IN THE MATTER OF AN ARBITRATION BETWEEEN

BUREAU OF PRISONS (BOP)
Low Security Correctional
Institution, Allenwood,
Pennsylvania

And RE: FMCS 13-58862

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 0306

APPEARANCES:

John Lemaster on behalf of the Employer
Evan Greenstein on behalf of the Union and Grievant

A hearing in this matter was conducted before the undersigned on September 17 and 18, 2014. Previously, on May 21, 2014, the Employer filed a motion to dismiss the grievance. Said motion was denied by the undersigned on June 2, 2014. Briefs were filed by both parties and the record was closed on November 18, 2014. Based upon a review of the foregoing record, the undersigned renders the following arbitration award.

STIPULATED ISSUE:

Was the disciplinary/adverse action taken against the Grievant for just and sufficient cause, or if not, what shall be the remedy?

BACKGROUND:

The Federal Correctional Complex, Allenwood, PA is a correctional institution, consisting of a low, medium, and high security penitentiary.

The Grievant, a Corrections officer, began working at BOP Allenwood in 2004. He is considered to be a good employee, without a disciplinary record.

The parties' collective bargaining agreement provides that "disciplinary and adverse actions . . . will be taken for just and sufficient cause . . ."

On February 1, 2012 the Grievant unintentionally/unknowingly introduced his personal firearm into the institution.

The officer staffing the screening machine at the employee entrance to the facility, after identifying the weapon, allowed, without comment, the Grievant to take the bag containing the weapon off the belt on which it was sitting, and depart the facility. Clear Agency policy provides that when firearms are identified under such circumstances, they are to remain on the screening belt and supervision is to be immediately notified. Both the screening officer and the Grievant were made aware of and understood this policy. Thereafter, the Grievant went to his car, which was parked on a facility parking lot, placed the weapon in his car, and returned to the facility entrance.

A Captain, who was in the screening area at the time, and who learned about the incident from the screening officer, allowed the Grievant to return to his vehicle to retrieve the weapon and return to the facility. The OIG found that the Captain's aforementioned conduct was "... a poor management decision that could have placed the security and safety of the facility in jeopardy" (Citation omitted)

It can reasonably be inferred from the record that neither the Officer staffing the screening machine, nor the Captain referred to above, received any discipline for their conduct in this matter.

In 2009 the Grievant was counseled for dialing fellow employees' phone numbers and hanging up each time the person answered the line. The record contains no persuasive evidence that the Grievant continued such conduct thereafter.

After an investigation on June 27, 2012 the Agency proposed removing the Grievant from his position.

The proposal was based upon three charges:

1. For bringing his personal firearm into the LSCI employee screening area.

2. For conduct unbecoming a law enforcement officer, specifically by grabbing his bag containing the firearm off the x-ray screening belt, exiting the institution and returning the firearm to his car.

3. For unprofessional conduct, specifically by dialing the number of another officer's work phone line and hanging up each time that officer answered the phone, known in the workplace as "phone fucking".

Ultimately the Warden at the facility, who was not the warden at the time of the incident, notified the Grievant that he was being suspended for forty-five (45) calendar days.

EMPLOYER POSITION:

It is undisputed that the Grievant committed the charged acts of misconduct, including bringing his personal firearm into the facility, thereafter taking the weapon, exiting the institution and placing it in his vehicle parked on Agency grounds, and dialing institution phone numbers and hanging up when the phone was answered.

It is also evident that the Grievant knew that storing a personal weapon in a vehicle on Agency grounds was a violation of policy and posed a threat to the safety and security of the institution. In this regard, personal firearms present a danger to safety and security, whether inside the institution or in a vehicle in the parking lot, since some inmates have free, unsupervised access to the lots. Clearly, the Grievant was not confused about Agency policy prohibiting personal firearms on Agency property.

He also knew, or should have understood the procedures to be followed when a firearm is discovered in the screening process, particularly since he served as a screener in the past.

Also, the Grievant admitted that he made a deliberate rather than panicked decision in this regard.

The Union argues that since the Grievant received informal, verbal counseling for "phone fucking" in 2009, the Grievant should not be disciplined for it now. In response, verbal counseling is not discipline under the parties' Agreement, and therefore the Grievant could and should have been disciplined for such conduct, particularly, where, as here, two fellow staff members gave affidavits that the Grievant participated in such conduct since 2009.

