University at Buffalo
The State University of New York

School of Management
Department of Organization and Human Resources

April 29, 2013

Beth M. Reese, Esq.
Federal Bureau of Prisons
320 First Street, NW
Room 256-E, HOLC Building
Washington, DC 20534

Evan Greenstein, Esq.
Legal Rights Attorney
American Federation of Government Employyes
80 F Street, NW
Washington, DC 20001

Re: Federal Bureau of Prisons and AFGE Local 3975 (von Justice)

Dear Ms. Reese and Mr. Greenstein:

Enclosed for each of you are two copies of my decision in the above matter. Also enclosed is my billing, with W-2.

Thank you very much for your cooperation.

Sincerely,

Howard Foster

Howard G. Foster
Arbitrator

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Tel: (716) 645-3280 Fax: (716) 645-2863

* *

In the Matter of Arbitration

between

Federal Bureau of Prisons

and

Council of Prison Locals:
American Federation of
Government Employees

Opinion

and

Award

(FMCS Case No. 11-02594-1)

* *

This arbitration was heard on February 6, 2013, at the Federal Correctional Institution in Fairton, New Jersey (FCI Fairton). The undersigned was appointed to arbitrate the controversy through the procedures of the Federal Mediation and Conciliation Service. The proceedings were transcribed. Upon submission of post-hearing briefs by both sides on April 8, 2013, the record was closed.

APPEARANCES

For the Employer:

Beth Reese, Assistant General Counsel
Valerie Cross, Human Resources Management, FCI Fairton
Robert Bourbon, Assistant Special Agent in Charge, Office of Inspector General
William Lee, Program Review Division (former Captain, FCI Fairton)
Mark Kirby, Associate Warden of Programs

For the Union:

Evan S. Greenstein, Legal Rights Attorney
David F. Gonzalez, President, Local 3975
Philip Glover, Northeast Regional Vice President
Kamela von Justice, Grievant

THE ISSUE

Was the adverse action taken against Kamela von Justice for just and sufficient cause? If not, what shall the remedy be?

BACKGROUND

The facts of this case are not materially in dispute. The grievant, Kamela von Justice, is employed as a Senior Officer Specialist at the Federal Correction Institution at Fairton, NJ (hereafter "FCI Fairton" or "Employer"). He has worked there for 17 years.

On July 5, 2010, the grievant reported for his regular shift at 6:00 a.m. He drove onto the grounds, parked his car, and entered the main building where all employees and visitors are electronically screened. He carried with him a bag with some personal belongings, which was also screened. There was at least one other employee coming in at the same time, and the attendant at the screening station, Officer Beckley, admitted the grievant before checking what was showing in the screen of the grievant's bag. In the bag was a gun that the grievant had earlier retrieved from his mother's home during a family visit over the Independence Day holiday.

As the grievant was making his way to the next checkpoint, Officer Beckley saw the image of the gun. He called Officer Riley, who was stationed there, and told him to have the grievant return to the screening post. When the grievant returned, Beckley showed him the image of the gun. The grievant uttered an expletive and took the gun back to his car. Beckley reported the incident to his lieutenant, and an investigation by the Office of Inspector General (OIG) ensued. During this time, the grievant was placed on home duty.

On October 19, 2010, the OIG reported its finding that misconduct in the form of "Weapons Introduction" had occurred. On November 29, 2010, Captain William Lee notified the grievant that he was proposing the grievant's removal, based on the charge "Introduction of Contraband." The grievant provided an oral reply to the Deciding Officer, Acting Warden Mark Kirby. On February 8, 2011, Warden Kirby decided that the grievant would instead be suspended for 21 calendar days. The decision to suspend the grievant was formally grieved on March 14, 2011, and eventually moved to arbitration.

During the investigation, the grievant claimed that he obtained the gun, which belonged to him, from his mother's house over the July 4 weekend, put it in his bag, and forgot it was there when he brought the bag into the facility on July 5. No witness for the Employer questioned this claim. The core issue thus reduces to whether there was just and sufficient cause for a 21-day suspension for an employee who inadvertently brought a firearm into the facility.

