In the Matter of an Arbitration Between **American Federation of Govt. Employees** **Prison Council 33, Local 1242 Atwater, CA** **and** **Federal Bureau of Prisons, United States** **Penitentiary, Atwater, CA** (Grievance: Mike Brown Suspension)	**Award & Opinion** FMCS 09-59451 **NB 3146**

Before
Norman Brand

Appearances

For AFGE Council 33, Local 1242
Martin & Kieklak
by Aaron L. Martin, Esq.

For Federal Bureau of Prisons, U.S. Penitentiary Atwater
Labor Management Relations Branch-South
by Loretta A. Burke, Labor Relations Specialist

October 18, 2010

Background

By letter dated June 29, 2009, Warden H. A. Rios, Jr.("Warden Rios") acting for the Federal Bureau of Prisons, U.S. Penitentiary Atwater ("Agency") sustained charges against Mr. Mike Brown ("Grievant") and imposed a twenty calendar day suspension. AFGE, Council 33, Local 1242 ("Union") grieved the discipline and timely invoked arbitration. I was chosen from a list provided by the Federal Mediation and Conciliation Service. I held a hearing on August 11, 2010, at the Penitentiary in Atwater, CA. Both parties were present at the hearing, and the Union was represented by counsel. Each party had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A certified court reporter recorded the hearing. At the close of the hearing the parties asked to file post-hearing briefs. I received the last brief on October 4, 2010, at which time I declared the hearing closed.

Issue

At the hearing the parties stipulated the following issue:

> Was the disciplinary action taken for just and sufficient cause? If not, what shall be the appropriate remedy?

The parties entered the following additional stipulations:

1. The lower steps of the grievance procedure have been met or waived and the matter is properly before the arbitrator.
2. If, and only if, there is a remedy, the arbitrator will retain jurisdiction over the remedy.

3. This grievance is brought in accordance with the parties' master agreement.

4. On March 7, 2009 Officer Mike Brown inadvertently entered the Atwater institution with his personal firearm.

5. Officer Mike Brown [was] charged with introduction of contraband and failure to immediately report.

6. William Lothrop proposed that Officer Brown be removed from the service and Warden Rios mitigated the penalty to a 20-day suspension effective July 6, 2009 through July 25, 2009.

7. The Agency must prove by a preponderance of evidence that disciplinary action taken against Officer Mike Brown was for just and sufficient cause and to promote the efficiency of the service.

8. The Agency must prove: one, that the charged conduct occurred; two, there is a nexus between the charged conduct and the efficiency of the service; and, three, that the disciplinary action was reasonable.

Facts

On March 7, 2009, Grievant practiced with his Glock in an orchard near his house. When he finished he stuck the handgun in an outside pocket of his bag and went home. He went to sleep, and then got up to go to work on morning watch, which begins at 000 hours.[1] He took his bag into the lobby of the facility and placed it on the x-ray machine, took the metal out of his pockets and walked through the metal detector. (Tr. 27:7-17) The handle and upper register of the Glock were sticking out of the bag. (Tr. 28:14-29) The Glock was also clearly

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[1] He normally worked evening watch and was just coming off sick and annual leave. He testified he was "Kind of tired and kind of groggy being on morning watch, not used to the shift." (Tr. 33:20-22)

visible in the X-ray pictures of the bag. (Agency Exhibit 7) Lt. Paul, who was screening employees, apparently did not see the Glock. Grievant picked up his bag and went to his post in the SHU. (Tr. 27:17-21) When he arrived he put down his bag and went to take his duty belt out. He then noticed the Glock and gave a startled exclamation. The other officers (the two being relieved and the other one on the SHU post for morning watch) were also shocked at seeing the handgun. Grievant asked Hickman, one of the officers going off duty, to take the Glock out of the institution. (Tr. 30:7-15)

