievant's conduct on January 3rd listed three specifications in support of his proposed ten day suspension (J. Ex. #8):

> Specification "A": "...failure to wear the bullet resistant vest at all times..."
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> Specification "B": "...you made use of a laptop computer with earphones..." and
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> Specification "C": "Using your personal cell phone on duty..."

The Grievant responded to these three charges by (1) admitting he was not wearing his

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[3] A two man escort team would have one weapon available, not one for each Officer. Wilson initially reported that the shared weapon was not being carried by either man. That observation was disputed and later dropped.

vest but explained this happened because he had removed it shortly before when going to the restroom and mistakenly forgot to put it back on, (2) admitted he had the laptop but denied it was distracting being used for a work related purpose, and (3) admitted having his personal cell phone with him, saying it was needed for "Watch Calls" made every two hours to the Control Center,[4] and furthermore he had no notice that personal cell phones were prohibited.

The Agency noted that there was published advice in the Specific Post Instructions (J.Ex. #12) that a "Cellular Telephone" was part of the "necessary equipment" for mandated for "Medical Trips." It was also noted that those same Instructions say that "Watch Calls" would be made "...using the escort officer's cell phone, which you obtained from the Control Center prior to the trip..." (Emphasis added).

There was evidence that the number of instituitional cell phones that could be checked-out from the Control Center was limited to one in 2011, and that fifteen months later there were five available.

Evidence also was adduced regarding difficulties in obtaining overtime approval for trips to the Center to pick up an institutional cell phone. None of the latter testimony was of any relevance however to the fact that the Grievant had his own cell phone, and not an institutional cell phone. He did not claim that administrative problems prevented him from obtaining the one institutional cell phone presumably available at the Center.

Testimony from experienced Officers established, without contradition, that the practice before January 3, 2011 was that personal cell phones were commonly utilized by Officers on "Medical Trips." There was no evidence submitted showing that the technical capabilities of institutional cell phones differed for material reasons from those of personal cell phones.

The Grievant was disciplined by being awarded an eight day suspension, reduced from ten days by the Deciding Official, Warden Martin. The Decision of Warden Martin was based upon the following finding:

"...failure to wear your bullet resistant vest, use of your personal cell phone, laptop

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[4] Telephone calls back to the Control Center also included change of location notifications, and reverse calls to the Officers on availability for overtime were apparently common.

computer, and ear phones while on duty at the outside hospital are violations of the post orders." (J. Ex. #3)

The eight days of the disciplinary suspension was not explained or differentiated between the three infractions.

C. ISSUE TO BE DECIDED

"Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?" Article 31, Section (h)(1)

D. RELEVANT CONTRACTUAL AND REGULATORY PROVISIONS

1. MASTER AGREEMENT

Article 30, "Disciplinary and Adverse Actions," Section "a":

The provisions of this article apply tto 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.

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) or two (2) ways:

> **1. By going directly to arbitration if the grieving party agrees that the sole issue is 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?"**

Article 32, "Arbitration," Section "h":

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

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

1. this Agreement, or
2. published Federal Bureau of Prisons policies and regulations.

2. POST ORDERS

SPECIAL INSTRUCTIONS (Escort/Outside Hospital/Medical Trips)

DISTRACTIONS: While assigned as coverage for an inmate on an escorted trip, it is important that you not become distracted in any manner. The safety and security of staff and the inmate depends on the diligence and alertness of the staff involved. There will not be watching of television, listening to a portable radio, or reading of newspaper or magazines. Staff are not to ask medical staff for any medication, food, etc. for personal consumption.

SPECIFIC POST ORDERS (Escort/Outside Hospital/Medical Trips)

Bullet Proof Vest: Bullet resistant vests will be worn by all staff assigned to escorted trips when there are weapons issued. These vests must be worn at all times.

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Watch Calls: While on escorted trips watch calls will be made every (2) hours...using the escort officer's cell phone, which you obtained from the Control Center prior to the trip,...

E. DECISION ON THE RECORD

1. Burden of Proof and Legal Standard

In accord with established arbitral practice the burden of proof in a discipline case such as this is upon the Agency. A preponderance of evidence standard is appropriate and will be adopted in this case in view of the comparatively minor nature of the discipline. Elkouri & Elkouri, How Arbitration Works 950 (6th ed. 2003).

