FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

BETWEEN

AMERICAN FEDERATION OF	§	
GOVERNMENT EMPLOYEES, Local 506	§	
Union	§	
and	§	**FMCS# 12-52035**
	§	
BUREAU OF PRISONS/	§	
FCC COLEMAN. FL	§	
Agency	§	

HEARING CALLED TO ORDER AT:

TIME:	9:00 A.M.
DATE:	November 21, 2012
ADDRESS:	Administration Building Coleman, FL

APPEARANCES:

Arbitrator:	**DON E. WILLIAMS** 1204 Creekwood Lane Longview, TX 75602
For the Agency:	**MERLY A. WHITE** Assistant General Counsel U. S. Department of Justice Federal Bureau of Prisons Employment Law & Ethics Branch 320 First Street NW Washington, DC 20534
For the Union:	**KENNETH PIKE** Medium Vice President Arbitration Specialist 409 W. Hunt Avenue Bushnell, FL 33513

FACTUAL BACKGROUND

PRELIMINARY STATEMENT

This is a contractual arbitration pursuant to a collect bargaining contract, called "CBA," between Federal Bureau of Prisons, referred to as the "Agency," and Council of Prison Locals American Federation of Government Employees, called the "Union." The Agency, acting under the authority of Warden Jorge L. Pastrana, referred to as the "Warden," on November 27, 2009, indefinitely suspended Sullivan arising from his alleged acts on November 1, 2009, and gave a five (5) day's suspension to Shannon Sullivan, called "Sullivan." The Chief sent notice of an indefinite suspension, which was signed for on November 19, 2009. Sullivan returned to work from the suspension on August 29, 2010. On July 25, 2011, the Union appealed the disciplinary action to arbitration for the five (5) days suspension. The parties agreed to the hearing date and location for the arbitration hearing.

STATEMENT OF FACTS

The Arbitrator adopts and finds the following statements as true as to each and all of the matters as set forth below. The Arbitrator adopts the following statements as findings of fact and where necessary as conclusions of law. Wherein conclusions are necessary to this award, findings shall be deemed to be conclusions, and where findings are necessary to the award, any conclusions shall be deemed to be findings.

Stipulated Facts.

The parties stipulated to the following facts:

1. The Agency hired Sullivan on July 24, 2005 and assigned him as a correctional officer.
2. Sullivan received notice of the indefinite suspension on November 27, 2009.
3. The Agency ceased paying Sullivan effective November 27, 2009.
4. Sullivan returned from indefinite suspension and his pay was resumed on August 29, 2010.
5. Sullivan received the five (5) day suspension proposal letter on June 17, 2011, which he signed for on June 24, 2011.
6. The parties agreed that the case has substantive arbitrability for the hearing.
7. Sullivan returned to duty on August 29, 2010.

Incident

Sullivan testified he received a copy of the Standards of Employees Conduct on July 25, 2005. He attended annual refresher training each year. He also attended Glynco training that went over the standards of employee conduct that taught illegal activities breached the trust and confidence between the officers and the public. He testified that on June 4, 2006, he signed a receipt for receiving the Law Enforcement Officer

Safety Act, called "LEOSA," which qualified the officers to carry a firearm while off duty. He testified that LEOSA stated the employee was responsible for and personally liable for any act using the firearm off duty. He testified officer's off-duty guidance did not require an off duty officer to carry a firearm. He admitted officers were not qualify to carry a firearm if he's under the influence of alcohol.

Sullivan testified the Federal Correctional Unit at Coleman, FL refereed to as "FCC," had begun to move him to different units because he was being assaulted by eight (8) inmates who surrounded and threatened him. The inmates had assaulted him causing a cracked eye orbit and herniated disc. Sullivan testified he was assaulted in the prison on August 18, 2008. He testified he and his home were assaulted August 11, 2009. He testified they were coming after his friends and family. He testified his family members were chased down the road in high pursuit chases. On August 18, 2008, some inmates had assaulted his fiancé'. One of the investigating officers was Deputy Sheriff Brian Coleman, called "Coleman." He testified eight (8) received twenty (20) years' incarceration. This was the reason he carried the firearm and bullets which were not federal issued items. He acknowledged he had received a copy of LEOSA guidance material, which provided that any action taken while off-duty will not be considered as within bureau employment. The standards of employees' conduct stated that illegal activities by an off-duty employee reflect on the integrity of the Bureau and betray the trust and confidence placed on it by the public and the off-duty staff may not misrepresent they are in furtherance of their official duties. The standards also state that off-duty staff may not claim to be carrying a concealed personal firearm in furtherance of their official duty.

Sullivan testified that on October 31, 2009, and November 1, 2009, he was off-duty and riding his motorcycle, when he observed a new club was opening with a sign that said Tuggs restaurant. He testified there was a Halloween party. He stopped his motorcycle and went into the Club Rain or Tuggs restaurant carrying his personal firearm, which was loaded with nine rounds. He testified they wand him to detect any metal but did not discover the pistol he had in his left pocket. He asked two (2) girls to dance if he bought them a drink. He testified that he ordered one drink for him self, after which he walked close to the dance floor. He testified he did not drink any of the drink, but set it down on a table close to the dance floor and asked a lady for a dance and he thought drinks were prohibited on the dance floor. He testified he did not have a drink of alcohol that night.

Sullivan testified that he had to ask the lady to dance, in very loud voice to be heard over the loud music, so when the music stopped he seem to be "shouting in an establishment on a holiday" in a louder tone than normal. He testified a guy shorter than him ask him to leave. As he was walking out with this guy, Sullivan told him he was law enforcement. Sullivan admitted he was knocked unconscious by a stun baton called a "slap jack." He testified he woke up on his hands and knees, with a broken shoulder and had been rendered unconscious. The Agency referred to the incident as Sullivan being escorted out of the establishment by security staff as under arrest for altercation with staff and customers. Sullivan testified "they had knocked me out" but when he recovered his consciousness the security guards were whirling him around and his firearm fell out of his pocket. Sullivan testified only one person saw the gun and other people reacted when he reported it. Sullivan admitted he said he was law enforcement and that is why he had the gun. He testified they were making false accusations against him. He testified he could not find his wallet so he went back to the front door, where they told him, "Sir, you got a gun." Sullivan said he told them he needed to find his wallet to show he was law enforcement. He wanted to go home but the deputy Sheriff's arrived and told him to get against the car. The deputy asked him if he had a gun and he said Yes. He testified the deputy sheriff took out the firearm. The deputy asked Sullivan if he had a concealed weapon permit. Sullivan testified the deputy said they had called his supervisor who said he had to have a permit and the officer arrested Sullivan for having a concealed weapon without a permit.

On November 1, 2009, Deputy Sheriff Police Officer David Pinner, called "Pinner" stated in a police report that he was dispatched to the Club Rain in Crystal River in reference to a disturbance in which he was informed a male subject had pulled out a pistol and pointed it at several persons. He stated when he arrived he was told Sullivan had said he was working on several high profile cases. Pinner stated in his observation that Sullivan's speech was thick tongued and slurred and he smelled an alcohol beverage from about two (2) feet away. Pinner stated in his written statement Sullivan contacted with five (5) witnesses and said, "You are mine, I got you." Pinner stated the witnesses stated they were in fear of their life and Sullivan stated further he was a federal agent ranked higher than an FBI agent and had broken up a Mexican drug ring and wanted by numerous gangs. He also stated there was a video of the aggravated assaults which were not introduced into evidence to sustain the discipline of Sullivan.

Coleman gave a written report that stated when he arrived he saw the club's bouncers standing around an individual who was later identified as Sullivan. He testified he was advised by Kevin Garcia,

called "Garcia," that Sullivan pointed a gun at him. Coleman stated he heard from other people that Sullivan pointed a gun at them. He stated he was told by Garcia that Sullivan pointed the gun at him. He wrote that he asked Sullivan if he had a gun, which Sullivan stated he did and reached to get it out of his pocket. Coleman stated he told Sullivan to wait, which he did until Pinner arrived at the scene.

Sullivan was taken to jail for five (5) felony charges of aggravated assault with a firearm and one count of carrying a concealed weapon. Sullivan testified his button-down shirt and his T-shirt were damp from rolling around on the floor in the bar, which caused him to smell of alcohol. On November 2, 2009, he reported to the Warden that he had been arrested and charged with aggravated assault, and that his first court date was November 20, 2009. Sullivan testified he was placed on home duty on November 3, 2009, until the criminal charges were remedied. He testified, while he was on home duty, he was not permitted to come to work, but he received pay. He stated he was placed on indefinite suspension until the criminal proceedings were completed. Sullivan testified that during this suspension without pay he was not told he could appeal the suspension.

Sullivan testified on July 9, 2010, he reported in a court document that he was accused by five (5) witnesses accusing him of pointing his firearm at them. The document was a Motion to Dismiss Count VI but the Agency offered the document as an admission by Sullivan admitting to pointing a firearm at the five (5) individuals on November 1, 2009. Sullivan testified that on November 17, 2009, he was charged with *five felony counts* of Aggravated Assault With a Firearm, and *one felony count* of Carrying a Concealed Firearm. He admitted he received a proposal for indefinite suspension on November 19, 2009. Sullivan testified that he was "told [he] would be ended up in the suspension until the legal proceedings were remedied." Sullivan testified that he and his Union representative Robert Edge were granted sixteen (16) hours of official time to be used on November 23 and 24, 2009, to prepare an oral and written response to the proposal for indefinite suspension. Sullivan testified that he did not provide an oral or written response to the decision maker, Warden Pastrana, for the indefinite suspension proposal.