POSITION OF THE AGENCY

The Agency contends, first of all, that the grievance is not arbitrable because the Union failed to meet the procedural requirements of the CBA. Article 32(a) states in relevant part:

> In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy.

The written invocation of arbitration in this case stated only that "pursuant to the Master Agreement Article 32 this is to inform you that AFGE Local 3975 is hereby invoking arbitration" and included none of the required items. As the plain language of

the CBA sets forth the requirements, and as the Arbitrator is without power to add to, subtract from, disregard, alter or modify any term of the Agreement, the grievance must fail. Several previous arbitrators have concluded that a grievance is not arbitrable if the Union fails to properly invoke arbitration in the manner prescribed by Section 32(a).

The Agency further argues that it has established by a preponderance of the evidence that the grievant introduced contraband into the facility, in violation of the Standards of Employee Conduct. The grievant acknowledges that he introduced the firearm and that he knew it was a violation of Agency policy to bring a weapon onto institutional property. The prohibition of personal firearms on the property is consistent with federal law and regulation.

Furthermore, asserts the Agency, the penalty of a 21-day suspension is reasonable and consistent with its Table of Penalties. Where charges have been sustained, the penalty may be reviewed only to determine whether all the relevant factors were considered and discretion was exercised within tolerable limits. In this case the deciding official did consider all relevant factors and acted within tolerable limits. This standard has been established by the MSPB and is thus binding on arbitrators. Arbitrators must give due deference to the Agency's discretion and not substitute their judgment for management's in determining appropriate discipline. Here management determined that, while there were several mitigating factors in this case, the grievant's offense was very serious and warranted a 21-day suspension in order to serve the efficiency of the service.

The Agency also notes that the grievant was afforded all his due-process rights and was not punished more than once for the same misconduct. Even though the

grievant was placed on home duty pending investigation, the suspension was the sole disciplinary action taken in this case. Home duty is merely a change in duty location, not discipline. And while the Union suggested that the grievant lost overtime, the record shows that the grievant was not in the habit of working overtime.

Finally, contends the Agency, prior arbitration decisions involving the inadvertent introduction of firearms that are cited by the Union, which resulted in substantial reductions in the penalty imposed, are distinguishable from the instant case in significant ways. In *AFGE Local 1242 and BOP, USP Atwater,* the arbitrator found that the deciding official had wrongly assumed that the employee had committed a crime and thus failed to properly consider the *Douglas* factors. The deciding official also incorrectly considered the employee a supervisor. In *AFGE Local 2005 and BOP, MDC Brooklyn*, the institution, much unlike FCI Fairton, was in an urban setting surrounded by public streets that are not controlled by the regulations of the Agency. In addition, the warden there testified that he had been advised that a 21-day suspension was the minimum that could be imposed. None of these factors is present in the instant case, and indeed Warden Kirby testified that he was unfamiliar with the prior decisions and made his determination by considering the statements in the record and the *Douglas* factors.

For all of the foregoing reasons, the Agency urges that the disciplinary suspension be upheld by the Arbitrator.

POSITION OF THE UNION

The Union argues, first of all, that the Agency's attempt to have the grievance declared non-arbitrable should be denied, as there was no prior notice of the claim and it was not adduced until the end of the hearing.

On the merits, the Union contends that the CBA was violated several times throughout this matter. The suspension was not for just and sufficient cause, mainly because the Agency failed to impose an appropriate penalty. Two recent arbitration decisions under the contract between these parties support the claim that the penalty was disproportionate to the offense. While these decisions are not binding here, they lend persuasive authority to the Union's position, especially since the decisions involve the same issues and the same parties. And although the deciding official denied that there is any national policy on the penalty for introduction of contraband, the nearly identical facts and outcomes in the three cases make it clear that there is a national policy to propose removal and then, if the employee is remorseful, mitigate the penalty to a lengthy suspension. This pattern suggests that Warden Kirby was not the true deciding official in this case.