2. Just and Sufficient Cause

As shown in the Decision Letter of October 12, 2011the Grievant was disciplined by a ten day suspension (later reduced to eight) for "Failure to Follow Post Orders." That failure was described in the Decision Letter as:

> "Your failure to wear your bullet resistant vest, use of your personal cell phone, laptop computer, and ear phones while on duty at the outside hospital..." (J. Ex.#3)

There was no penalty differentiation between the violations, i.e. a number of suspension days for one violation, a number for another, etc. Considering that very similar discipline for an almost identical violation was given another employee on the same shift and Post, it might be assumed that the disparity in discipline between the two officers (four days) was due to the difference in the misconduct (i.e. the other officer was sleeping on the job). That allows the conclusion that a certain amount of discipline was assigned to each type of infraction. How much cannot be ascertained on the record of the arbitration hearing. All the record shows is that eight days was imposed because the Grievant engaged in conduct that violated the Post Orders in three ways.

The first observation of this factfinder relates to the forthright response of the Grievant. From the outset of the investigation and throughout he took "responsibility" for his actions. That is a factual - not a legal - admission, and if anything it commends his testimony on disputed issues. He essentially was admitting that he was responsible for his actions - the legal implications to be decided elsewhere.

(a) "failure to wear your bullet resistant vest"

The Specific Post Orders having application to "Escort/Outside Hospital/Medical Trips" such as the one the two Officers were involved with on January 3rd specifically and unambiguously states:

> "Bullet Proof Vest: Bullet resistant vests will be worn by all staff assigned to escorted trips when there are weapons issued. These vests must be worn at all times." (J.Ex. #12)

The Grievant admits that when visited by Captain Wilson early on January 3rd that he was not wearing his vests. He explained that he neglected to put it back on after a visit to the restroom.

There may be extenuating circumstances that would excuse a brief period in which the protection of a bullet resistant vest was excusable, but this is not one. The rule is reasonable with obvious valid objectives. It clearly has a nexus to the mission of the Agency and the particulars of this job assignment.

This error provides "just and sufficient cause" for discipline. However it would not be reasonable to impose the full eight day suspension on the Grievant for failing to wear his bullet resistant vest. As noted supra there is nothing in the record that allows a finding of what part of the suspension was derived from this single infraction.

(b) "use of your personal cell phone...while on duty"

This, the second specification in the Agency's Decision Letter, is more problematical than his failure to wear the bullet resistant vest.

First, it is not something specifically listed in the Specific Post Orders. The Special Instructions caution against "distractions," relating that to "diligence and alertness." Those Instructions then forbid "...watching of television, listening to a portable radio, or reading of newspaper or magazines."[5]

There is no mention in the Special Instructions or elsewhere in the regulations produced at the hearing of personal "cell phones," or for that matter "laptop computers." Under a very well-established rule of contract language interpretation[6] this leads to an interpretation that use of personal cell phones and laptop computers was allowable under the Instructions. As stated in Elkouri & Elkouri, How Arbitration Works 467 (6th ed. 2003):

> "Frequently arbitrators apply the principle that 'when parties list specific items, without any more general or inclusive term, they intend to exclude unlisted items, even though they are similar to those listed.'"

To be totally complete on this issue the Regulations do refer to cell phones generically[7] (1) in the list of equipment that is in the escorted trip kit, and (2) to be used in making watch calls every two hours (Specific Post Orders, J.Ex.#12, pg. 1 and 3). Those references, however,

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[5] Curiously the list of banned items does not end with a general or inclusive phrase, e.g. "and similar communication or entertainment devices." Even more to this point is the fact that in the next sentence an open-ended signal or word: "etc." was used at the end of a list of items the Officers were not to request from medical staff of the institution.

[6] *Expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another")

[7] Presumably cell phones issued by the Control Center, herein referred to as "institutional cell phones."

simply note the availability of institutional cell phones, and do not indicate that they are the exclusive means of communicating with the Control Center.