Sullivan testified that he received a decision letter for the indefinite suspension on November 27, 2009. He testified that in the indefinite suspension decision letter, he was provided with the appeal

rights to file a grievance under the grievance procedures of the Master Agreement within forty (40) days. Sullivan testified that he did not file a grievance within forty (40) days of receiving the decision letter for the indefinite suspension. Sullivan testified that in the indefinite suspension decision letter, he was provided with the appeal right to file an appeal with the Merit System Protection Board within thirty (30) days Sullivan testified that he did not file an appeal within thirty (30) days of receiving the decision letter for indefinite suspension.

Sullivan testified that in the indefinite suspension decision letter, he was provided with the appeal right to file a complaint with the Equal Employment Opportunity Commission within forty-five (45) days of receiving the decision letter for indefinite suspension. Sullivan testified that he did not file a complaint within forty-five (45) days of receiving the decision letter for indefinite suspension. Sullivan testified that he was indefinitely suspended pending resolution of six felony charges against him. Sullivan testified that the felony criminal charges were disposed of on August 20, 2010. He testified that he returned back to work at the Bureau of Prisons on August 29, 2010.

Sullivan was placed under investigation by the Agency for the off-duty misconduct, resulting from the incident at the Club Rain on October 31, 2009/November 1, 2009. An affidavit of Sullivan was taken by SIS Lieutenant Floyd Thorn, called "Thorn," on December 28, 2010. Sullivan's Union Representative Pike was present when Thorn took Sullivan's affidavit on December 28, 2010.

Sullivan testified they picked a jury for the five (5) charges of which he was found not guilty of four (4) and one (1) was reduced to a charge of an improper exhibition of a firearm, which he was also found not guilty. The other charge was dismissed.

Procedural Facts

The Agency assigned Lieutenant Arrington called "Arrington," to investigate the charges against Sullivan, and the investigation was later assigned to Thorn. Thorn testified the Agency waited until the criminal cases were disposed of before investigating the incident. Arrington obtained copies of the police reports in the criminal case against Sullivan. Thorn testified Sullivan was given a form B that is

explanation of rights and oath. Thorn testified that he took Sullivan's affidavit. Thorn testified he gets a referral from the warden to take a case for off-duty offenses.

The Warden had been in his position for four (4) years and eight (8) months. The Warden was the deciding official in disciplinary matters. He testified an adverse action would be a suspension more than fifteen (15) days and a disciplinary action is a suspension less than fourteen (14) days. He testified he was the deciding official for adverse action and disciplinary action. He testified an adverse action can include an indefinite suspension and termination. The Warden testified he reviewed the disciplinary file and if required the adverse action file, which include the proposal letter, affidavits, memorandum, police reports, and employee's written response from the employee or union. The Agency could have subpoenaed the witnesses to testified in this hearing rather than using their written statements, which was hearsay. He testified that some inmates could use a rule's violation to manipulate an errant officer. The Warden testified as a federal law enforcement officer, Sullivan or any correctional office is held to a higher standard.

The Warden testified he read the narrative by Oliver Blanchette, called "Blanchette, "which stated he was present when Sullivan was ask to leave due to disrespecting the bartender. The statement from Blanchette was that Sullivan was thrown out of the club and became irate and fell because he was very intoxicated. Blanchette stated when he got up he had his pistol in his hand walking back toward the club. Blanchette said Sullivan refused to leave and deputy's sheriffs were called.

The Warden testified he was not with the Office of Internal Affairs, called "OIA." The Warden testified it was protocol for him to report any violation of rules to the OIA. The Warden testified he put Sullivan on home duty, which required the allegedly errant officer to stay home, but remain on pay status pending a criminal or administrative investigation. He testified that home duty was not disciplinary or adverse action. The Warden allowed sixteen (16) hours to Sullivan and his union representative as official time to prepare an oral or written response to the disciplinary and adverse action. Neither the Union nor Sullivan made a written or oral response to the indefinite suspension. When Warden learned of the information on these charges was filed, he put Sullivan on indefinite suspension. He testified the charges would lead an inmate to not respect or follow orders from an officer charged with a felony.

The Warden testified that under the LEOSA an officer cannot carry a fire arm while under the influence of alcohol, engage in argument with folks at the "bar," be removed from the bar by owner or removed outside, talk about his being a federal agent involved in some investigation for some kind of drug related offense, and showing the weapon to people in the bar. The Warden testified that he used some of Sullivan's admissions, to determine he had a loaded weapon, did not deny he had drank alcohol, and discredits the Bureau of Prisons. He testified he used police reports but no affidavits but a statement by Lieutenant James Earl, called "Earl." The Warden testified he had no proof that Sullivan was under the influence of alcohol other then the hearsay testimony of the deputies and witnesses. He testified there were no Blood/Alcohol tests given. The Warden testified that Sullivan admitted to buying a drink in the club, bar, or restaurant, while he was carrying a weapon. The Warden did not know that Earl gave incorrect information to the local authorities about the qualifications for carrying a weapon by an officer off duty. He testified he was aware that Sullivan had authority to carry the weapon. He testified he could not find any mitigating factors.

On June 24, 2011, Sullivan was issued a proposal for a five (5) day suspension for off duty misconduct, a violation of the Standards of Employee Conduct, which he acknowledged receipts of on July 25, 2005.

On November 3, 2009, Warden changed Sullivan's duty station to his home. On November 19, 2009, Sullivan received notice of indefinite suspension. Sullivan testified he thought the Union had filed a response for the indefinite suspension. He testified he received the decision letter for indefinite suspension on November 27, 2009. He testified he did not file a response with the Merit Systems Protection Board or the Equal Employment Opportunity Commission. He testified he was indefinitely suspended until after the criminal charges were disposed of on August 11, 2010 for the lack of concealed weapon's permit and the not guilty finding for the five (5) aggravated assault charges with a firearm on August 19 and 20, 2010. He testified he returned to work on August 29, 2012. The Warden was aware the Court determined Sullivan did have authority to carry a concealed weapon under state and federal law. The Warden stated he used Sullivan's affidavit stating he walked into the bar with a loaded weapon. The Warden testified Sullivan did not admit he was drinking or pointing the firearm at anyone. The Warden testified Sullivan did not accept responsibility for walking into the bar with a loaded weapon, order a drink, get involved in argument with

others, or got removed from the bar. The Warden testified he based his findings on statements by the victims, who were at the location. The Warden testified he did not know if the LEOSA allowed Sullivan to carry a weapon into a bar, restaurant, or club. The Warden summarized, his testimony was based on Sullivan's own admission he walked into the bar with a loaded weapon, ordered a drink, got into an altercation, was removed from the premises, and police had to be called in and by witnesses statements that he showed a weapon talking about being a federal agent working on cases, drug related cases, and gang related also. He testified he had no personal knowledge of the judge and jury making credibility determination of the witnesses and the two (2) police officers.

The Warden reviewed Pinner's police report, which stated Sullivan had thick and slurred speech and Pinner could smell alcohol. The Warden testified that according to witnesses at the scene said Sullivan had stated he was a federal agent working on high profile case. The Warden viewed the incident report had pointed the gun at patrons of the bar and made statements that he was a federal agent. The Warden testified he reviewed Derrick Knapp's narrative, which stated they threw Sullivan to the ground when his gun fell to the ground then got up headed for the door and pointed the gun at him and the other bouncers. The Warden testified that neither SIS nor OIA interviewed any of the witnesses.

Sullivan testified that on December 28, 2010, Sullivan and his Union Representative Ken Pike referred to as "Pike," provided Thorn, a SIS Lieutenant with a sworn affidavit during an interview about the incident. Thorn testified that OIA is in charge of investigation of discreditable behavior, which is used for conduct on the outside or off-duty. The Agency attorney stated that discreditable behavior does not apply in this case and did not know how the Form B got into this case. The Warden stated Sullivan was guilty of discreditable behavior as proven from the statement of Sullivan, police reports, which stated he had a weapon, smelled of alcohol, he admitted he had the weapon, they could smell alcohol on his breath, he admitted to buying a drink, he was in possession of a weapon, at the time of his arrest. The Warden said Sullivan had authority to have a gun on his person.

Earl testified that he was an operations lieutenant on November 1, 2009, when he received a telephone call from the Citrus County Sheriff's Office at approximately 12:45 a.m. He testified he also received a call from Ms. Getman on behalf of Sullivan. He testified he did not recall answering any questions about carrying a concealed weapon.

Sullivan said he was unaware of this investigation for unprofessional conduct, then later changed to bringing discredit on the Agency, then told him it was for discreditable behavior. Sullivan testified during the period he was taken off home duty and placed on indefinite suspension, he did not receive any pay, which caused him to file bankruptcy, dispose of personal property to pay child support and later borrowed money to pay child support to prevent his license being revoked.

Sullivan testified he did not know how the disciplinary process worked. He testified he wanted the money he was not paid. He testified he expected the FCC-Coleman should represent him when he was assaulted. He testified he would not have gone through the whole process if the Sheriff's office had not been told by his supervisor that he did not qualify as allowed to carry the weapon. He had called to come back to work several times and they stated he was not allowed. On December 12, 2011, Sullivan filed an INVOCATION TO ARBITRATE, in which he had been given a five (5) days suspension on December 5, 2011, for "Off-duty Conduct." The Union stated that the remedies requested were: five (5) day's suspension set aside, Sullivan be made hold for pay and benefits as a result of suspension without "just and sufficient" cause, interest pursuant to 5 U.S.C. § 5596 (b)(2), any annual leave and sick leave that would have been accrued during time of suspension, any overtime, and any other remedy the arbitrator finds necessary.

