

In the Matter of the)
Arbitration Between)
)
FEDERAL BUREAU OF PRISONS,) FMCS Case No. 14-01355-6
FEDERAL CORRECTIONAL INSTITUTION)
MENDOTA, CALIFORNIA) Adverse Action – Charles Mitchell
)
and)
)
AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES LOCAL 1237)
)

The hearing in the arbitration between the Federal Bureau of Prisons, Federal Correctional Institution, Mendota, California and the American Federation of Government Employees Local 1237 was held in Mendota, California on October 29, 2014. The Agency was represented by John Stuart Bauch, Esq., Assistant General Counsel, Employment Law & Ethics Branch. The Grievant was in attendance and represented by Michael T. Pazder, Esq., Union Legal Rights Attorney. The neutral Arbitrator was Mark Berger, Esq. The parties were given a full opportunity to present evidence, and examine and cross-examine all witnesses.

The parties agreed that the issue presented is whether the Agency had just and sufficient cause to suspend the Grievant for twenty-one (21) days based on the charge of Introduction of Contraband: Firearm, and if not what shall the remedy be? The parties stipulated that there are no procedural challenges to the arbitrability of the instant grievance and that the case is properly before this Arbitrator for resolution pursuant to the terms of the governing collective bargaining agreement.

FACTS

The Federal Correctional Institution in Mendota, California is a relatively new Bureau of Prisons facility. Its Chief Operating Officer is Warden Audrey Gill. She began her service as Warden at the facility in July, 2012 on a temporary basis, and later became the permanent Warden in October, 2012. She was the official who made the decision to impose a 21-day suspension on the Grievant for an incident that occurred on August 9, 2013.

The Grievant had served as a Correctional Officer at the Mendota facility for three (3) years at the time of the 2013 incident. During that period he had not received any other discipline for misconduct from the Agency. Moreover, his evaluations both before and after his suspension were all at the excellent or outstanding level.

On August 9, 2013 the Grievant was driving the commuting van provided by the Agency to bring facility personnel to the Institution. When he arrived there, and consistent with normal practice, he placed the personal bag he had brought with him on the conveyor belt for x-ray screening by the Institution's security officer.

When the bag went through the x-ray security screen the security officer told the Grievant that there was something in the bag. He was surprised by this and emptied out the bag to reveal its contents. Under other personal items that were present in the bag the Grievant found his loaded revolver that he had placed in the bag but had forgotten to remove.

The Grievant showed the revolver to the security officer and with the officer's apparent permission he headed out to his vehicle to secure it there. On the way the

Grievant encountered another supervisor whom he told about the incident. This supervisor told the Grievant to lock the weapon in the van, but he apparently also informed other managerial staff about what had happened. The Grievant was later called to another supervisor's office after which he was sent home on administrative leave, even though he had initially been allowed to proceed to his post. The weapon was removed from the van and secured in the facility.

The incident was referred to the Office of the Inspector General (OIG), an independent federal agency, for investigation. An OIG Special Agent came to the facility and interviewed the Grievant and other witnesses, accompanied by a supervisor from the Institution's Special Investigations Services Division. The Grievant had the assistance of his Union Representative during the interview. The ultimate conclusion of the OIG was that the incident did not constitute a criminal offense, and therefore the Grievant was never charged with a crime. Nevertheless the incident was referred back to the Institution for administrative review and possible adverse action.

The relevant information related to the incident was assembled by the Institution's Human Resources Manager. In consultation with Institutional supervisors and the Agency's Legal Office, the HR Manager prepared a proposal letter which recommended that the Grievant be discharged from service. This letter was ultimately presented to the Warden for her consideration. As part of the process the Grievant took advantage of the opportunity to provide the Warden with both a written and oral

response to the proposal letter.