In *AFGE Local 1242 and Federal Bureau of Prisons* (hereafter "Atwater" case), notes the Union, the grievant also forgot that he had a personal weapon in his bag. He asked a co-worker to take the gun to his (the grievant's) car, and the co-worker reported the incident. The grievant was proposed for removal, and the deciding official imposed a 20-day suspension. Arbitrator Brand, for reasons that resonate with the instant case, reduced the penalty to a letter of reprimand. He found that the grievant did not bring in the firearm intentionally; that management incorrectly asserted that the grievant committed a crime; that the grievant did not try to hide his behavior; that the deciding official did not properly consider the *Douglas* factors; and that the grievant failed to call a supervisor when the gun was discovered (a factor not present in the instant case).

In *AFGE Local 2005 and Federal Bureau of Prisons* (hereafter "Brooklyn" case), the Union further observes, the grievant received a 21-day suspension for introduction of contraband. Arbitrator Mehlman reduced the suspension to a reprimand, opining that the offense was not an egregious action or a flagrant disregard of policy, and that progressive discipline, which is mandated by Article 30, Section C, of the CBA, called for no more than a reprimand for a first offense. The facts of the Brooklyn case are almost identical to those in the instant matter. The fact that the grievant's car in Brooklyn was parked on a city street rather than federal property does not make his offense less severe than the one at issue here, as neither grievant was cited for putting his gun in his car.

The Union argues, in addition, that the parties have agreed that the results of an electronic search should not be punitive. A Memorandum of Understanding (MOU) negotiated in 2007 contemplated that prohibited items that did not pass screening could be taken to vehicles or placed in lockers. (There are no employee lockers at Fairton.) There is no mention of punishment. In June 2009, however, the regional Director of the Southeast Region issued a memo ("Holt memo") stating that if an employee brings a firearm into a facility, the matter should be referred for prosecution and the employee placed on home-duty status. In 2012, Arbitrator Saltzman found the issuance of the Holt memo to be a violation of the Master Agreement in that notice of its implementation was not provided. Nevertheless, the procedures detailed in the memo have been applied nationwide and, contrary to the intent of the 2007 MOU, employees have been punished.

Furthermore, asserts the Union, the suspension of the grievant was improper under the *Douglas* factors. It is clear that the Agency did not perform a proper *Douglas*-factor analysis, as there was arguably only one aggravating factor, the seriousness of the offense, among the 12 factors that must be considered. The record shows that Warden Kirby did not give appropriate weight to the mitigating elements in the case. He testified, for example, that he did not consider that the firearm was not carried all the way to the grievant's post or that the gun may have been unloaded. In sum, the 21-day suspension was clearly excessive, disproportionate to the charges, arbitrary, capricious and unreasonable, especially in light of the mitigating factors.

- Although the parties agree that it is a serious offense to bring a gun into a federal prison, it is undisputed that the introduction in this case inadvertent and unintentional. In addition, there is arguably little nexus between the misconduct and the work of the Agency.
- The grievant does not have a supervisory or fiduciary role at the Agency and has few contacts with the public.
- The grievant does not have a record of prior discipline.
- The grievant has a good work record and was remorseful over his lapse.
- There is no evidence that the offense affected the grievant's ability to perform satisfactorily or his supervisor's confidence in that ability. Had there not been such confidence, the grievant would have been terminated.
- The penalty issued to the grievant was inconsistent with that issued to Officer Beckley. Further, the Agency provided extra training for Beckley but not for the grievant.
- Although the Agency claims that the suspension is consistent with the Table of Penalties, the range of penalties is very broad, and the Agency has much discretion. The deciding official admitted that he had never before issued a suspension of the length he imposed in this case.
- The grievant had never been warned about the conduct in question as this was his first offense.

- There is no dispute that there was much potential for the grievant's rehabilitation.
- There were mitigating circumstances surrounding the offense: the grievant was contrite, the act was unintentional, and the grievant's bag was not properly screened.
- There were alternate sanctions available to deter misconduct in the future. Since the grievant has not reoffended since being placed on home duty, it is clear that this assignment had the proper corrective effect, obviating the need for suspension.

In sum, contends the Union, the abundance of mitigating factors in this case requires that the grievant's penalty be substantially reduced to a letter of reprimand or a letter of counseling. It urges that the suspension be rescinded in its entirety, that the grievant be made whole, and that reasonable attorney fees be awarded pursuant to the Back Pay Act.