PARTIES' POSITION

AGENCY'S POSITION

The Agency argued that the indefinite suspension was imposed November 27, 2009. The Agency argued that the arbitration hearing was conducted pursuant to Article 31, Section h.1 of the Master Agreement between Council of Prison Locals, American Federation of Government Employees and the Federal Bureau of Prisons. The Agency argued that the evidence adduced at the hearing proves that Sullivan's five-day suspension was taken for just and sufficient cause for a five (5) day suspension not about indefinite leave, with the Union not arguing Sullivan was placed on indefinite suspension improperly

The Agency argued there were undisputed facts that Sullivan was at Club Rain on October 31, 2009/November 1, 2009, where he purchased a drink with inconsistent testimony about the color, shouted in an establishment on a holiday, was escorted out of the establishment by security staff, and testified that five (5) witnesses alleged he pointed a gun at them. The Agency argued Sullivan was arrested on November

1, 2009, and on November 17, 2009, charged with five felony counts of Aggravated Assault With a Firearm, and one count of Carrying a Concealed Weapon, which he reported to the Warden on November 2, 2009, and he was placed on home duty on November 3, 2009. The Agency argued Sullivan testified he received a proposal for indefinite suspension without pay on November 19, 2009, and told he would end up in suspension until the court remedied the legal proceedings. The Agency argued Sullivan testified he and his union representative Edge were granted sixteen (16) hours official time to respond to the indefinite suspension but did not respond in a written or oral form. The Agency argued Sullivan received the decision letter for the indefinite suspension on November 27, 2009, in which the Master Agreement provided filing response within forty (40) days or the Merit System Protection Board within 30 days, neither of which he did. The Agency argued Sullivan was indefinitely suspended pending resolution of six felony charges. The Agency argued the criminal charges were disposed of on August 20, 2010 and Thorn took Sullivan's affidavit on December 28, 2010.

The Agency argued Sullivan was issued a proposal letter for the five (5) day's suspension, which he admitted was issued on June 24, 2011. The Agency argued the proposal letter stated,

> Specifically, on November 1, 2009, [you] were arrested and charged with Aggravated assault and Possession of a Concealed Weapon for pulling out a weapon and pointing it at the staff and patrons of Club Rain in Crystal River, FL after being removed from the facility by security. Your actions were observed by five staff and/or patrons. You were subsequently charged with Aggravated Assault with a Deadly Weapon, although the case was ultimately dismissed by the State. In your affidavit of December 28, 2010, you admitted that you were carrying a firearm.

On November 27, 2009, Sullivan was issued a proposal letter for five (5) days's suspension, which the Agency put Sullivan under indefinite suspension and stated in pertinent part,

> Your actions are in violation of Program Statement 3420.09, Standards of Employee Conduct, which states, 'the Bureau expects its employees to conduct themselves in such a manner that their activities both on and off duty will not discredit themselves or the agency.' Furthermore, as a correctional worker and law enforcement officer, your behavior, in addition to being unlawful, reflects negatively on the integrity of the Bureau and may cause one to question the trust and confidence placed in it by the public. Your actions were not only unprofessional, but embarrassing to the agency. It is expected that employees shall obey, not only the letter of the law, but also the spirit of the law while engaged in personal or official activities. The Agency argued that Sullivan was

> arrested on November 1, 2009, for causing a disturbance in the Club Rain, a night club. The Agency argued that an Information was filed on November 17, 2009 in the 5th Judicial Circuit in Florida for five (5) felony charges, five counts of aggravated assault with a firearm and on count of carrying a concealed firearm.

The Agency argued a Decision Letter was issued on December 8, 2011, for the five (5) day's suspension for off-duty conduct. The Decision Letter stated in pertinent part,

> The seriousness of your actions cannot be overlooked. As a Bureau employee, you must conduct yourself in such a manner that your activities both on and off duty will not discredit you or the agency. In addition, Bureau employees must avoid any actions which might result in, or create the appearance of adversely affecting the confidence of the public and the integrity of the U. S. Government.
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> . . .
>
> When considering the appropriate penalty for your actions, I considered, among other factors, the seriousness of the charges in light of your position as a law enforcement officer. I have taken into consideration that you did not take any responsibility for your actions. It is an extremely serious offense when a correctional employee goes into a public dwelling with a weapon and have to be removed based [on] his/her actions. Your perceived inability to temper and remedy your conduct undermines the public' confidence in our staff and the agency. Your suspension is warranted and is in the interest of the efficiency of the service. The suspension should have the desired corrective effect. It is my decision that you be suspended for five calendar days.

The Agency argued the Union invoked the arbitration of the five (5) days suspension on December 13, 2011, for off-duty conduct. The Agency argued in using *Enterprise Wire Cos,* 46 Lab. Arb. (BNA) 359 (1966), with Arbitrator Daugherty later setting out seven tests of just cause. The tests are whether the Agency's rule was reasonably related to the orderly, safe, and efficient running of the Agency, whether Agency gave warning that possible discipline could result from misconduct, whether prior to administrating the discipline, the Agency conducted an investigation to determine if the employee committed the misconduct, whether the investigation was fair, whether the investigation looks to determine if the investigation uncovered substantial proof of the employee's guilt, whether the employer applied its rules without discrimination, and lastly, whether the penalty was related to the seriousness of the offense.

The Agency argued the Agency rules are reasonably related to the orderly, efficient, and safe operation of the Agency. The Agency states the Standard of Employment Conduct, Program Statement

3420.09, Section 11, "Illegal Activities" states "Illegal activities on the part of any employee, in addition to being unlawful, reflects on the integrity of the Bureau and betrays the trust and confidence placed in it by the public, by the employee obeying the letter and the spirit of the law." The Agency argued the Union did not question the rule as reasonably related to the orderly, efficient, and safe operation of the Agency.

The Agency argued the Union did not question the "Guidance Regarding the Law Enforcement Officer's Safety Act." The memorandum dated February 27, 2006, provided:

- "Bureau staff is not required to carry a firearm off duty as a condition of employment, and, therefore, the Bureau is not responsible for providing a letter of necessity or statement to this effect."
- "LEOSA defines a qualified current law enforcement officer as an employee who (1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest; (2) is authorized by the agency to carry a firearm; (3) is not the subject of any disciplinary action by the agency; (4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm; (5) is not under the influence of alcohol or another intoxicating, or hallucinatory drug or substance; and (6) is not prohibited by Federal law from receiving a firearm.
- Personal Responsibility of Off Duty Employees for Carrying/Using Concealed Personal Firearms Under LEOSA: "The carrying of concealed firearms by off-duty staff pursuant to LEOSA is not an extension of official Bureau duties." Any actions within the scope of Bureau employment, but rather will be considered actions taken as private citizens. Off-duty staff will be individually and personally liable for any event that may relate to the carrying or use of a concealed personal firearm under LEOSA.
- Use of Bureau of Prisons Identification for LEOSA Purposes: "Following Union negotiations, the Bureau has decided to approve staff use of Bureau identification cards or credentials for LEOSA purposes. Consequently, the Bureau will no longer issue specific LEOSA identification cards."
- Copies of LEOSA to Employees: "All Bureau employees will be provided a copy of this guidance memorandum and its attachments and are required to sign the acknowledge receipt of these documents."

The Agency argued Sullivan testified that the agency's forewarning of LEOSA policy on June 4, 2006, which he signed as having received. The Agency argued Sullivan testified that LEOSA is a "Negotiated Memorandum that talks about the implementation of LEOSA and LEOSA allows a qualified officer to carry personal weapons off duty but there were exceptions." The Agency argued an off-duty officer is not required to carry a weapon but any action he takes are under the Bureau's guidance of LEOSA, any action taken involving his personal weapon will not be considered actions within the scope of Bureau's employment. The Agency argued Sullivan testified that carrying a concealed person firearm was not part of his duties as a corrections officer.

The Agency argued that Sullivan received and signed the Bureau of Prison's Standards of Employee Conduct on July 25, 2005.The Agency argued the range of discipline is from reprimand to removal. The Agency argued Sullivan testified he received and signed the Bureau of Prison's Standard of Employee Conduct and every year he received Annual Refresher Training. The Agency argued he testified when he first started with the Agency, he attended "Glynco Training," where he learned the illegal activities by employees, which betrays trust of the Agency. The Agency argued Sullivan was aware he was responsible for higher standard of conduct.

The Agency argued that prior to administration of discipline, the Agency conducted an investigation to determine if Sullivan committed misconduct. The Agency argued the investigation was fair. The Agency argued the Union did not question the fairness of the Agency's investigation. The Agency argued Thorn was with Sullivan and his union representative at the December 28, 2010-investigative interview. The Agency stated Thorn testified he has conducted approximately 600 investigations, in which he stated the protocol in an **off duty misconduct case** was to do a referral, which the Warden signs off on and it is sent to OIA, who decides they are going to pick it up or not. The Agency argued Thorn then gets a copy of the police report and if it goes to trial, he takes their statements and other evidence that pertain to the case. Thorn said he would wait until the criminal case is completed when he takes affidavits from contractors but "never the public." The Agency argued that Thorn used the affidavit that was provided in the police report for purposes of the local SIS' investigation. The Agency argued Thorn testified that he interviewed Sullivan last and gives him the signed and sworn form and with a Form B, which gives Sullivan the warning and assurance of his rights, particularly to have a Union Representative. The Agency argued the Program Statement 1210.24, Officer of Internal Affairs provides "**Interviewing Subjects.**" The Agency argued the

field investigator or the officer of the OIA all subjects exercise extreme care to afford the opportunity to read and sign the Warning and Assurance to Employees Required to Provide Information (BP-S194.012).