Following her review of the available documents and the Grievant's oral and written response, Warden Gill considered the case from the perspective of Douglas v. Veterans Administration, 5 MSPR 280 (1981). In that case the Merit Systems Protection Board (MSPB) established the *Douglas* factors which are to be applied in determining what kind of punishment to impose for employee misconduct. Paraphrasing from the decision, the *Douglas* factors require that a penalty decision take into account the nature and seriousness of the offense in relation to the employee's position and duties; his job level and type of employment; his past disciplinary record; his work record and tenure; the effect of the offense on his ability to perform his duties and retain his supervisors' confidence; the consistency of the penalty with other similar actions; the Agency Table of Penalties; the notoriety of the offense; the clarity of the rules violated; the potential for rehabilitation; any unusual mitigating circumstances; and the effectiveness of alternative sanctions. As noted in the *Douglas* case, however, not all factors are necessarily relevant in every case.

Warden Gill emphasized that of paramount concern was the dangerousness of the offense itself. Bringing a loaded firearm on to correctional institution property represents one of the most serious dangers the Institution could face. At potential risk are inmates, staff and visitors. Based on this the Warden concluded that discharge from service was an entirely appropriate step to take.

However, among the considerations that led Warden Gill to reduce the penalty to

a 21-day suspension was the fact that the Grievant had not incurred any prior discipline during the period of his service at the facility as well as his overall performance record. On the other hand, however, the Warden testified that further reducing the suspension to a reprimand would not adequately reflect the seriousness of the offense and therefore would not constitute an appropriate institutional response to the incident.

The evidence revealed that there was one administrative error that was made in the processing of this case. An initial decision letter was issued to the Grievant informing him of the 21-day suspension on November 15, 2013. However, it was later discovered that the letter was premature due to the fact that it had been issued less than 30 days after the issuance of the proposal letter as required by applicable regulations. The Agency then rescinded the suspension, compensated the Grievant for lost income, and reissued the very same decision letter on December 13, 2013. All other administrative steps in the handling of this matter were properly followed.

The evidence presented at the hearing revealed that the introduction of contraband, specifically including weapons, is explicitly prohibited by the Department's Code of Employee Conduct. This weapons prohibition is also the subject of initial training that Correction Officers receive as well as being included in annual refresher training conducted by the Warden. The Grievant acknowledged receipt of a copy of the Code of Employee Conduct and his record revealed that he participated in the relevant training sessions at which the contraband restriction as applied to firearms was explained and emphasized. It is also true that the ban on the introduction of weapons on to Institutional property is included on prominent signs at the entry point to the

property as well as the entry point to the correctional facility itself.

The Department's Code of Employee Conduct contains a Table of Penalties that illustrates appropriate responses to various acts of employee misconduct. However, there is no specific penalty provided for the introduction of a weapon on to correctional property or into the facility itself. Nevertheless, the Table of Penalties is not all inclusive, and the penalty decided upon was deemed by the Warden to be appropriate given comparable misconduct penalties and the totality of circumstances surrounding the incident.

Finally, a specific message from the Director of the Bureau of Prisons was sent to all Department staff through the Department's intranet system. This occurred on August 10, 2012. The message from the Director specifically noted Bureau policy barring the introduction of personal weapons on to Bureau of Prisons property and that he found violations of this prohibition "alarming." He added that there were far too many cases of weapons being brought on to Bureau property, and disciplinary action was being taken in response. The Director made it clear that all cases involving violation of this prohibition would be thoroughly investigated and appropriate administrative responses would follow.

In his testimony at the hearing and in his written statement provided to the OIG, the Grievant explained that on August 9, 2013, he had a disagreement with his wife and thought he was going to leave his home for a few days and stay with his cousin. In connection with packing up some things to take with him the Grievant put his gun inside

the personal bag he normally took to work along with various other items. As he was leaving his children asked where he was going, and that led to a short discussion with his wife to work out the problem that had arisen between them. The Grievant wound up not leaving his home, but he neglected to take his weapon out of his bag at that time and it was there when he went to work.

