

BACKGROUND AND ISSUE

The parties selected Arbitrator Harvey A. Shapiro from a list prepared by the Federal Mediation and Conciliation Service (FMCS). The Arbitrator was notified of his appointment via mail, received May 27, 2008. The letter of appointment specified the use of an Expedited Arbitration, but this process was not agreed to by the Employer (Agency). After many communications among the parties, and with the assistance of FMCS staff, it was determined that a conventional Arbitration be held.

By agreement of the parties, a Hearing was scheduled on July 10, 2008, at the Sam Snead Restaurant, at the Navy/Marine Golf Course, in Honolulu Hawaii. It was further agreed that the start time would be 7:30 a.m. The Arbitrator advised the parties that a pre-Hearing conference would take place first and the Hearing would commence immediately afterward. At the end of the Hearing, the Hearing record was closed and the parties agreed to submit post-Hearing briefs no later than September 2, 2008. Both briefs were received by the Arbitrator on-time, via email, who distributed them to all parties.

The issue presented to the Arbitrator was: “Was the Agency’s removal of the Grievant taken for just and sufficient cause? If so, the removal action should be sustained, if not, what shall be the remedy?”

APPEARANCES AND EXHIBITS

Appearing for the Employer:

William E. Branch, Esq.
Irene Montoya

Appearing for the Union:

Aaron L. Martin, Esq.
Ronald Nipp, Union Representative
Anthony Torres, Grievant

The following Exhibits were introduced during the Hearing:

- Joint Exhibit #1 – Master (Collective Bargaining) Agreement
- Joint Exhibit #2 – 5-16-08 Memo to Invoke Arbitration
- Joint Exhibit #3 – 3-24-08 Dyer Letter
- Joint Exhibit #4 – 4-8-08 Memo of Oral Response
- Joint Exhibit #5 – 4-8-08 Formal Response
- Joint Exhibit #6 – 2-5-99 3420.09 Change to Standards of Employee Conduct
- Joint Exhibit #7 – 4-28-06 Drug-Free Workplace Program Statement
- Joint Exhibit #8 – 5-12-08 McGrew Letter of Dismissal
- Joint Exhibit #9 – 1-12-04 Torres Receipt for 3420.09 Change Notice
- Joint Exhibit #10 – 12-3-07 Torres Affidavit
- Joint Exhibit #11 – 11-9-07 Quintero Affidavit
- Joint Exhibit #12 – 12-3-07 Quintero Affidavit
- Joint Exhibit #13 – 12-10-07 Eastburn Affidavit
- Joint Exhibit #14 – 10-5-07 Quintero Memo

- Joint Exhibit #15 – 10-10-07 Torres Memo
- Joint Exhibit #16 – 10-11-07 McGrew Letter
- Joint Exhibit #17 – Sherdog.com Internet Report
- Joint Exhibit #18 – Douglas Factors
- Agency Exhibit #1 – 11-25-05 Federal Register - Boldenone
- Agency Exhibit #2 – Fort Dodge Animal Health - Equipose
- Agency Exhibit #3 – 10-19-07 OIA Investigation Authorization
- Union Exhibit #1 – 5-20-03 1210.24 Program Statement
- Union Exhibit #2 – 4-17-08 Torres Performance Appraisal
- Union Exhibit #3 – 9/2004 Review of Disciplinary System

THE HEARING - EVIDENCE AND ARGUMENT

The Grievant was employed as a Correctional Officer for the Federal Bureau of Prisons in Honolulu, since October 20, 2002. In 2007, in a Ultimate Fighter Competition (UFC) in London, England, in which he was a participant, on September 8, he was drug-tested and tested positive for a steroid known as Boldenone, aka Equipose and Nandrolone, a controlled substance administered to horses by veterinarians. The Grievant voluntarily informed his employer on October 5, 2007, of this event, but the Employer had already learned of the positive drug test a day earlier by an article posted on the Internet.

The Grievant testified that he was administered the steroid by his trainer after he sustained injuries to his hand and elbow. His trainer of about one year apparently told the Grievant that he could give him “supplements” that would speed his recovery and the Grievant believed the drug was some type of cortisone. After taking the injection for approximately a fifth time, the Grievant testified that he realized that it was a steroid and he fired the trainer (Joint Exhibit #10, Item 18). The estimated date when he took the last injection was the “end of June or early July” (Joint Exhibit #10, Item 9), although in his statement to Warden McGrew, dated April 4, 2008 (Joint Exhibit #5), he indicated that “his last injection was in May, 2007.”