Officer Hickman put the handgun in his backpack, walked out of the institution, and locked it in Grievant's truck. (Tr. 67:23-68:20) He had seen Lt. Brigham (his duty Lieutenant) as he walked out of the institution, so Officer Hickman waited by Lt. Brigham's truck. He also called Grievant and told him he was going to notify Lt. Brigham. Officer Hickman told Lt. Brigham Grievant had inadvertently brought his gun into the institution. Lt. Brigham told Officer Hickman to be sure Grievant called Lt. Paul. Officer Hickman called Grievant and told him what Lt. Brigham had said. (Tr. 69) Lt. Brigham told Lt. Paul he was coming back to talk to him about a problem. Lt. Paul called Grievant to ask him what was going on and Grievant told him he was waiting for relief so he could talk with Lt. Paul face to face. (Tr. 120:19-121:9) Lt. Paul told Grievant to leave his post and come directly to him. (121:10-14) Lt. Paul had everyone write statements and this disciplinary action followed.[2]

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[2] At the time of the arbitration Lt. Paul had gotten a proposal letter for discipline and was waiting for the ultimate determination.

Discussion

The Union makes two arguments to demonstrate the Agency did not have just and sufficient cause to discipline Grievant. First, it argues there is no nexus between disciplining Grievant and promoting the efficiency of the service. Grievant's conduct neither affected his job performance, nor diminished the trust and confidence his direct supervisors had in him. Second, the Union argues, the Agency failed to prove the adverse action was reasonable under the circumstances. The Agency presumed Grievant's actions were criminal and the Warden failed to comprehend or properly apply the *Douglas* factors. The Agency argues the deciding official recognized the introduction of the weapon was inadvertent, but demonstrated poor judgment on Grievant's part. Moreover, Grievant's failure to immediately report the violation "casts serious doubt on the Grievant's integrity and served to destroy the confidence the supervisor had in his credibility." Since the choice of discipline is normally left to the "sound discretion of the Agency," the 20 day suspension should not be disturbed.

The Agency did not have just and sufficient cause to suspend Grievant for 20 working days. I make this finding for five reasons. First, Grievant did not engage in any knowing or intentional behavior when he brought a firearm into the institution. The parties stipulated his action was inadvertent. (Stipulation 4) Moreover, he was only able to enter the facility with a handgun because the operator of the X-ray machine failed in his duties. The handgun was clearly visible; the operator either did not take notice, or ignored what he saw. Had he fulfilled his responsibility, the handgun would never have gotten past the lobby of the institution.

Second, both Chief Correctional Supervisor Lothrop and Warden Rios incorrectly asserted Grievant committed a crime. Grievant's behavior was referred to the OIG, who investigated and brought no criminal charges against Grievant. (Tr. 169) Mr. Lothrop could not identify what Penal Code section Grievant violated when he inadvertently brought the handgun into the institution. (Tr. 134) Nevertheless, Warden Rios wrote in his decision letter that introducing: "… a weapon, into the secure part of the institution was a criminal act whether or not it was unintentional." The Agency presented no evidence to support this assertion. In deciding whether there was just and sufficient cause to discipline Grievant, Warden Rios proceeded from a false premise: that Grievant committed a crime.

Moreover, the evidence shows Grievant's inadvertent behavior did not, as Mr. Lothrop charged in his proposal letter, destroy Grievant's credibility or make him unfit for his duties. Each of his direct supervisors testified they had not lost confidence in Grievant's ability to perform his job effectively. Even Mr. Lothrop admitted that Grievant's actions did not affect his ability to perform his job effectively. (Tr. 133) Grievant's performance appraisals in October 2009 and April 2010 rated him as "Exceeds" and Mr. Lothrop wrote: "Keep up the hard work. Thank you. Great Job!" (U-1) This evidence shows, as the Union argues, there is no nexus between Grievant's inadvertent introduction of a firearm into the institution and the efficiency of the service. It was an accident that should have been avoided by normal institutional searches, but was not.