It is well established that the Grievant, as a law enforcement officer, is held to a very high standard of conduct (Citation omitted), and, in that regard, the Agency has significant discretion in determining reasonable penalties for misconduct (Citation omitted).

In this matter the Agency's decision should be given such deference, since the decision was based upon consideration of all relevant Douglas factors and was within tolerable limits of reasonableness.

Consideration was given to the fact that the Grievant is a law enforcement officer, that he clearly understood that he was not permitted to bring his weapon onto institution grounds, that he placed the security of the institution at risk, and to the fact that he made an effort to conceal his misconduct.

The decision also recognized and gave consideration to mitigating factors, including the fact that this was the Grievant's first disciplinary offense, and that the Grievant's performance had been acceptable.

Though the Agency noted that the Grievant took responsibility for his actions in his written response, it did not find the Grievant's statement that he did not try to conceal his actions persuasive.

Assuming arguendo that the Captain who was involved in this matter made a poor management decision by allowing the Grievant to return to his car and retrieve the weapon, that decision did not constitute misconduct, nor is it relevant to the Grievant's misconduct.

The Union's disparate treatment argument, as related to this discipline, is misplaced. In order to demonstrate disparate treatment, the Union would need to demonstrate that a similarly situated employee received a different penalty for a similar infraction. (Citations omitted) In contrast, this was an unprecedented situation.

Relatedly, the arbitral comparisons submitted by the Union are not in fact comparable since in both cases the employees faced only one charge, introduction of contraband. (Citations omitted) Here, in contrast, the Grievant faces three very serious charges.

Lastly, the parties' Agreement provides that all expenses of the arbitration, except as specifically noted, are to be borne equally by the parties. Since the Agreement makes no reference to attorney fees, that is an expense that should be covered equally by the parties.

UNION POSITION:

When considering the Douglas Factors (Citation Omitted), which must be applied in determining whether just cause exists in matters such as this (Citation Omitted), the Employer's conduct violated the Grievant's rights in several ways. In this regard, it failed to complete a full and fair investigation. In particular, the Employer failed to give proper consideration to the fact that although the matter was referred to the OIG, no criminal charges against the Grievant were filed, and, in addition, the US attorney's Office declined to prosecute the Grievant. Indeed, it would appear that critical facts relating to the conduct of the Officer staffing the screening machine and the Captain who permitted the Grievant to return to his car to pick up the weapon were not even considered by the disciplinary decision makers in this matter.

This is so in spite of the fact that the Employer's policy is clear that, upon discovery of a firearm during the screening process, "...the screening staff member will instruct the staff possessing the firearm to step aside and await the arrival of an appropriate supervisor." (Citation omitted) It is undisputed that the screening officer did not do so.

Though the Grievant was found by the Employer to be guilty of three charges, the Employer failed to prove that he engaged in conduct unbecoming a law enforcement officer by a preponderance of the evidence. In this regard, while it is not disputed that he may have asked the screening officer to hush upon discovery of the firearm in the Grievant's bag, he wasn't attempting to hide the gun or to cover up his misconduct. Instead, when the Grievant became aware that the gun was in his bag and that it had been discovered, he became embarrassed and did not want his co-workers to know about what was happening. Even the screening officer did not believe the Grievant was attempting to conceal his misconduct or hide the gun. The Grievant's instant reaction was to get the gun out of the institution and to make it more secure. Given the fact that there was already of screen shot of the gun, it is not plausible that the Grievant would have believed that his return of the gun to the car would have prevented management from finding out about the incident.

Nor has it been persuasively demonstrated that the Grievant engaged in unprofessional conduct, as charged. In this regard, while it is conceded that the Grievant engaged in what the parties have referred to as "phone fucking" (dialing a colleague's phone number and hanging up when the phone is answered) in the distant past (2009), he received counseling for said misconduct, after which it did not recur. Indeed, there is no witness testimony or documented evidence that he has engaged in such conduct since then, but for unsupported affidavits of fellow employees who did not testify at the hearing.