The Agency argued Thorn testified that Lieutenant Arrington imitated the investigation, by compiling police reports. The Agency argued Thorn testified he completed the investigation on this incident, provided Sullivan a Form B, the warning and assurance, and took his sworn affidavit, with Pike present on December 28, 2010, for Sullivan's affidavit.

The Agency argued the investigation uncovered substantial proof of Sullivan's misconduct, on the disputed facts:

- Grievant was at Club Rain on October 31/November 1, 2009.
- Grievant admitted in his sworn statement that he purchased one drink
- Grievant admitted in his sworn affidavit that he was escorted out by the security staff.
- Grievant admitted in his sworn affidavit that he was carrying a firearm, with the First round a 45-caliber bird shot followed by hollow points and then by a ball round staggered for a total of nine rounds.
- On November 2, 2009, Grievant reported to Warden Pastrana that he was arrested and charged with aggravated assault, and that his first court date was November 20, 2009.

The Agency argued the parties stipulated that the following non-Bureau witnesses made the following statements in the police reports; however, none of these witnesses were called to testify.

- **Witness Derrick Knapp:** "We were in the club we escorted him out threw him to the ground his gun fell out he proceed to get back up and run at the door with a gun and aimed it at everyone in the door way."
- **Witness Bran Farr:** "I seen the guy get thrown out of the door. He got up and walked back to the door and reached in his jacket and pulled a gun and started yelling."
- **Witness Robert Reed:** "The suspect that was taken out from the front door and push out by myself and another bouncer. The suspect hit the ground after losing his balance. He stood up and had a gun in his hand and was pointing it at me and DJ. We told him to put it away as he started to get closer to the front door he put the gun away. Then the owner

came out. I went back inside."

- **Witness Kevin Garcia:** "The gentleman disrespected the bartender and was asked to leave. Refused to Leave so my security guard threw him out on the floor. His gun fell out and began to point his gun at us and said 'you're mine. I got you." Then he told us that he was higher than an FBI agent. I felt threatened but I just kept to myself and tried to keep a steady mind.
- **Witness Oliver Blanchette**: "I Oliver Blanchette, head of security for Club Rain was present when suspect was ask to leave the club due to disrespecting the bartender. Suspect became irate and became aggressive and began to fight. Bouncers escort him out. After suspect was thrown out of the club he fell as he was very intoxicated. Where suspect got up his gun fell out of his jacket. He got up, grabbed his pistol and walked back at the entrance pointing the guy at my self and my bouncers and customers. He refused to leave also repeatedly said I'm a FBI agent and would not leave, simultaneously threatening everyone verbally. He refused to leave and deputies were called. He even told them he was a FBI agent. I am 100 percent willing to press charges for threatening my life with a gun. He obviously pulled out a gun with intent to use it."

The Agency argued Thorn complied with Program Statement 1210.24, Officer of Internal Affairs, which provides: "The investigative report should include the investigator's conclusions based on a review of the evidence and state whether the allegation(s) is/are sustained. The Agency argued Program Statement 1210.24, Officer of Internal Affairs provides: "Reports from the field, including all affidavits and reporting documentation, will be forewarned to OIA for review and clearance before any disciplinary action is proposed." The Agency argued Thorn testified he submitted the investigatory file to the OIA, which made the final determination to sustain the charge.

The Agency argued it was not questioned whether rules were applied without determination. The Agency demonstrating fairness and upholding the process, on June 29, 2011, granted the Union an extension of ten (10) working days to submit an oral and written response to the Warden. The Agency argued Sullivan provided a written but not an oral response to Warden.

The Agency argued the Warden properly considered the relevant factors contained in *Douglas v.*

Veteran Administration, 5 M.S.P.R. 280 (1981). The Agency argued the Warden testified that he reviewed the "affidavits, memos, police reports, a written response, proposal letter. The Agency argued in the decision letter, dated December 5, 2011, Warden stated, "I considered among other factors, the seriousness of the charges in light of your position as law enforcement officer. I have taken into consideration that you did not take any responsibility for your actions. It is extremely serious offense when a correctional officer going into public dwelling with a weapon and have to be removed based [on] his/her actions. Your perceived inability to temper and remedy your conduct undermines the public's confidence in our staff and the agency." The Agency argued Warden did not mitigate the 5-day proposal because as he said, "So I used his affidavit. The written response also, well, he didn't take responsibility and he was blaming everyone else about this incident. To see I didn't see - - I couldn't determine any mitigating factors because he had prior notice of the standards of employee conduct and he had prior notice of the LEOSA rules about the weapon." The Warden stated the public would lose confidence in an officer arrested in a public dwelling because it will impact the credibility we have in the community and basically, because we are here to protect society, ensure that these inmates stay incarcerated, while doing their time.

The Agency argued as provided in the Master Agreement, and as indicated at the hearing, the only issue under the Master Agreement for the arbitrator to decide here is whether the discipline was taken for just and sufficient cause, and if not, what is the remedy.

The Agency argued there is no specific statutory, regulatory, or contractual time frames within which the investigation must be completed, citing *Federal Bureau of Prisons, Complex, Coleman and Local 506,* FMCS#10-59428 (Arb. Yancy, 2013) and *Federal Bureau of Prisons, MCC Chicago and Local 3652,* FMCS#12-55359 (Arb.Jenks 2013), as consistent Agency wide..

The Agency argued more importantly, it is well established that arbitrator "draw their essence" from the collective bargaining agreement, citing *United Steelworkers of America v. Enterprise Wheel and Car Corporation,* 262 U. S. 593 (1960). The Agency cited Article 32, Section h of the Master Agreement describes the arbitrator's authority as, "The Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: this agreement; or published Federal Bureau of Prisons policies and regulations."

The Agency argued it is undisputed that enforcement of a statute of limitations was never contemplated in the Master Agreement, as the plain language does not provide for a statute of limitations. The Agency argued Article 30(d) provides only that the Master Agreement states that individual cases will vary, and the parties endorse the concept of timely disposition of investigations and disciplinary actions, when an investigation takes place on an individual's conduct, which is not proposed until the investigation has been completed and reviewed by the Chief Executive Officer or his designee.

The Agency argued that the plain language of the foregoing provision does not specify a precise deadline for either (1) the completion; of any instigation or (2) the proposal of any discipline that results from an investigation but the Agency argued to the contrary, the language accepts that there are complexities in individual cases. The Agency argued the language chosen in Article 30, Sections d and d(1) is not ambiguous but unequivocally states that the parties endorse the "concept of timely disposition of investigations and disciplinary/adverse actions" but that they also recognized circumstances of individual case will vary. The Agency argued in this case it is uncontested that the investigation was suspended from October 31/November 1, 2009, to August 20, 2010, when the felony charges were in the criminal process. The Agency argued that if it attempted to conduct its own investigation, it would likely have been interfering with the ongoing prosecution. The Agency argued that therefore, without a time frame for either the investigative phase of the adjudicated phase, there is not basis to consider the disciplinary process as untimely in this case.

The Agency argued the arbitrator lacks jurisdiction to provided the Union with the requested nine/ten moths back pay. The Agency notes that the Union Representative Pike conceded, "This case is a just and sufficient cause case. This isn't about indefinite leave . . . And I'm not even arguing-I mean I have read the law and I'm not even arguing that he was placed on indefinite suspension improperly. I think they did." The Agency argued the arbitrator has no jurisdiction to pay the Union's request for back pay to cover the time frame that Sullivan was on indefinite leave.

The Agency argued pursuant to the Master Agreement, Article 31, Section e, "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." The Agency argued Sullivan testified he received a decision letter of the indefinite suspension on November 27, 2009, which would require the Union to file within forty (40) days. The Agency states the arbitrator does

not have procedural arbitrability for determining the indefinite suspension.

UNION'S POSITION

The Union argued Sullivan had been employed since July 24, 2005 by the Department of Justice, Federal Bureau of Prisons at FCC Coleman, FL. The Union asserts that the FCC Coleman is a complex with four separate components to include, a Medium facility, Law facility, a satellite Camp, and two (2) Penitentiaries and the Union, Local 506 is a local bargaining unit of the American Federation of Government Employees. The Union argued the parties are subject to a collective bargaining agreement. The parties were subject to the CBA at the time of this disciplinary action. The Union argued the Agency raised an issue of timeliness regarding the Union's requested remedy of back pay for that period of time Sullivan was on indefinite suspension. The Union argued Sullivan should be reimbursed back pay when he was reinstated to duty. The Union argued it requested the five (5) days suspension to be set aside with pay for the time he had indefinite suspension, which is separate and apart from the Case in Chief. The Union argued that the request for back pay for the period of the indefinite suspension was a requested remedy as part of the overall case, not the instant issue that gave rise to the grievance. The Union argued that both the Union and Sullivan argued the indefinite leave suspension was a separate and apart issue.