The Grievant acknowledged his awareness of the prohibition against taking a personal firearm on to Institutional property. He added in his statement that he had never done so before, but simply forgot that the weapon was in his bag on the date of the incident.

The Grievant was surprised when something was detected in his bag after it had gone through the x-ray machine because he always cleared the machine without incident. When he opened the bag he ultimately discovered that the firearm was there. He retrieved it and left the building without being called back. Outside he encountered a lieutenant, told him what had happened, and was instructed to put the weapon in the commuting van. He then reported to his post but later was told that he was being placed on administrative leave. The firearm was retrieved from the van and placed in a secure location in the Institution.

Based upon the totality of the circumstances surrounding the August 9, 2013 incident, the Union argued that the 21-day suspension imposed by the Warden was not supported by just and sufficient cause. The Union also argued that the length of the suspension amounted to a disparate treatment of the Grievant as compared to other Bureau personnel who committed the same violation. In support of this argument the Union produced arbitration rulings in four cases in which the offending employees

received either a reprimand or a 2-day suspension for the unintentional introduction of a firearm into a Bureau facility. These cases are discussed below in the Discussion section of this opinion.

DISCUSSION

The instant arbitration presents the issue of whether the Agency had just and sufficient cause to impose a 21-day suspension on the Grievant for introducing a firearm on to Agency property. The standards to be used in this proceeding are the same as those that would apply to the Merit Systems Protection Board if the case had been appealed to the Board. Cornelius v. Nutt, 472 U.S. 648, 652 (1985). The burden of proof in the review of an adverse personnel action rests with the Agency. King v. Nazelrod, 43 F.3d 663, 666 (Fed. Cir. 1994)(The court “mandated that the agency must prove all of the elements of the substantive offense with which an individual is charged.”)

In judging an Agency’s penalty determination its failure to consider a significant mitigating circumstance may warrant reversing its decision. VanFossen v. U.S. Dep’t of Housing and Urban Development, 748 F.2d 1579, 1581 (Fed. Cir. 1984)(Termination overturned where MSPB failed to consider area manager’s authorization letter permitting outside work even though it was issued without authority.) However, the MSPB has noted that it “will not disturb a removal if it is the maximum reasonable penalty which may be imposed considering all relevant factors in a case.” Murphy v.

Department of Navy, 25 MSPR 333, 338 (1984). In a similar fashion, courts hesitate to interfere in Agency disciplinary decisions, and deference is given to the primary discretion of the Agency in reaching disciplinary determinations. Mings v. Department of Justice, 813 F.2d 384, 390 (Fed. Cir. 1987) ("This court has held that it will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all the factors."). See also, Miguel v. Department of the Army, 727 F.2d 1081, 1083 (Fed. Cir. 1984).

The evidence presented at the arbitration hearing clearly established that the Bureau of Prisons has a strict policy against anyone bringing a firearm on to Bureau property. This prohibition is clearly stated in the Agency's Standards of Employee Conduct. The ban is also prominently featured on signs that appear at the entrance to the Mendota facility property as well as in front of the building itself. The prohibition is also a prominent part of the initial training that Correction Officers receive as well as their annual refresher training. The Grievant, moreover, did not dispute that he was fully aware of his obligation not to bring any personal weapon on to the property of the Federal Correctional Institution at Mendota where he worked.

Nevertheless, as a result of events that occurred at his home on August 9, 2013, the Grievant placed his personal loaded firearm in the bag that he normally brought to work along with other personal items because he was intending to stay that evening at his cousin's home. That plan changed, but the Grievant neglected to remove the

firearm from his bag when he went to work later that evening.

The Grievant only discovered the fact that the firearm was in his bag when it was detected as a result of the security screening he went through in the building before proceeding on to his work area. The introduction of the weapon on to Bureau property was unintended, and there was no evidence presented to suggest anything else. The Warden testified that her administrative response to the Grievant's introduction of his personal weapon on to Bureau property was premised on her view that the introduction of the weapon on to facility grounds was non-criminal and unintentional.