Third, while Grievant did not report the firearm the moment he discovered it, the evidence does not support any inference he sought to hide his behavior. He erred in thinking the best course of action was first to get the firearm out of the facility and wait until he could talk directly to Lt. Paul. The evidence shows that

after Officer Hickman told him Lt. Brigham said to tell Lt. Paul what happened Grievant sought relief to leave his post. Lt. Paul called Grievant and told him not to wait for relief, but to leave his post. (Tr. 121) Grievant did and told Lt. Paul what had occurred. This evidence shows that when faced with a novel situation Grievant did not immediately call supervision, which would have been the correct thing to do. It also shows that no one involved– neither the officers being relieved, nor the officers coming on – immediately reported the firearm to supervision. This suggests a weakness in training, not a conspiracy.

Fourth, Warden Rios failed to properly consider the *Douglas* factors – if he considered them at all. As previously noted, Warden Rios proceeded from the mistaken assumption Grievant engaged in criminal behavior. He also testified, with respect to the second *Douglas* factor, that he considered Grievant a supervisor. He is not. Warden Rios should not have treated the behavior as if it was performed by a supervisor. Additionally, Warden Rios did not consider the consistency of the penalty. He said he considered Grievant's inadvertent introduction of the handgun as an introduction of contraband into the facility. The only similar incident he cited was when an officer deliberately circumvented the metal detector and brought a cell phone into the facility. (Tr. 183) The penalty was a one day suspension. (Union Exhibit 4)

It is not clear Warden Rios actually considered the *Douglas* factors at all when determining the appropriate penalty. In response to the Agency representative's question about whether he considered whether alternative sanctions would have been sufficient to correct Grievant's behavior, Warden Rios testified:

> You know what, I said it once, twice, three times already that I was very lenient, very gracious to give him 20 days. But, yes,

> ma'am to answer your question, yes. And you know, to be honest with you, this is really – never mind. (Tr. 181)

The question and answer reflect the underlying basis for Warden Rios' determination to impose a 20 day suspension. It was a matter of "grace," not an application of the *Douglas* factors. Warden Rios said he determined the penalty based on his personal notion of lenience. This is not consistent with the deciding official's responsibility to use Agency guidance and the *Douglas* factors to determine an appropriate penalty for misconduct.

Finally, the only thing 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 a unique situation for which he was not trained. In the "Disciplinary/Adverse Action Log" the most common penalty for "Failure to Follow Policy" is a Letter of Reprimand. That is the only appropriate penalty for Grievant's failure to immediately call his supervisor when he discovered he had inadvertently brought a firearm into the institution.

Consequently, I find the Agency did not have just and sufficient cause to impose a 20 day suspension on Grievant. It only had just and sufficient cause to impose a Letter of Reprimand. Grievant was subjected to an unjustified and unwarranted personnel action. He is entitled to back pay and interest, in accordance with the Back Pay Act.

Grievant is also entitled to reasonable attorney fees. Warden Rios was adamant in asserting Grievant had committed a crime, but he could identify no crime that Grievant had committed. The Agency knew, or should have known, Warden Rios was wrong. Grievant committed no crime. It should have known it could not possibly prevail on the merits in light of that claim. By proceeding, the

Agency required Grievant to seek legal help to vindicate his rights. Consequently, the Agency is responsible for Grievant's reasonable attorney fees. His counsel will submit an application for attorney's fees setting forth the applicable rates and hours devoted to this case.

In light of my findings of fact and conclusions of law, I make the following:

Award

1. The disciplinary action was not taken for just and sufficient cause and did not promote the efficiency of the service.

2. The Agency did not have just cause to suspend Grievant for 20 days.

3. The Agency only had just cause to issue a Letter of Reprimand.

4. In light of the disparity between the discipline imposed and the appropriate penalty for the proven misconduct, Grievant is the prevailing party.

5. Grievant is entitled to back pay and interest in accordance with the Back Pay Act.

6. Grievant is entitled to reasonable attorney fees.

7. In accordance with the stipulation of the parties, I retain jurisdiction to resolve any disputes over the amount owed Grievant or the amount of his reasonable attorney fees.

San Francisco, CA

October 19, 2010

Norman Brand