The Grievant testified that he was a professional fighter with the UFC for “four, five years” (Transcript, Page 149) before the September fight in England, and after losing his match, he lost his contract with UFC. It was indicated that the random drug test that exposed his use of an illegal substance (steroid) was around the same time but he testified that this was not the cause of his dismissal from UFC, but rather his performance in the fight (Transcript, Page 156). However, in his December 3, 2007, affidavit, he indicated that he had been involved with UFC

for over five years (Joint Exhibit #10, Item 14) and that his dismissal from UFC was due to the positive test result (Joint Exhibit #10, Item 15). The Grievant indicated that prior to his injuries, he had never taken any illegal drugs (Joint Exhibit #10, Item 10).

The issue of whether or not the Grievant was covered under Program Statement 3735.05, Drug-Free Workplace (dated 4/28/2006), was raised. Joint Exhibit #7 outlines the necessary provisions of this program, specifically Section 9, the “Safe Harbor” provision, and testimony was received from multiple witnesses, including the Grievant, Bryan Lowry (national union president of the Council of Prison Locals), Roger Payne (national secretary/treasurer) and Warden Linda T. McGrew about the Grievant’s request that he be covered.

There was also discussion that, according to testimony, the Grievant was on family leave, specifically the Family Medical Leave Act (FMLA), at the time he went to England to fight. He testified that he used FMLA “for the purpose of providing for my family...”

On October 19,2007, this matter was turned over to the Office of Internal Affairs for investigation (Agency Exhibit #3). Testimony was presented with the details of the subsequent investigation of this incident and the procedures designed to keep the deciding authority, the Warden, from having any part in the investigation.

During the entire period of investigation, from October 5, 2007, to May 12, 2008, the date of the Grievant’s termination letter, he remained employed in various capacities at the detention center. Some of his assignments were restricted, while others gave him routine contact with the inmates at the center.

On May 12, 2008, after the OIA investigation was completed, the Warden testified that she reviewed all of the material, including the Douglas Factors (Joint Exhibit #18) and made the decision to terminate his employment at the detention center.


OPINION AND AWARD

Testimony was presented at the Hearing that assured the Arbitrator that the Grievant's rights and due process were always respected. The Arbitrator wishes to commend the staff of the Federal Detention Center – Honolulu for their care and professionalism throughout this process.

The Arbitrator finds that the “Safe Harbor” provision does not apply in this case. The Grievant's use of the drug Boldenone ended, according to the Grievant, somewhere between May and July 2007 and the drug test that he failed was administered in September. The voluntary report made by the Grievant occurred on October 5 and came after a public report of the test results, so it was neither timely, nor in line with reporting the illegal drug use “prior to being identified through other means;...”.

The testimony about the Grievant's conduct and poor judgment, and also consideration of the Douglas Factors, was persuasive in deciding this matter. Although feelings of sympathy were evoked for the Grievant since he apparently had no knowledge that steroids were being administered, the zero tolerance policy must take precedence over these feelings, especially for a law enforcement officer in a federal detention center.

Therefore, the grievance brought forward by the Union in this case is denied and the termination of employment for the Grievant is sustained.



HARVEY A. SHAPIRO

Arbitrator

Honolulu, Hawaii

STATE OF HAWAII)
)
CITY AND COUNTY OF HONOLULU)

On this 22nd day of September, 2008, before me personally appeared HARVEY A. SHAPIRO, to me known to be the person described in and who executed the foregoing instrument, and acknowledges that he executed the same as his free act and deed.



Julie A. Y. Apina
Notary Public
State of Hawaii

My commission expires:

Julie A.Y. Apina
Notary Public, State of Hawaii
My commission expires 1/19/2011

Julie A.Y. Apina, 1st Circuit Doc Date 9/22/08
Pages: 9 Doc Description Award and Opinion
Julie A.Y. Apina 9/22/08
Notary Signature Date
NOTARY CERTIFICATION



CERTIFICATE OF SERVICE

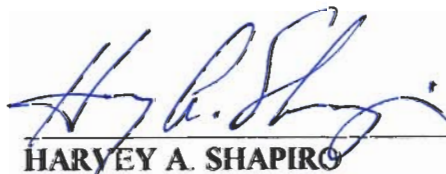
I hereby certify that a copy of this Arbitration Decision and Award, FMCS Case Number 08-56247, between the Council of Prisons (AFL-CIO), Local No. 1218, on behalf of Grievant Anthony C. Torres, and the Federal Bureau of Prisons, US Department of Justice, was sent to the following parties by Certified U.S. Mail, return receipt requested, on the 22nd of September, 2008, to:

William E. Branch, Esq.
Federal Bureau of Prisons
230 N. First Avenue, Suite 201
Phoenix, AZ 85003

Aaron L. Martin, Esq.
Martin & Kieklak
P.O. Box 3597
Fayetteville, AR 72702

Copies of this decision were sent on September 22, 2008, via e-mail to the above parties and also to:

Ms. Irene Montoya
Mr. Renton Nipp



HARVEY A. SHAPIRO

Arbitrator
Honolulu, Hawaii