The evidence also established that once the Grievant was told by the security screener that there was something in his bag, and it turned out to be his personal weapon, he made no attempt to hide that fact. He thought the appropriate step would be to remove the weapon from the building and lock it in the van he was driving that evening, but he also notified a lieutenant of what had happened as he was heading toward the vehicle. Ultimately, the weapon was secured in the building and the Grievant was sent home.

Thereafter the administration took appropriate steps to investigate the incident and frame an administrative response. The investigation included a determination by the OIG that no criminal offense had been committed. Nevertheless, the Institution continued its own internal investigation leading to an initial proposal letter that called for the Grievant's removal, later reduced in a decision letter to the 21-day suspension at issue in the instant case. While it is true that the initial decision letter was issued too early, it was replaced by a timely second decision letter. The Grievant was

compensated for any loss that he incurred, and thereafter served his suspension after the issuance of the second decision letter.

In her testimony at the hearing the Warden made it very clear that she applied the *Douglas* factors the MSPB established as required considerations when an adverse personnel action is taken against a covered employee. This assessment led to the Warden's conclusion that a 21-day suspension was the appropriate response to the Grievant's act of introducing a loaded firearm on to Bureau property. Although the Warden felt that the introduction of a firearm on to Bureau property is the most dangerous safety violation that can occur and could warrant immediate termination, the fact that this was the Grievant's first offense and that he had very positive performance evaluations made the reduction of the proposed termination to a 21-day suspension appropriate.

Based on the evidence presented at the hearing, there is no question that the Grievant violated a clearly-stated prohibition when he brought his firearm on to Bureau property. Indeed, the Union does not challenge that conclusion. The only question in this proceeding is whether the imposition of a 21-day suspension was a permissible Agency response given the totality of circumstances surrounding the Grievant's misconduct.

In the final analysis, it was the Warden's judgment that the circumstances warranted a 21-day suspension. That conclusion was reached after a full evaluation of

the investigative facts and following the application of the *Douglas* factors. Under these conditions the Warden's judgment must be given deference unless the penalty decision is deemed unjust or unreasonable. After carefully considering the available evidence it is this Arbitrator's judgment that the totality of the circumstances requires the reduction of the Grievant's suspension from 21 days to 5 days and that all relevant factors render the 21-day penalty applied in the instant case unjust and unreasonable.

It is true that the Grievant unintentionally brought his weapon on to Bureau property and into the facility lobby. It was at that point that the weapon was discovered. However, the fact that it was unintentional does not mean that the Grievant was faultless. It is not as though someone secreted the weapon in the Grievant's personal bag. To the contrary, as he acknowledged, he put it there himself. He had the opportunity to check his bag before heading off to work, but he failed to do so. Had he checked his personal bag, he would have discovered the weapon and removed it.

It is true that the Grievant was simply following his normal pattern of bringing a personal bag with him to work and that the firearm was in the bag because of unusual circumstances. However, the potential danger involved in the introduction of a firearm on to Bureau property along with the heightened responsibility of Corrections Officers call for extra care and attention which the Grievant neglected. Simply put, Corrections Officers must take advantage of every opportunity available to them to avoid violating the weapons prohibition and the imposition of a penalty where this duty is breached is

entirely appropriate.

In its brief the Union argued that the application of the *Douglas* factors did not warrant the 21-day suspension imposed on the Grievant in the instant case. Initially, however, there is a clear relationship or “nexus” between the identified misconduct – introduction of a firearm on to Bureau property – and the efficiency of the service. The nature of the Bureau’s function and the environment of a Bureau prison fully support the firearm prohibition that the Agency established and the Grievant violated.

However, as the Warden realized, there were mitigating circumstances surrounding the Grievant’s actions that made termination an excessive response to the Grievant’s actions. These were reflected in her consideration of the *Douglas* factors and led her to reduce the penalty to the 21-day suspension at issue in the instant case.