The Union argued there was some confusion regarding the arbitrability of this case. The Union argued the reason the parties were at the hearing was to resolve the five (5) day's suspension and determination of whether the Agency had "just and sufficient cause" to suspend him. The Union argued the Agency is not arguing the arbitration of the five (5) days suspension was untimely. The Union argued that if the remedies requested do not meet the requirements for relief of the remedy, the arbitrator will just not award the remedy.

The Union argued there were some statements made by the Agency, some of which are not "Out come Determinant," but are supportive of his actions before he was arrested. The Union argued Sullivan ordered a drink but there is no probative evidence he drank any of it, but set it down on the table near the dance floor. The Union argued Sullivan was asking a lady to dance at a higher pitch, when the music stopped, making his words louder in relation to the other sounds. The Union argued that at that point an employee of the club asked him to leave. The Union argued Sullivan complied and began walking out when

suddenly he claims to have felt pain in his shoulder, was being thrown to the ground, and as he fell his pistol fell from his jacket pocket. The Union argued Sullivan stated he immediately retrieved it and start looking for his wallet containing his credentials but could not find it. The Union argued Sullivan walked back into the entrance and asked about his wallet. The Union argued someone stated to Sullivan, "Sir, you have a gun." The Union argued it was then Sullivan advised them he was a law enforcement officer and needed his wallet to prove his status. The Union states he finally found his wallet to show his credentials.

The Union argued the Citrus County Sheriff's office arrived and ordered Sullivan to stand against his car. The Union argued the deputies asked Sullivan if he had a gun and a concealed weapon permit, to which he answered that he did have a gun but no permit. The Union argued that the deputy said Sullivan's supervisor, Earl," was called and had stated Sullivan needed a concealed weapons permit, which he did not have, at which point he was arrested for carrying a concealed weapon without a permit.

The Union argued on November 17, 2009, an information was filled by the 5th Judicial Circuit in Florida charging Sullivan with six (6) felony charges arising from the incident, which were five (5) counts of Aggravated Assault With A Firearm and one (1) count of carrying a concealed weapon. The Union argued Sullivan was returned to full duty after charges were dismissed or he was found Not Guilty of all the charges by a jury around August 20, 2010, and sometime around August 29, 2010, Sullivan was returned to work.

The Union argued Sullivan was suspended by the Agency for five (5) days without pay and returned to work. The Union argued that Sullivan was advised on December 28, 2010, that he was being investigated for "Off Duty Misconduct." The Union argued Sullivan was suspended for five (5) days. The Union argued the Warden made a decision letter that stated, "However, the charge and specification in the proposal letter is based on your actions that occurred on November 1, 2009. The Union argued that the Proposal Letter and the Decision Letter were based on the November 1, 2009, events and his subsequent arrest. The Union argued, the Warden based his decision on Sullivan's written statement, sign and sworn statements by the witnesses, who saw the weapon.

The Union argued that Sullivan was not given a field sobriety test but the police report in which the sheriff's officer stated Sullivan was thick tongued and slurred his speech and smelled of alcohol from about

two (2) feet away. The Union argued there was no mention of intoxication the night of his arrest or during the trial. The Union argued the Agency pressed the issue of drinking and possibly intoxicated without any testimony to fit into the violation of LEOSA narrative. The Union argued the Agency's counsel stated LEOSA states a law enforcement officer may not carry a weapon if he under the influence of alcohol. The Union stated there was no evidence other than the hearsay statements or unsupported statements by deputies that Sullivan was drinking, got into an argument, and he stated he was a federal agent. The Union argued that Sullivan was in violation of LEOSA, which states, "is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance." The Union argued there is no provision, which is a violation of LEOSA by simply ordering a drink. The Union argued there was no evidence or any proof that Sullivan was Under the Influence of or was intoxicated the night of the incident.

The Union argued Warden cites witness statements as part of his final decision to suspend Sullivan. The Union argued that the accusation that he was pointing his gun at the other patrons at the club and was a federal officer investigating serious drug cases were supported by statements provided to the Sheriff's office by the customers. The Union argued there was not one sherd of evidence presented in court and, in fact, the jury did not find their testimony truthful and the jury found all five (5) charges were found untruthful.

The Union argued when Sullivan was returned to work an investigation was conducted by Thorn into the Off Duty Misconduct. The Union argued Thorn got the subject of his questions from the Deputies, as example when he asked Sullivan if he recalled the question asked Sullivan if he made the statement, "I was not drunk," [Thorn] admitted he was going by the police report, wherein the officer stated he smelled it. The Union argued that Thorn had no proof from witnesses other then the statements from Sullivan that he ordered one (1) drink. The Union argued Thorn could have interviewed the police officers and the witnesses, which he stated he could have done but based his conclusions on statements from Sullivan, other officers, and witnesses. The Union argued that all the statements and testimony of the officers and witness were heard in the trial and he was found not guilty, from which it can be presumed that the charges in the disciplinary action were likewise untruthful. There were no attempts by OIA or other department with the Agency to interview the witnesses.

The Union argued on the night of the incident, the arresting officer called Sullivan's supervisor,

whose untruthful statement, caused the arrest and charges against Sullivan. Earl had a duty to know the contents of the LEOSA, whereby his false statements lead to the arrest of Sullivan. There was no further research by the Sheriff's Office and Sullivan was put on trial.

The Union responded to the position of the Agency that Article 30, §30 of the CBA states "Recognizes that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition or investigation and disciplinary/adverse actions. The Union argued the incident was on November 1, 2009, which caused the Chief to place him on indefinite suspension. The Union argued Sullivan was returned to full duty on August 29, 2010, The Union argued he was given a five-day suspension on June 17, 2011. The Union argued that almost two (2) years after the incident, on December 5, 2011, Sullivan was given a decision letter suspending him for five (5) days. The Union argued Sullivan became aware of an investigation when he was called to provide an affidavit on December 28, 2010. The Union argued finally, almost two (2), Sullivan was given a decision letter suspending him for five (5) days.

The Union argued the Agency failed to timely dispose of a charge in a timely manner, citing *U. S. Dept. Of Justice, Federal Bureau of Prisons, Correctional Institution, El Reno, Oklahoma and American Federation of Govt. Employees, Council of Prison, Local 33, Local 171, (AFL-CIO.,* FMCS#3342 in which the Arbitrator stated he was troubled by evidence in that case, in particular, he finds eleven (11) month delay in imposting a five (5) days suspension for unprofessional conduct. The Arbitrator had noted the incident was on April 19, 2010, and the Agency failed to have any reasonable or valid import in promoting the efficiency of the Agency. In that case, the Arbitrator had difficulty with a penalty imposed eleven (11) months after the incident and where the officer was allowed to continue working the same assignment and perform the same job would cause any impact on the efficiency or integrity of the Agency or serve to reduce the probability of recurrence of behavior, which allegedly compromised the safety and security of other employees or the inmates.

The Union argued the local Agency was untimely in conducting its investigation, citing REVIEW OF THE FEDERAL BUREAU OF PRISONS' DISCIPLINARY SYSTEM, U. S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division, Report Number I-2004-008, September 2004. The Union further cites Norman Brand's treatise as stating "timely action by the employer" and take reasonable

time after learning of misconduct. Brand further states an unreasonable delay subjects employee's to suspense or uncertainty and deprives the union and employee of an early opportunity to investigate, gather evidence, and prepare a defense. Brand further states the passage of time may disadvantage the grievance witness's lose of their recollections or become unavailable. The Union further argued Anne L. Draznin stated:

> "Timely action by employers in imposing discipline is important because it permits an employee to respond to the discipline at a time when memories are fresh. An employer's failure to act promptly has resulted in the setting aside or reduction of discipline. For example, while the employer otherwise met the just cause standard for determination, an almost four month delay in imposing discipline violated the contract's requirement that discipline be imposed "as soon as possible."

The Union argued Sullivan had already suffered financial and emotional hardship due to the Agency's imposing the indefinite leave. The Union urged that to impose an added five (5) days suspension after almost two (2) years after the alleged incident is unconscionable. The Union argued this was not a complicated case and the Agency only had to take one (1) affidavit with the balance on statements and affidavits being done by the Citrus County Sheriff's Office. The Union argued that Sullivan had already suffered penalty of lost wages from the time he was found not guilty until this case was set to be heard. The Union argued Sullivan could have filed a grievance when he was placed on Indefinite Suspension. The Union argued it was within the authority for the Arbitrator to award back pay for the time Sullivan was placed on leave without pay or at the very least when he was returned to duty when he realized the Agency was not going to reimburse him for that time, citing *Just Cause The Seven Tests,* Adolph M. Koven and Susan L. Smith, 2nd ed.

The Union argued that if management based (1) to suspend the employee on the basis of arrest or indictment, if the verdict is not guilty, the employer would be required not only to reinstatement but compensation to him for lost time. If management decided (2) to keep an errant employee on the job pending the trial, it must prove, it would have an adverse impact on its business. The Union cites Arbitrator Turkus (Unknown issues, parties involved, or issues of the case) stated "Mere surmise, conjecture, or speculation as to the adverse impact upon its operations or its business because the nature per se of the alleged misconduct is only a limited time unless management has evidence that misconduct was committed. One premise operating here: whether or not a suspension is called disciplinary, the employee is left in "economic limbo" without means of support for a considerable period of time . . . a loss for which even an eventual

award of back pay might not compensate.