Because 2 of the 3 charges against the Grievant have not been proven by a preponderance of evidence, the only charge the Arbitrator can fairly consider is the Grievant's introduction of contraband into the facility. And in this regard, the Grievant's 45-day suspension is grossly disproportionate of the charged offense.

The undisputed fact that the Grievant's conduct in this regard was unintentional/accidental weighs heavily in favor of mitigation of the suspension penalty.

It may also reasonably be inferred that the Employer did not treat the Grievant in a nondiscriminatory manner in that the screening officer and Captain, referred to in the above mentioned factual background, were not even counseled regarding their clearly improper conduct in this matter, all of which constituted security breaches arising out of the same set of circumstances.

Another mitigating factor is the fact that it is clearly contemplated that personal weapons may be brought onto the premises, as evidenced by the Employer's "Special Instructions for the Front Entrance Officer" which provide that officers may store weapons in a gun locker and/or leave such items in their vehicles, providing they have a locker specifically designed to secure those items.

The record also demonstrates that the Grievant attempted to report the incident to the Warden shortly after the weapon was secured. In this regard, the Grievant's prompt and multiple conversations with the staff, including a captain, should be deemed an "immediate report" within the meaning of the Employer's policies. It is also undisputed that the Grievant was remorseful about the incident.

The Grievant's suspension was also not progressive or corrective as provided for in the parties' Agreement. (Citation omitted) Relatedly, the fact that the Grievant was previously counseled for misuse of his telephone, and that he did not repeat said misconduct thereafter, demonstrates the punitive rather than corrective nature of the discipline that was imposed in this case.

Given that this was a first offense, and that the Employer did not engage in progressive discipline, this factor is of strong mitigating value. Relatedly, it is significant that the Grievant has been evaluated as an officer functioning at the second highest performance level in the Bureau.

Also relevant is the fact that the Warden conceded in his written analysis that there was "no apparent effect on this employee's ability to perform at an acceptable level." (Citation omitted)

The Warden's conclusion that the instant misconduct damages the Agency's professional image was clearly mistaken. Few people outside the institution had any knowledge of the incident.

The record demonstrates that the Grievant was the subject of gossip and hearsay, indicating some kind of elevated job tension that should carry some mitigating weight.

Contractual silence on attorney's fees and expenses does not deprive the Union of its statutory right to collect fees and expenses in this matter. The Back Pay Act confers statutory jurisdiction on an arbitrator to consider a request for attorney's fees. (Citation omitted) The contract here also does not contain a "clear and unmistakable waiver" of the Union's statutory right to seek attorney's fees. (Citation omitted) It would also be premature for the arbitrator to rule on the issue of entitlement to attorney's fees and expenses at this juncture. The Union is not requesting that fees be granted as part of the Arbitrator's award; it is simply asking that, absent full grievance denial, it be given the opportunity to petition for fees after the issuance of the Arbitrator's decision. It is simply premature for the Union to apply for fees until the arbitrator has reached a decision on the merits. Indeed, it would be a violation of law for the arbitrator to deny fees as part of his original award. (Citation omitted).

DISCUSSION:

There is really no dispute that the Grievant, by unintentionally bringing his firearm into the facility, violated Agency policy. The only legitimate question, in that regard, is whether said conduct merited discipline under the just cause standard, and if so, how severe the discipline should be. In this regard, a related question is whether the Grievant's misconduct was aggravated by conduct described in the other two charges against him that were utilized by the Agency to justify the discipline that was imposed.

In the undersigned's opinion, the allegation that the Grievant engaged in what the parties refer to as "phone fucking" is not supported by a preponderance of evidence. Although it is undisputed that the Grievant engaged in such conduct three years before the incident in question, it is undisputed that at that time he was orally counseled rather than disciplined about the matter. Although the Agency asserts that during its investigation two fellow employees asserted by affidavit that the Grievant continued such misconduct, the record does not support the Agency's conclusion that that was the case. Not only was there not any testimony supporting these assertions, thereby not permitting the Grievant to refute them, but also the assertions were sufficiently unspecific as to their time and content to be persuasive and credible. Relatedly, there is no evidence that such alleged misconduct was reported to management prior to the investigation in this matter. Accordingly, the undersigned finds that this charge is not supported in this evidentiary record.