Nevertheless, the Union has challenged how the Warden applied the *Douglas* factors, arguing that a reprimand would be the most severe penalty allowable. In a very thorough brief the Union argued for a different conclusion concerning the impact of the factors on the penalty determination. For example, it judged that the Warden gave greater weight to the seriousness of the offense than the circumstances warranted given that the violation of the firearms prohibition could have more serious consequences in other settings.

However, in this Arbitrator’s judgment, the Warden’s conclusion that the violation

itself was very serious even though the worst outcome did not occur was a reasonable judgment well within her administrative discretion. The Agency did not treat the violation as more serious than the circumstances warranted as was the case in Shelly v. Dept. of Treasury, 75 MSPR 677, 683 (1997), quoting Taylor v. Department of Justice, 60 MSPR 686, 690-92 (1994) ("although the Board will normally review an agency's penalty determination only to ensure that the agency considered the relevant factors and exercised its judgment within the tolerable limits of reasonableness, there may be grounds to mitigate the penalty if the deciding official considered the misconduct to be more serious than it was.").

In a similar fashion the Union disputes the Warden's conclusions on the impact of the Grievant's discipline-free work record and positive job evaluations. It also questions what the Agency relied on for a comparable penalty in its application of the Agency's Table of Penalties given that there is no specific penalty listed for the introduction of a firearm on to Bureau property. It also argues for more weight to be given to the Grievant's potential for rehabilitation and to the unusual circumstances that led to the violation.

Nevertheless, while these may be permissible conclusions, they do not render the Warden's judgments on these matters outside the range of Agency discretion. While the Union may disagree with the Warden's assessment of all of the considerations

relevant to the penalty determination under *Douglas*, this does not mean that the decision to impose a suspension rather than a reprimand was unjust and unreasonable.

However, in this Arbitrator's judgment one factor stands apart and renders the 21-day suspension imposed in the instant case excessive. That factor is the Grievant's self-reporting of the incident to a supervisory officer. He was heading toward the van he had driven to the facility when he encountered a lieutenant and told him what happened. This was initiated by the Grievant, not by anyone else. Not only did the Grievant not attempt to hide what he had done, instead he brought it to the attention of a responsible supervisory official. This significantly distinguishes the instant case from the other firearms violation cases brought to this Arbitrator's attention. I agree with the Union that this factor was not given adequate weight in the ultimate penalty determination.

Nevertheless, the strength of this factor does not in and of itself warrant the elimination of any suspension as part of the punishment for violating the firearms prohibition. The seriousness of the offense, when judged alongside the other *Douglas* factors, leads to the conclusion that a not insignificant suspension is called for. While a 21-day suspension may be unjust and unreasonable given the totality of the circumstances, a 5-day suspension will adequately serve the interests of the Agency in penalizing the very serious offense of introducing a weapon on to Bureau property while simultaneously giving appropriate weight to all other relevant factors.

One final consideration is the disparate treatment argument arising out of the fact that arbitration rulings stemming from comparable misconduct in other Bureau facilities

resulted in lesser penalties than the 21-day suspension the Grievant received.

Decisions of the MSPB establish that where the elements of disparate treatment are established penalty decisions may be revised. E.g., Gomez v. Department of Justice, 36 MSPR 56, 62 (1988).

One of the decisions cited by the Union involved a 2009 arbitration ruling that the Union introduced at the instant hearing. In it the arbitrator reduced a 20 calendar-day suspension for bringing a weapon into the Atwater, California Correctional Institution to a written reprimand. However, that result is not sufficient to undermine the penalty imposed by Warden Gill in the instant case due to notable differences in the circumstances of the two cases.

In the Atwater case the arbitrator emphasized two critical mistakes made by the Atwater Warden. First, the Warden erroneously believed that the misconduct of the Corrections Officer who accidentally brought a weapon into the facility was a criminal offense. Second, it was noted in the Atwater case that the Warden appeared to mistakenly judge the grievant there on the basis of his holding a supervisory position. This also was an error since the Atwater grievant was not a supervisor. Both factors may have contributed to the significant suspension imposed on the Atwater grievant. In contrast, Warden Gill in the instant case knew that the Grievant's actions did not amount to a criminal offense and was fully aware that he was not a supervisor.