The employers has other options, such as, conduct it own investigation and impose discipline on that basis. The Union referred that one arbitrator held that suspension on the basis of suspicion should not extend "beyond that point in time that is reasonably necessary to permit the company either to determine the facts of the case that give rise to the suspicion or to conclude that it is impossible to obtain sufficient facts to terminate the suspension in form of some exact disciplinary act.

The Union concluded that the Agency was unable to prove the five (5) days suspension was for just and sufficient cause nor was it to promote the efficiency of the service. The Union argued the Warden based his decision solely on police reports, witness statements, Greivant's affidavit and his own opinion colored by those documents and he was upset by Sullivan's failure to take responsibility for his actions by "walking in there and creating all that situation." The Union argued the Agency used evidence, which had support a verdict of not guilty, the Agency presented no evidence to tie into the LEOSA. The Union argued police officers and witnesses were not present to allow Sullivan to cross-examine. The Union argued when Sullivan was proven to be not guilty, he was reinstated but then the Agency assessed him with a six (6) days suspension for the same charges he had been found not guilty in a court of law.

ISSUES

PARTIES' PROPOSED ISSUE

The Union proposed the issue to be "Was the disciplinary/adverse action taken for just and sufficient cause and if not, what shall be the remedy?" The Agency proposed the issue should be: Whether Grievant's five-day suspension for Off Duty Misconduct was taken for just and sufficient cause, and if not, what shall be the remedy?

The issue must be framed in such a manner that the party having the burden of proof must obtain an affirmative answer to the issue. The issue may not assume a fact, which is in dispute by the parties. The parties seem to have a clear understanding of the substantive issue in this case.

STATED ISSUE

The stated issue is: was the disciplinary action taken for just and sufficient cause? If the answer is in the affirmative, then the requested remedy must set aside the suspension and pay the loss of pay at stated.

DISCUSSION

ARBITRABILITY AND DUE PROCESS

Substantive arbitrability refers to whether an issue is properly the subject of an arbitration agreement; that is whether a party has agreed to be bound by an arbitration decision concerning the subject manner of the case. The parties did not raise an issue of the arbitrability of this dispute. However, there was an issue as to procedural arbitrability based on the timeliness of any claim for the indefinite suspension without pay. On November 1, 2009, Pinner compose an incident report about the events he observed and November 2, 2009, Coleman composed a similar letter as he observed the incident. On November 2, 2009, both Pinner and Coleman supplemented their statements. On November 1, 2009, Derrick Knapp, Bryan, called "Bryan," Farr, Robert Reed, called "Reed," Kevin Garcia, called "Garcia" and Oliver Blanchette, called "Blanchette," made statements of their having seen Sullivan with misconduct at the club; however, these witnesses were not provided for confrontation or cross-examination by the Union.

STATED AND ALLEGED DISCIPLINARY CONDUCT

The legislature promulgated 5 U.S.C. § 7513, which states an employee under the crime provision allows the Agency to discipline an employee if the Agency has reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed. The evidence in the present case depending on the testimony of civilian witnesses, who were not present for the arbitration hearing.

Carrying a Concealed Weapon Without a Permit
F.S. 790.06(5)(b) and F.S. 790.052
and LEOSA

This rule states that an officer may carry a concealed weapon under specific qualification. F.S.

790.052 states all persons holding a certification from the Criminal Justice Standards shall have the right to carry on or about their person a concealed firearm being exempt from the licencing requirements of this section. F.S. 790.052 grants the right to carry a concealed weapon while off duty. The disciplinary action by the Agency depends on the testimony of several witnesses, some civilian and some local sheriff's officers, who were not present at the arbitration hearing or otherwise being available to be cross-examined by the Union's counsel. The Florida Statute states:

> I790.052 Carrying concealed firearms; off-duty law enforcement officers.—
> (1) All persons holding active certifications from the Criminal Justice Standards and Training Commission as law enforcement officers or correctional officers as defined in s. 943.10(1), (2), (6), (7), (8), or (9) shall have the right to carry, on or about their persons, concealed firearms, during off-duty hours, at the discretion of their superior officers, and may perform those law enforcement functions that they normally perform during duty hours, utilizing their weapons in a manner which is reasonably expected of on-duty officers in similar situations. However, nothing in this subsection shall be construed to limit the right of a law enforcement officer, correctional officer, or correctional probation officer to carry a concealed firearm off duty as a private citizen under the exemption provided in s. 790.06 that allows a law enforcement officer, correctional officer, or correctional probation officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9) to carry a concealed firearm without a concealed weapon or firearm license. The appointing or employing agency or department of an officer carrying a concealed firearm as a private citizen under s. 790.06 shall not be liable for the use of the firearm in such capacity. Nothing herein limits the authority of the appointing or employing agency or department from establishing policies limiting law enforcement officers or correctional officers from carrying concealed firearms during off-duty hours in their capacity as appointees or employees of the agency or department.
> (2) The superior officer of any police department or sheriff's office or the Florida Highway Patrol, if he or she elects to direct the officers under his or her supervision to carry concealed firearms while off duty, shall file a statement with the governing body of such department of his or her instructions and requirements relating to the carrying of said firearms.

In many cases, it is exceedingly unlikely that an arbitrator will render a decision supported on the main ground by hearsay evidence alone. Other authority has like wise denied discipline when the accused officer is not allowed to cross-examine the outcome determining witnesses. In National Academy of Arbitrators, *The Common Law of the Workplace: The Views of Arbitrators,* Second Edition (The Bureau of

National Affairs, Inc). Theodore J. St. Antoine, 2005 §1.39 states in former rulings that employers could keep the identity of certain witnesses, such as undercover spotter or shoppers, confidential by withholding their appearance at a hearing have generally been superseded and it is now commonly required that all witnesses must testify and be subject to cross-examination. However, the Union attorney or representative could have subpoenaed these to compel their testimony; however, the Agency has the burden of persuasion and must call first hand witnesses to testify to the factors necessary to sustain the fact that Sullivan did not have the right to carry a pistol due to intoxication. In Elkouri & Elkouri, *How Arbitration Works,* (The Bureau of National Affairs, Inc.). Ed. Alan Miles Ruben, 2003. Sixth Edition. Pages 366-368, there may be other witnesses with first hand knowledge acquired by their first hand observation, who were not called as witness but their sworn and unsworn testimony was introduced. See Elkouri at page 268. The affidavits of the absent witnesses are likewise subject to the same prohibition from consideration under the confrontational rule, which is justly reserved for criminal cases.

Further, LEOSA states the officer is responsible for his actions involving the gun carried off duty. Sullivan testified he was responsible for any event while off duty involving the gun. Sullivan admitted he was not qualified under LEOSA to carry gun off duty if he is under the influence of alcohol. Sullivan filed a Motion to Dismiss the weapons charge, which was subsequently granted.

Another fact that condemns the written statements is the fact that Sullivan was found not guilty by the jury on the charge of Aggravated Assault, presumptively from testimony of these same witnesses, who may or may not have had the benefit of their first-hand observation of the conduct of Sullivan. It is difficult to give any weight to the statements, which subject matter resulted in a not guilty finding. It is understandable that the criminal case has a consideration of the different degrees of proof, namely beyond a reasonable doubt as opposed to the preponderance of the evidence.

Federal Rules of Evidence, Rule 801, *et seq.* defines a "statement" as an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. The statement is made by a declarant who is the person making the statement. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted, with several exceptions, which were not asserted in this case.

The witnesses' statements were written and made part of the sheriff's office files, which stated Sullivan was "thrown" out of the front door, which caused the gun to fall out of his pocket, showing that he had a firearm in his possession. Reed stated Sullivan put the gun away and went back into the club. Garcia stated the bartender asked Sullivan to leave and when he refused to leave and Garcia stated Sullivan pointed his gun at them and said, "You're mine, I got you" then told them he was higher than an FBI agent. Then the security guards threw him outside on the ground. Garcia stated he was threatened but kept to myself with a steady mind. Blanchette stated he was the head of security and when Sullivan began to disrespect the bartender, became irate, and was thrown outside the club but walked back into the club with a gun in his hand and repeatedly said "I'm a FBI agent and would not leave." Blanchette stated Sullivan pointed the gun at his bouncers and customers, but continuously refuse to leave. Blanchette stated Sullivan intended to use the gun.

Sullivant testified that a call by the Agency to his supervisor that Sullivan was not allowed to carry a concealed weapon without a weapon permit because F.S. 790.06 exempted correction guards when off duty from carrying a concealed weapon and was authorized by F.S. 790.052 to carry a concealed weapon without a license and F.S. 790.01(2) states a person who is an individual holding an active certification from the Criminal Justice Standards and Training Commission as a correction officer is exempt from the licensing permit while off duty.

> The Department of Agriculture and Consumer Services is authorized to issue licenses to carry concealed weapons or concealed firearms to persons qualified as provided in this section. Each such license must bear a color photograph of the licensee. For the purposes of this section, concealed weapons or concealed firearms are defined as a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun as defined in s. 790.001(9). Such licenses shall be valid throughout the state for a period of 7 years from the date of issuance . . .
>
> (e) Has not been committed for the abuse of a controlled substance or been found guilty of a crime under the provisions of chapter 893 or similar laws of any other state relating to controlled substances within a 3-year period immediately preceding the date on which the application is submitted;
>
> (f) Does not chronically and habitually use alcoholic beverages or other substances to the extent that his or her normal faculties are impaired.