The remaining charge, that he improperly grabbed his bag containing the firearm off the x-ray screening belt, exited the facility and returned the firearm to his car that was parked on the facility's parking lot, is factually accurate, although there are other related facts relevant to the merits of this charge.

In this regard it is clear from the record that both the Grievant and the Officer staffing the screening machine knew that what should have happened was that the bag containing the firearm should have remained on the belt and that the matter should have immediately been reported to supervision. Instead, the Grievant motioned the screening officer not to alert anyone, removed the bag/weapon from the belt, without any intervention by the screening officer, and left the facility, again, without anyone trying to stop him.

Based upon these facts, it was not unreasonable for the Agency to have concluded that the Grievant not only ignored known Agency policy, but in addition, that, at least in the moment, he was trying to hide the fact that the incident had occurred at all. In this regard, the Grievant's assertion that he was simply trying to remove the weapon from the premises is simply not persuasive. Though the Grievant couldn't have been sure that the incident was or was not going to be reported by the screening officer, all of the foregoing indicates that he took a chance that it might not have been.

The Grievant's misconduct was further aggravated by the fact that he put the bag containing the gun in his car, and left it there, when it is clear that he should have known that weapons can only be left in vehicles if they are placed in lockers specifically designed to secure them, per the Agency's special instructions for front entrance officers, which had previously been one of the Grievant's assignments. The record further indicates that this was a serious security breach since it is undisputed that inmates have access to employee parking areas at the facility.

In the undersigned's opinion, Grievant's conduct after the weapon had been identified significantly added to the seriousness of his infraction.

So, two of the three charges against the Grievant were meritorious, and the second charge, described above, was, in the undersigned's opinion, very serious, justifying serious disciplinary action under the just cause standard.

Which leaves unanswered, one question; namely, under said standard, what should the penalty or disciplinary action have been?

A couple of issues raised by the Union related to this question will be addressed.

One is arbitral precedent supporting the Union's contention that discipline imposed for the unintentional bringing of personal firearms into such facilities has generally been quite minimal. While, in principle, I would agree with that premise, the facts here are distinguishable in that additional meritorious charge found herein is, in the undersigned's opinion, quite serious, justifying a more serious form of discipline.

Secondly, the Grievant in this matter is a long standing good employee with no disciplinary record, with little likelihood that problems similar to those that occurred in this case are likely to continue or be repeated.

Thirdly, though there is no evidence that employees who have committed similar infractions have been treated differently than the Grievant, it is relevant to the determination of how severe the Grievant's conduct jeopardized the security of the facility that the screening officer allowed the Grievant to remove the firearm from the belt and the facility without apparent consequence, and the Captain allowed the Grievant to retrieve the weapon from his car, again without apparent consequence. While these facts do not technically constitute disparate treatment, they do indicate that the management of the facility appeared to be more concerned about precedent and lessons to be learned from the incident rather than the breach of security that the incident caused.

Based upon all of the foregoing considerations, the undersigned believes that the Grievant's 45-calendar day suspension was excessive under the just cause standard. Accordingly, this award will reduce that suspension to 12 working days, 2 for the unintentional bringing of the firearm into the facility, and 10 for the removal of the

firearm from the screening belt and the placement of the firearm in an unsecured place in his car.

The award further contemplates that the Grievant shall be made whole for the losses he incurred as a result of the too severe suspension, i.e., the difference between the wages and benefits he lost as a result of the 45 calendar suspension, and the wages and benefits he would have lost had the suspension only been for 12 work days.

The undersigned is also persuaded that he should retain jurisdiction in this matter for 45 days from the date of this award to permit the Union to apply for attorney fees in this matter under the Back Pay Act. The parties should understand that the undersigned's retention of jurisdiction for such purpose in no way reflects the undersigned's position on the merits of such a request.

Based upon all of the foregoing, the undersigned hereby renders the following:

ARBITRATION AWARD

The Grievant's 45-calendar day suspension was excessive under the just cause standard and shall be reduced to a 12 working day suspension. In accord with the discussion above, the Grievant shall be made whole for losses incurred.

The undersigned will retain jurisdiction in this matter for the purpose and duration set forth above.

Dated this 19th day of November 2014 at Chevy Chase, Maryland.

Byron Yaffe
Arbitrator


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GENERAL COUNSEL