The facts that were introduced in the Atwater hearing were not available to this Arbitrator. However, from the Atwater arbitrator's ruling it appears that he concluded that there was some institutional fault because the security screener failed to detect the

weapon when it was brought into the facility. Given that the introduction of the weapon into the facility in the Atwater case was unintentional and that it never would have gotten past the lobby had the security screener detected it, the Atwater arbitrator concluded that "the only thing the Grievant can be said to have done wrong is failing to follow the policy that required him to call a supervisor when he was faced with the unique situation for which he was not trained." While that may have been how the Atwater case was litigated, in the instant proceeding the Warden made it absolutely clear that the violation occurred when the weapon was brought on to Bureau property, whether or not it got past the lobby and into the secured area of the facility.

Additionally, the Atwater arbitrator commented that the Atwater Warden "failed to properly consider the *Douglas* Factors-if he considered them at all." In contrast, Warden Gill's testimony in the instant case was clear and unequivocal that the *Douglas* factors were considered, evaluated and applied in reaching the judgment that a 21-day suspension was appropriate for the Grievant's introduction of a firearm onto Bureau property.

As part of its post-hearing submission the Union introduced an arbitral ruling involving a July, 2010 incident at the Bureau's Fairton, New Jersey facility. There a 17-year Senior Officer Specialist unintentionally brought a weapon into the building, and the security officer admitted him before checking the screening equipment. When the

screener saw the weapon he had another officer tell the grievant to return. The grievant was clearly surprised by the discovery. He took the weapon to his vehicle and the screener reported the incident to supervision.

In his ruling the arbitrator expressed the view that the penalty was excessive in light of the *Douglas* factors, and there are certainly parallels to the instant case. In particular the grievant there had inadvertently brought the weapon with him to work, had a discipline-free work history, and did not have a supervisory or fiduciary job. But the Fairton case involved two additional mitigating factors that are not applicable to the Grievant in the instant case. First, the Fairton arbitrator specifically commented that the grievant there "had never been warned about the conduct in question as this was his first offense." However, any suggestion that a first weapons introduction offense can only justify a warning would be inappropriate in Mendota in light of the heavy emphasis in the training of Mendota officers on their obligation not to bring weapons on to Bureau property and the evidence presented in the instant case of clear posted warnings on this issue.

Another factor unique to the Fairton case was that the screening officer received a two-day suspension for the incident, rather than the 21-day suspension given to the grievant. This was true even though it was his neglect that allowed the weapon to get passed initial screening. The Fairton arbitrator expressed particular concern over this differential treatment and may have felt compelled to reduce the grievant's suspension to a similar two-day period. In contrast, the screener in the instant case did not let the

firearm slip by as did the Fairton screener.

Another weapon introduction case submitted by the Union involved an incident that occurred in April, 2011 in Brooklyn, New York. Once again a Corrections Officer accidentally and unintentionally brought a weapon with him into the facility where he worked. This time the weapon was detected and the incident was reported to supervision by the security screener. The Warden imposed a 21-day suspension which the Bureau's Regional Director affirmed.

According to the arbitrator, the evidence revealed that the penalty decision was made after the Warden consulted with an "expert" in the regional office. The arbitrator concluded that the penalty was excessive and reduced it to a reprimand, emphasizing the need to give greater weight to the need for progressive discipline in light of the fact that this was a first offense for the violation of the Bureau's contraband rules. The arbitrator's concluding decisional paragraph did not reference the fact that the contraband in question was a firearm.