Further, the Agency argued Sullivan had been under the influence or intoxicated. The evidence on this issue was the written statements from persons, who were at the club but did not testify at the disciplinary

hearing. Even the statements were that Sullivan had an odor of alcohol from two (2) feet away most by supported by witness' statements tested by cross examination. There was no person with first hand knowledge, who testified at the hearing about the conduct of Sullivan except by a written statement, which was introduced without the opportunity to cross-examination. The Agency offered only the statements as evidence.

The Agency offered into evidence several police reports and statements made by the witnesses, which were not presented for testimony or cross-examined. These statements were in general hearsay. Hearsay evidence, testimony about what the witnesses heard, is less reliable than direct testimony and court documents of Sullivan's arrest and arraignment. The most telling documents offered was the statements by the "victims," which was heard from and was introduced to prove the truth of the events and words to prove what was heard is less reliable than direct testimony from the speaker about an event he had personal first hand knowledge. A distinction is drawn between the situations where there is at least a witness, who may be cross-examined, giving the hearsay evidence and where there is a "naked testimony" document that is not subject to cross-examination. See National Academy of Arbitrators, *The Common Law of the Workplace: The Views of Arbitrators,* (The Bureau of National Affairs, Inc). Theodore J. St. Antoine, 1998, §§ 1.57 - 1.59. The most compelling testimony is from Sullivan him self in which he admits to carrying the pistol into the club, ordering a drink, and having a pistol in his hand when entering the club after being ejected.

The just cause principle is normally contractual. It arises from the collective bargaining agreement, individual contracts of employment, and, in some jurisdictions, from the implied covenant of good faith and fair dealing. It may also stem from statutory protections, as with public sector employees or, in a few jurisdictions, to private sector employees. See National Academy of Arbitrators, *The Common Law of the Workplace: The Views of Arbitrators,* (The Bureau of National Affairs, Inc). Theodore J. St. Antoine, 1998. The principle contains certain tests to be applied to the discipline being imposed. Arbitrator J.D. Dunn summarizes those tests in *Texas Int'l Airlines*, 78 LA 893 (1982),with a prefatory comment, as follows:

Carroll R. Daugherty has suggested seven test questions for determining "just cause." He suggests that a 'no' answer to any one of them would normally indicate that just cause did not exist (see *Enterprise Wire Co.*, 46 LA 359). They are cited in Robert's Dictionary of Industrial Relations (BNA, Revised Edition),

as follows:

> (1) Was the employee given advance warning of the possible or probable disciplinary consequences of his conduct?
> (2) Was the rule or order reasonably related to the efficient and safe operation of the business?
> (3) Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate the rule or order of management?
> (4) Was the employer's investigation conducted fairly and objectively?
> (5) Did the investigation produce substantial evidence or proof that the employee was guilty as charged.
> (6) Had the Company applied its rules, orders, and penalties without discrimination?
> (7) Was the degree of discipline administered in the particular case reasonably related to (a) the seriousness of the offense and (b) the employee's record of company service.

The Agency proffered the above standard for determining the guidelines to assess the discipline. The rule states that if there is one (1) negative finding, the discipline lacks "just cause." Without the testimony from an eyewitness with first hand knowledge to support a finding of Sullivan violated the rule or order. The Agency argued Sullivan was prohibited from carrying the firearm because he was under the influence of alcohol. However, intoxication must be proven with a showing of certain traits as slurred speech, staggering walk gait, odor of alcohol on his breath, with certain field tests as walking a straight line, and even eye movement without jerking and also breath or blood testing. The conclusion must be that the suspect does not have the normal use of his physical and mental functions. The Agency did not have first hand witnesses for this determination.

The evidence proves that Sullivan was carrying a weapon but there is no probative evidence by first hand testimony that he was intoxicated or under the influence of alcohol. The only testimony is by officers working at the prison, who may or may not have observed Sullivan's condition. Therefore, there is insufficient first hand evidence to support the accusation that Sullivan was under the influence of alcohol; therefore, without a measurable amount of alcohol in ratio to his blood (BAC) he was not under the influence

of alcohol. Sullivan admitted he carried a firearm into the Club Rain, which was fully loaded. He admitted he purchased a "drink." He admitted he was escorted out the establishment by security staff. He acknowledged that five (5) witnesses alleged he pointed the gun at them but they did not appear at the hearing and testify and if they did testify, the verdict was not guilty.

The employees of FCC-Coleman are made aware of the standards of conduct at the start of their employment. The Agency must show that the Douglas factors have been applied in this case as was applied in *Douglas v. Veterans Administration,* 5 MSPB 313 (1981) stating:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.
6. The consistency of the penalty with those imposed upon other employees for the same offense in like or similar circumstances.
7. The consistency of the penalty with agency guidance on disciplinary actions.
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.
10. The potential for the employee's rehabilitation.
11. The mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment or bad faith, malice or provocation on the part of others involved in the matter.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Warden applied these factors to the charges against Sullivan.

The application of the *Douglas* factors is somewhat difficult to determine the rules when applying to Off duty conduct. The alleged misconduct is certainly adequate if it were supported by the testimony of eyewitnesses' observation and testimony. A finding of not guilty does not support a finding on any issue for

disciplinary action because the burden of proof on the criminal charges is beyond a reasonable doubt, which is greater than by a preponderene of evidence. The Agency failed to prove Sullivan's misconduct by the greater weight of evidence and only offered hearsay testimony, which will not support the accusations. Sullivan may have acted inappropriately but the Agency must prove with the first hand evidence as observed by an unbiased witness.

Violation of Statute Prohibiting Aggravated Assault
Just Cause for Disciplinary Action

In 18 U.S.C. § 926B(c),[9] "qualified law enforcement officer" is defined as an employee of a governmental agency who: is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of criminal law, and has statutory powers of arrest, or apprehension as shown by section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice); is authorized by the agency to carry a firearm; is not the subject of any disciplinary action by the agency which could result in suspension or loss of police powers; meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm; is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and is not prohibited by Federal law from receiving a firearm.

The Warden again refers to the written statements of the bouncers and deputies to support the accusation of Aggravated Assault. These are not statements from witnesses having been cross examination allowed by the accused officer to support the assault on any of the five (5) witnesses . Simply stated, the rule against hearsay requires witnesses to testify in court and be subject to cross examination. FEDERAL RULES OF EVIDENCE, Rule 801, et seq.. A statement of a witness made out of court is not allowed. Out of court written statements, both sworn and unsworn, and oral statements are equally prohibited. Therefore, a witness may not testify in court to what someone else said, nor may a written statement be received in evidence. But not all out of court statements are prohibited. The rule only prohibits hearsay statements that are offered for the truth of the statement. If the statement is offered into evidence to prove the truth of its substance, it is hearsay. But an out of court statement is not made inadmissible by the rule against hearsay if it is offered for a purpose other than proving the truth of the assertion. The rule is equally applicable in criminal prosecution and civil suits, and although the rule against hearsay is referred to as

"the child of the jury," the rule applies to bench trials as well as jury trials. The principle of just cause to achieve fairnessmust allow the opposing party to cross-examine the tendered witness.

Simply stated, the rule against hearsay requires witnesses to testify in court and be subject to cross examination. A statement of a witness made out of court is not allowed. Out of court written statements, both sworn and unsworn, and oral statements are equally prohibited. Therefore, a witness may not testify in court to what someone else said, nor may have written statements are received in evidence with the author testifiying to his ability to observe, recall, and testified to those offered facts. But not all out of court statements are prohibited. The rule only prohibits hearsay statements that are offered for the truth of the statement. If the statement is offered into evidence to prove the truth of its substance, it is hearsay. But an out of court statements is not made inadmissible by the rule against hearsay if it is offered for a purpose other than proving the truth of the assertion. The rule is equally applicable in criminal prosecution and civil suits, and although the rule against hearsay is referred to as "the child of the jury," the rule applies to bench trials as well as jury trials.

The rule against hearsay views out of court statements as inherently unreliable and an inferior form of proof. Requiring a witness to testify at trial is intended as a safeguard against the risks inherent in this inferior form of proof. The trial process offers several safeguards:

Every testifying witness must swear an oath, under a penalty of perjury, that the witness will testify truthfully. The solemnity of the oath is viewed as inducing an obligation to testify truthfully, and to impress upon the witness the threat of criminal prosecution for false testimony. One of the early historical criticisms of hearsay was that out of court statements were not made under an oath.

At common law, atheists were prohibited from testifying. Witnesses had to believe in a divine being who would punish them if they did not tell the truth. The oath a witness would swear to included the phrases "so help me God." The requirement that a witness believe in God has long been abandoned. Therefore, a witness may swear to an "oath or affirmation."

A lack of opportunity by the trier of fact to observe the demeanor of the witness is another long held criticism of hearsay. It is considered very important that the jury observe the witness while offering testimony in order for the jury to assess the credibility of the witness and the sincerity of the testimony.

The lack of opportunity for cross examination is accepted as the main reason for the exclusion of hearsay. Through cross examination, the witness can be tested for bias, perception, memory, and clarity of expression. The witness may be asked about any interest in the case or relationship with one of the adversarial parties. Cross examination can inquire as to whether the witness has personal knowledge of the matter being testified to and had sufficient opportunity to perceive the subject of the testimony. The accuracy of the description given in court can also be tested on cross examination.