FINDINGS AND OPINION

Although the Agency raises a non-frivolous question regarding the arbitrability of this grievance under the terms of the CBA, it makes its argument too late. Although there may be legitimate reasons for a party's failing to set forth a position on arbitrability at the first opportunity, here there were many opportunities, and the delay in this case is extreme. A chronology of events will illustrate the point.

This grievance was filed on March 14, 2011, claiming among other things that the suspension was "excessive" (the major argument advanced in arbitration). The Agency denied the grievance on April 14, 2011, and arbitration was invoked on April 25, 2011. Upon receiving the invocation, no question was raised by the Agency as to information missing in it. I was selected to arbitrate the matter in May 2011, but because of the parties' backlog of arbitrations a hearing was not scheduled until May 2012. Further

delay was occasioned by illness in the family of a key participant and by personnel changes in the Agency. The hearing was ultimately rescheduled for February 6, 2013. In the more than 21 months between the invocation and the hearing, no issue was raised about infirmities in the invocation.

At the outset of the hearing the parties stipulated to the statement of the issue indicated above. There was no mention by anyone of an issue of arbitrability, which in my experience is typically specified in the submission when a party wishes to have the question considered by the Arbitrator. There was also no mention of arbitrability in either of the opening statements. Nor was there any testimony speaking to the consequences of not having the information that was missing from the invocation. Only in the discussion of a briefing schedule did the Agency indicate that in its brief it would be contesting the arbitrability of the grievance.

Also relevant to this situation are the circumstances of the cases cited by the Agency in support of its argument on arbitrability. In *AFGE Local 1013 and FCI Yazoo City*, the arbitrator noted, "Although the Employer did not present the defect until the first hearing date, some issues were raised in response to the grievance. And at the first hearing in July the procedural defects were raised in total by the Employer's opening statement." Here the Agency's opening statement was silent on procedural defects. In *FCI Milan and AFGE Local 1741*, the question of arbitrability was raised in the Agency's opening statement, and the hearing was in fact bifurcated. In *FPC Seymour Johnson and AFGE Local 3977*, the parties requested and received a bifurcated hearing, with a written decision on arbitrability prior to proceeding on the merits. In *FCI Elkton and AFGE Local 607,* the first issue presented to the arbitrator was, "Is the matter arbitrable and

properly before the Arbitrator?" (In a second *FCI Elkton and AFGE 607*, it is not clear from the decision when the issue of arbitrability was first raised.) Thus in previous cases where arbitrators have strictly applied the contractual rules regarding the content of the invocation, they have done so in the context of Agency objections decidedly more timely than the one here.

I make no finding as to whether a grievance becomes non-arbitrable when the invocation fails to include any or all of the information prescribed in the CBA. My finding here is limited to the circumstances of this case, in which the Agency, by making no objection until the very end of the process, effectively acquiesced in whatever procedural infirmities there may have been in the invocation of arbitration. Accordingly, the grievance must proceed to the merits.

* * * * * * *

Whether there was misconduct in this case is beyond quarrel. Nobody denies that the grievant brought a firearm into the facility. Nobody denies that a firearm is contraband. Nobody denies that bringing contraband into a prison is against the rules. The rationale for such a rule hardly bears belaboring. Indeed, although the Union argues at one point that the parties have agreed that the results of an electronic search are not supposed to be punitive, it concedes at another point that "it is a serious offense to bring a gun into a federal prison." It seems unlikely that the parties have agreed that discipline is inappropriate for what is acknowledged by everyone to be a "serious offense." Once it is conceded that the employee committed a serious offense, the only real question is the degree of discipline.

There are two elements of the record that speak to the propriety of the penalty imposed by the Agency on the grievant: the *Douglas* factors and the similar cases in other prisons cited by the Union. A review of both of these elements compels the conclusion that the 21-day suspension, which is on its face a very harsh penalty, was excessive under the circumstances.