In fact the evidence produced at the hearing leads this arbitrator to conclude that the use of personal cell phones was known to, and thereby condoned by Agency management. Typically a cell phone number is displayed on the receiving phone's display screen. That alone would have given notice to the Control Center that a non-institutional cell phone was being used on the "watch calls." Similarly when, as apparently happened frequently, a call was made from a supervisor to an officer on escort duty, inquiring about availability for overtime duty that supervisor would have to have the cell number he/she was calling and would thereby be placed on notice that this was going to a personal cell phone.

Finally there is the unrebutted evidence that the Agency felt the need to amend the "Distraction" paragraph in the Specific Post Orders (Union Ex.#1). That amendment's sole purpose was to clarify that the prohibited list of items included personal cell phones and laptop computers. It did this by adding the following sentence to the paragraph:

> "At no time will staff have in their possession a personal cellular telephone, laptop computer, electronic game or any other electronic device."

This part of the proposed revision of the Specific Post Orders on escort trips was emphasized by adding to the first page (1) reference in the equipment list to a "BOP issued Cellular Telephone" (as opposed to the original description of "Cellular Telephone"), and (2) the following sentence at the bottom saying

> "Personal cellular telephones, laptops or any electronic devices are not authorized to be in the possession of staff assigned to this post or these duties at any time."

One does not need legal training, or a Latin phrase, to recognize this proposed amendment is an admission that the original language did not fully communicate the intent of the Agency.

This failure to communicate the idea that personal cell phones were banned, accompanied by an absence of enforcement known to the work force, is a violation of arbitral due process preventing a finding of "just and sufficient cause" in support of the disciplinary suspension for the putative violation: "Using your personal cell phone on duty..." (J. Ex. #8).

(c) use of "laptop computer and ear phones while on duty"

This, the third specification in the Decision Letter, suffers from all of the contract language defects in the original "Distraction" paragraph of the Specific Post Orders that was explained supra on cell phone usage.[8] Lap tops, as well as personal cell phones, were not expressly covered by the Specific Post Orders, and hence could have reasonably been seen as permitted.

As eloquently stated in McQuay Int'l, 1999 WL 908632 at 27 by Arbitrator Howell:

> "An employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited."

Lack of notice of the claimed prohibition on lap top computers means there is no "just and substantial cause" for this part of the Grievant's suspension.

3. Conclusion

The Grievant was given a disciplinary suspension for "Failure to Follow Post Orders" which failure was alleged as being three infractions of the Specific Post Orders for "Escort/Outside Hospital/Medical Trips." Based upon the evidence at hearing and applicable legal rules there is no "just and sufficient cause" for discipline (1) based upon the Grievant having and using a personal cell phone at the Hospice, or (2) the Grievant having and using a laptop at the Hospice. In contrast there is "just and sufficient cause" for discipline of Grievant for failing to wear his protective vest while on Post.

The discipline of an eight day suspension was for the three infractions described above, considered as a whole. There is no evidence in this arbitration that would show what part of that discipline could be ascribed to one infraction or the other.

Reviewing courts have unanimously denied arbitrators the power to "dispense their (own)

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[8] The only real difference is that there was no evidence that the Agency knew, or should have known that lap top computers were being used while on duty.

brand of industrial justice."[9] Those judicial rulings are consistent with the prohibition of Article 32(h) of the CBA which denies an arbitrator by explicit terms the "...power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement...." As indicated above there is nothing in the record of the case that would allow a finding of a lesser, included discipline based upon the protective vest violation alone. At the same time for the reasons stated supra the discipline given en globo was in large part based upon flawed findings and conclusions. For that reason it cannot stand.

Accordingly in order to avoid a decision that would "dispense (my own) brand of industrial justice," and "add to...the terms" of the CBA I must grant the grievance vacating and reversing the entire eight day suspension at issue here.

AWARD

The disciplinary suspension of the Grievant is reversed and vacated. The Grievant shall be paid all wages and accrue all benefits that he would have earned from October 16 through October 23, 2011 had he not been suspended. Furthermore the Grievant's personnel records shall be expunged of any and all references to the disciplinary suspension reversed by this Decision and Award.

The arbitrator retains jurisdiction for the limited purpose of effectuating the terms of this Award.

5/18/13
Date


David E. Walker
Labor Arbitrator

[9] United States Steelworkers of America v. Enterprise Wheel and Car Corp. 363 U.S. 593, 597 (1960)