In addition to testing the testimony of a witness by cross examination, the rules of evidence also allow for challenging the character of the witness for truthfulness. Evidence that the witness has been convicted of a felony or any crime of dishonesty is allowed to challenge whether the witness is capable of truthful testimony. As a challenge to character for untruthfulness, the witness may be asked on cross examination about specific instances of the witness's past untruthful conduct, unconnected to the case at hand. The credibility of the witness may also be attacked by evidence of the untruthful character of the witness. This evidence is limited to the reputation of the witnesses for untruthfulness or a person's opinion that the witness is untruthful.

Taken together, the opportunity for cross examination and the mechanisms for attacking witness credibility are viewed to operate as "a security for the correctness and completeness of testimony." The Federal Rules of Evidence do allow for challenges to the credibility of the speaker of a hearsay statement by the same manner that would have occurred had the speaker testified in court. Nevertheless, when the speaker is not present, the trier of fact or jury does not have the opportunity to observe the demeanor of the speaker when the challenges to credibility are made. With a not guilty verdict, there is more doubt about the credibility of those witnesses.

Despite mistrust of out of court statements that have not been subject to cross examination, hearsay doctrine contains numerous exemptions and exceptions. It is often said that hearsay doctrine is most known for its exceptions. The common theme of the exceptions is that cross examination is not needed to test the hearsay exceptions because the circumstances under which the statement was made provide a guarantee of trustworthiness that the statement is reliable. The exceptions are equally applicable in civil and criminal cases. Most of these exemptions and exceptions are recognized in the evidence law of the various states and, as will be discussed, many states have adopted additional or "new" hearsay exceptions. The numerous exemptions and exceptions, as contained in the Federal Rules of Evidence, fall into four broad categories.

The rule against hearsay views out of court statements as inherently unreliable and an inferior form of proof. Requiring a witness to testify at trial is intended as a safeguard against the risks inherent in this inferior form of proof. The trial process offers several safeguards:

Every testifying witness must swear an oath, under penalty of perjury, that the witness will testify truthfully. The solemnity of the oath is viewed as inducing an obligation to testify truthfully, and to impress upon the witness the threat of criminal prosecution for false testimony. One of the early historical criticisms of hearsay was that out of court statements were not made under an oath.

At common law, atheists were prohibited from testifying. Witnesses had to believe in a divine being who would punish them if they did not tell the truth. The oath a witness would swear to included the phrases "so help me God." The requirement that a witness believe in God has long been abandoned. Therefore, a witness may swear to an "oath or affirmation."

A lack of opportunity by the trier of fact to observe the demeanor of the witness is another long held criticism of hearsay. It is considered very important that the trier of fact observe the witness while offering testimony in order for the jury or trier to assess the credibility of the witness and the sincerity of the testimony.

Common law tradition regards cross examination as "beyond doubt the greatest engine ever invented for the discovery of truth." The lack of opportunity for cross examination is accepted as the main reason for the exclusion of hearsay. Through cross examination, the witness can be tested for bias, perception, memory, and clarity of expression. The witness may be asked about any interest in the case or relationship with one of the adversarial parties. Cross examination can inquire as to whether the witness has personal knowledge of the matter being testified to and had sufficient opportunity to perceive the subject of the testimony. The accuracy of the description given in court can also be tested on cross examination.

In addition to testing the testimony of a witness by cross examination, the rules of evidence also allow for challenging the character of the witness for truthfulness. Evidence that the witness has been convicted of a felony or any crime of dishonesty is allowed to challenge whether the witness is capable of truthful testimony. As a challenge to character for untruthfulness, the witness may be asked on cross examination about specific instances of the witness's past untruthful conduct, unconnected to the case at hand. The credibility of the witness may also be attacked by evidence of the untruthful character of the witness. This evidence is limited to the reputation of the witness for untruthfulness or a person's opinion that the witness is untruthful. If out of court statements were allowed in evidence, these opportunities would not be present to test witness testimony in front of the jury. The Federal Rules of Evidence do allow for challenges to the credibility of the speaker of a hearsay statement by the same manner that would have occurred had the speaker testified in court.

Taken together, the opportunity for cross examination and the mechanisms for attacking witness credibility are viewed to operate as "a security for the correctness and completeness of testimony." Nevertheless, when the speaker is not present, the jury does not have the opportunity to observe the demeanor of the speaker when the challenges to credibility are made. Despite mistrust of out of court statements that have not been subject to cross examination, hearsay doctrine contains numerous exemptions and exceptions. It is often said that hearsay doctrine is most known for its exceptions. The common theme of the exceptions is that cross examination is not needed to test the hearsay exceptions

because the circumstances under which the statement was made provide a guarantee of trustworthiness that the statement is reliable. Most of these exemptions and exceptions are recognized in the evidence law of the various states and, many states have adopted additional or "new" hearsay exceptions. The numerous exemptions and exceptions, as contained in the Federal Rules of Evidence, fall into four broad categories, which are not advance in this case.

With the application of the rule of hearsay, there is no admissible evidence on which to base the charges by the Agency. The Warden testified the only evidence he has to support that Sullivan was intoxicated was one witness said the smelled alcohol on Sullivan. The jury having found Sullivan not guilty surely does not add support to the Agency's finding of just cause to discipline. By the Warden relying on Sullivan's testimony there was no admission of his being intoxicated or even drinking, which is a necessary element of the charges against him.

DISCIPLINARY ACTION

Due Process and Procedural Requirement

In addition to the disallowance of written statements by the witnesses, Sullivan is entitled to be judged by just and substantial cause. If the facts occurred as was alleged by the Agency the discipline would be a great deal more severe than five (5) days suspension. However, by the application of due process of suppressing the statements of the five (5) "victims" and the deputies due to their testimony being hearsay leaves the accusations of the Agency without factual basis. There was no evidence of the contents of the "drink," which he ordered. By suppressing the statements, the five (5) day's suspension is overturned for the lack of persuasive evidence. The law states 18 U.S.C.§.926B(c),[9] "qualified law enforcement officer" is defined as an employee of a governmental agency who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest, or apprehension under section 807(b) of title 10, United States Code (article 7(b) of the Uniform Code of Military Justice); . . . "is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and is not prohibited by Federal law from receiving a firearm.

The five (5) days suspension is overturned and 5 U.S. CODE § 5596 - BACK PAY DUE TO UNJUSTIFIED PERSONNEL ACTION is to be applied for payment of pay and benefits, any interest allowed under 5 U.S.C. §5596 (b)(2), annual and sick leave that would be accrued accorded by 5 U.S.C. §5596 (b)(1)(B), and any overtime Sullivan would be have been eligible to work if he had not been suspended for the five (5) days.

Due Process and Procedural Requirement

The due process is judged by the prescribed rules of conduct demanded by the jailers, including supervisors, clerical, and other employees of the Bureau. The procedural due processes of most cases are determined by the collective bargaining agreement. In this case, Sullivan was denied procedural due process by the Agency failing to allow cross-examination of the witnesses upon which the Agency relied to assess this discipline. Sullivan has the right to cross-examine the witnesses which the agency relies to support his discipline.

Nature of the Offense

The accusations by the Agency are very serious and could support termination if found to be truthful by unbias, truthful witnesses, who have been tested by cross-examination. This subject manner of the accusations is the severity and the nature of the officer's understanding of the offense. If the Agency had presented eyewitness persons, who testified to having observed the accusations, the facts would support a greater disciple than assessed. The facts that are properly considered in this case are that Sullivan was carrying his privately owned pistol, he observed the "new" club or restaurant, stopped his motorcycle and went into the club. He testified the once inside he bought one "drink," and asked a lady to dance with him if he bought her a drink. The bartender told Sullivan to leave the club and he started to leave when he felt a blow to his back that he learned subsequently broke his rotator cup in his shoulder. He was "thrown" outside the club and he dropped his pistol that he subsequently picked up. He testified he went back into the club when the deputy sheriffs arrived after he "showed" then his gun. He was taken to jail, where he was charged with aggravated assault and carrying a concealed weapon. He was subsequently tried for these offenses but was found not guilty.

Prior Treatment of Offenses of This Same Nature

The Agency testified that a prior occurrence similar to the facts of this case resulted in reinstatement of the prior officer. The Union did not offer a prior case that was same or similar to find that this case was unequal in the treatment of Sullivan.

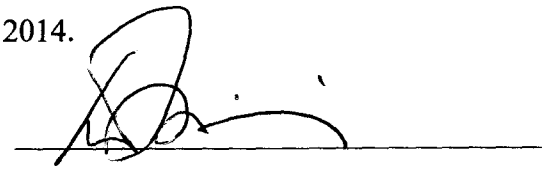
Past Employment History of Officer

There was no evidence that the Agency had previously disciplined Sullivan. Therefore, his prior conduct was sufficient to support a favorable treatment for this occurrence. However, without finding Sullivan as guilty of this incident there is not need to determine mitigating factors.

AWARD

1. The Agency shall overturn the disciple and overturn the grievance in this case.
2. The Agency shall pay wages and benefits lost as a result of the five (5) days suspension.
3. The Agency shall pay any interest owed in accordance with 5 U.S.C. §5596(b)(2).
4. The Agency shall pay any interest accrued in accordance with 5 U. S. C. §5596 (b)(1)(B).
5. The Agency shall pay any overtime Sullivan would have been eligible to work had he not been suspended.

DATED this 11 day of February 2014.



DON E. WILLIAMS
Arbitrator