Although the *Douglas* factors themselves are specific to federal labor relations, they very much parallel the conventional standards that have been developed for just-cause analyses in both the private and public sectors over many decades. These standards invoke such considerations as notice to employees of the rules, evidence of *mens rea,* proportionality, the employee's length of service and past employment record, the employer's consistency in imposing discipline, mitigating circumstances, and the preference for progressive discipline. By these standards, as well as the specific prescriptions of *Douglas*, the Agency has failed to show why a penalty as harsh as a 21-day suspension was necessary to accomplish the purposes of discipline. While I accept the Agency's argument that a certain deference should be given to the judgment of management in fixing a penalty to established misconduct, that deference must have limits. I find here that a 21-day suspension is well outside the range of discretion within which a reasonable penalty could be set.

While bringing a gun into a prison, even inadvertently, is decidedly a serious offense, and the grievant knew it was (hence no issue of notice), the Union is persuasive in asserting that just about everything else in this case argues for mitigation. The act was not intentional or malicious or for personal gain of any kind. It happened once. The grievant had a good record, over a 17-year period, in terms of both discipline and job

performance. There is no discernible threat of repetition. It is also noteworthy that the Agency judged Officer Beckley's lapse, without which the gun would not have gone beyond the initial screening station, to warrant only a two-day suspension, and his lapse was exacerbated by the facts that he allowed the grievant to bring the gun to his car afterwards and failed to report the situation promptly. In sum, the penalty imposed by the Agency does not meet the test of reasonable proportionality.

The two other cases adduced by the Union, even if not binding here, are significant in two respects. First, they represent judgments by other neutrals faced with very similar fact patterns as to an appropriate penalty for inadvertently bringing a gun into a prison. Those judgments are not conclusive but they are instructive. Second, they raise a question as to how the Master Agreement is to be applied to a particular set of facts. The question before those arbitrators, as does the one before me, asked whether, under this Agreement, there is just and sufficient cause to impose a 21-day suspension on an employee for inadvertently bringing a gun into a facility. The arbitrators found that in their cases there was not just and sufficient cause for anything like a penalty of that magnitude, even though there was misconduct. Upholding the Agency's position in the present case would mean that, under the same Agreement between the same parties, there is just and sufficient cause for a 21-day suspension in Fairton, NJ, but in Atwater, CA, and Brooklyn, NY, the same offense warrants only a reprimand. The gap between these applications of the same contract to similar facts is not tenable.

Although I am persuaded that the 21-day suspension was excessive, I am not persuaded that the grievant's "serious offense" warranted no more than a reprimand, as suggested by the Union. In my experience, reprimands are usually reserved for less-

than-serious offenses. In this case, moreover, we have the standard of the penalty imposed on Officer Beckley, whose lapses strike me as at least roughly equivalent to that of the grievant. (There is no evidence in the record that Officer Beckley's suspension was grieved.) Accordingly, I find that a reasonable penalty for the grievant's offense, under the circumstances present in this case, is a suspension of two days. As for the home duty, the Agency clearly had to launch an investigation, and until it had all the facts it was not unreasonable for the Agency to remove the grievant from the premises. Hence there will be no award for lost overtime or pay differential.

The Union's request to submit a petition for reasonable attorney fees shall be granted. Unless agreed otherwise, the Union's petition will be submitted no later than June 10, 2013, and the Agency will have 30 days from the date of the Union's submission to respond.

AWARD

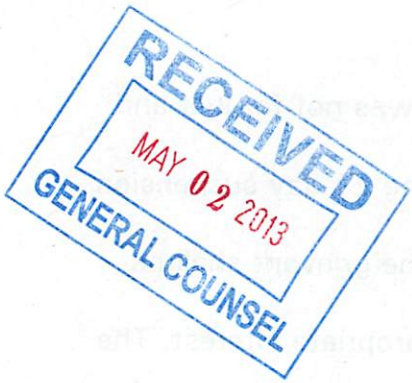
The adverse action taken against Kamela von Justice was not for just and sufficient cause, although some discipline was warranted. The 21-day suspension imposed on him shall be converted to a 2-day suspension. The grievant shall be compensated for all time lost beyond the two days, with appropriate interest. The Union's request to submit a petition for reasonable attorney fees is granted. The Arbitrator shall retain jurisdiction of this matter for the purpose of resolving any dispute that may arise out of the implementation of this Award.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

April 29, 2013
(dated)

Howard G. Foster
(signature)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GENERAL COUNSEL