The final incident referenced by the Union occurred in Allenwood, Pennsylvania in February, 2012. There the grievant unintentionally brought a weapon into a Bureau facility. It was detected by the screener who nevertheless allowed the grievant to retrieve the weapon and take it to his vehicle. A Bureau Captain was notified of the incident by the screener and he allowed the grievant to retrieve his weapon and return it to the facility. The grievant in this case had a prior 2009 incident where he was

counseled for calling fellow employees and hanging up when they answered the call.

The Warden sought to impose a 45-day suspension for the grievant's actions, noting in particular that he viewed the grievant's conduct as involving three separate offenses: bringing a personal firearm into the screening area; conduct unbecoming an officer for grabbing his bag with the firearm, leaving the institution and returning the firearm to his car; and unprofessional conduct for further instances of dialing the telephone numbers of colleagues and hanging up when they answered.

The arbitrator first concluded that the charge involving the telephone calls was not supported by a preponderance of the evidence. However, the charge that the grievant brought a firearm into the facility was undisputed and he was found to have made an effort to conceal what he had done by grabbing his bag so that he could return the firearm to his vehicle. The arbitrator then reduced the suspension to a total of twelve days, two for unintentionally bringing the firearm into the facility, and ten for removing the weapon and placing it in his unsecured car.

While it is true that every case will have its own unique features, the arbitration rulings relied on by the Union seem to create a pattern of punishing the unintentional bringing of a weapon to work at the level of either a reprimand or a two-day suspension. The 21-day suspension at issue in the instant case is obviously substantially more severe than either of those alternatives.

However, it is significant to this Arbitrator that all of the above cases relied on by the Union involved incidents that occurred prior to the Bureau Director's August 10, 2012 intranet message to Bureau personnel on the subject of the introduction of

weapons on to Bureau property and into the Bureau's physical facilities. The message indicated the Bureau's concern that there were too many violations of the weapon-introduction prohibition and that all such instances would be investigated and appropriately dealt with. If nothing else this was a clear reflection of the Bureau's view that its method of responding to this problem up until that point was not having the desired effect. It should also have been a clear warning to employees to be careful to comply with the prohibition against bringing weapons on to Bureau property.

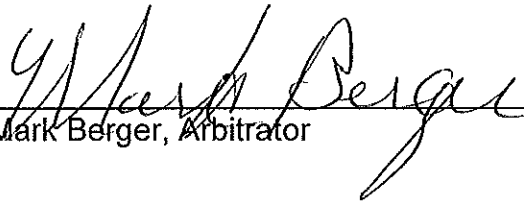
While reasonable minds may disagree over whether a reprimand, a two-day suspension, or something slightly more is a satisfactory response to the violation of the weapon-introduction prohibition, it would be an inappropriate arbitral infringement on the legitimate exercise of Agency discretion to bar the Agency from reevaluating its response in light of accumulated evidence. As long as the Agency's response is reasonable in light of the *Douglas* factors, arbitrators should defer to the Agency's decision. Balancing all of the relevant considerations, this Arbitrator has concluded that a five calendar-day suspension is the appropriate response given the seriousness of the offense and all related mitigating circumstances.

I firmly believe that there is no question that the Grievant will not repeat his misconduct in the future. He made a mistake which he acknowledged, but it was his fault and the imposition of a five-day suspension is not out of line given all the relevant circumstances. The 21-day suspension imposed by Warden Gill in this case must therefore be reduced to a five-day suspension.

AWARD

The Agency did not have just and sufficient cause to suspend the Grievant for 21 days for introducing a firearm on to Bureau property on August 13, 2013. The *Douglas* factors and all relevant considerations require that the penalty be reduced to a five-day suspension.

In order to make the Grievant whole the Agency shall compensate him for all lost income resulting from the period of suspension he served beyond the five-day suspension herein upheld. Jurisdiction is hereby retained for a period of 90 days to resolve any disputes which may arise in the implementation of the award, including any disagreements over attorney fees which may be claimed by the Union and Grievant pursuant to the Back Pay Act.


Mark Berger, Arbitrator

Kansas City, Missouri
January 20, 2015