

FROM : young resid

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Jul. 24 2007 02:08PM P1

IN RE: THE GRIEVANCE ARBITRATION BETWEEN
THE AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFGE), COUNCIL OF PRISON LOCALS
C-33, ON BEHALF OF CORRECTIONAL OFFICER
MANUEL RODRIGUEZ,

Union/Employee,

AND

FMCS # 03-04684

THE UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, FEDERAL DETENTION
CENTER MIAMI, FLORIDA,
Employer.

OPINION AND AWARD

Arbitrator: Martin A. Soll, Esq.

For the Union:

Mr. Eric Young
AFGE, Council of Prisons, Local C-33
3594 SW 69th Ave.
Miramar, Florida 33023

For the Employer:

Mr. Robert J. Will
Agency Representative
Department of Justice, Bureau of Prisons
Labor Management Relations, Room 814
320 First Street, N.W.
Washington, D.C. 20534

Witnesses:

Officer Dennis Nelson, Warden Monica Wetzel, Manuel Rodriguez.

BACKGROUND & JURISDICTION

In this matter, the American Federation of Government Employees (AFGE), on behalf of Manuel Rodriguez (Rodriguez or Grievant), protests and grieves Rodriguez's November 4, 2002, removal/discharge as a correctional officer at the Federal Detention Center (FDC) Miami, Florida. Rodriguez has worked for the United States Department of Justice, Federal Bureau of Prisons

FROM : young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:07PM P1

(Agency) since March 1992. He transferred from the Federal Correctional Institute (FCI) Yazoo City, Mississippi to FDC Miami in October, 2001. Prior to joining the Agency, Grievant served as a police/SWAT team leader in Puerto Rico for approximately seven years.

While assigned to Miami, Grievant's chain of command included Captain Kenneth Lee, Associate Wardens Robert Thompson and Mary R. Hulle who, in turn, reported to Warden Monica Wetzel. Except for a prior 2001 fourteen day disciplinary suspension, which, to date, remains unresolved pending arbitration, Grievant's work record is unblemished. He has also received multiple commendations

The instant grievance was timely filed on November 29, 2002, under the grievance and dispute resolution procedures of the current AFGF/Agency Collective Bargaining Agreement (CBA). Remaining unresolved, it was submitted to binding arbitration before the undersigned neutral arbitrator under the rules and procedures of the Federal Mediation and Conciliation Service. A transcribed hearing was held in Miami, Florida on June 5, 2003, wherein, the parties were accorded the full opportunity to call, examine and cross-examine witnesses and submit all evidence pertinent and material to the case. Written post-hearing briefs were received by the undersigned on or about September 10, 2003. At the arbitration, the parties agreed to extend the arbitrator's time limit to render a decision to sixty days after his receipt of the parties' briefs.

APPLICABLE CONTRACT LANGUAGE

Article 31, Section h.

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or
2. through the conventional grievance procedures outlined in Article 31 and 32,

FROM : young res:d

FAX NO. [REDACTED]

Jul. 24 2007 01:08PM P2

where the grieving party wishes to have the arbitrator decide other issues.

Article 31. Sections f-1 & f-2.

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;
2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;

Article 32. Sections a & g.

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

APPLICABLE STATE AND FEDERAL LAWS

49 United States Code Section 46505 - Carrying a Weapon or Explosive On An Aircraft.

- (a) Definition. - In this section, "loaded firearm" means a starter gun or a weapon designed or converted to expel a projectile through an explosive, cartridge, a detonator, or powder in the chamber, magazine, or clip.
- (b) General Criminal Penalty - An individual shall be fined under title 13, imprisoned for not more than 10 years, or both, if the individual -
- (1) when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on

FROM : young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:09PM P3

- or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight;
- (2) has placed, attempted to place, or attempted to have placed a loaded firearm on that aircraft in property not accessible to passengers in flight; or
 - (3) has on or about the individual, or has placed, attempted to place, or attempted to have placed on that aircraft, an explosive or incendiary device.

Florida Statute 790.06-12, License to Carry Concealed Weapon or Firearm.

(12) No license issued pursuant to this section shall authorize any person to carry a concealed weapon or firearm . . . inside the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft; or any place where the carrying of firearms is prohibited by federal law. Any person who willfully violates any provision of this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

APPLICABLE AGENCY RULES & REGULATIONS

Standards of Employee Conduct and Program Statement 55558.14.

11. Identification Badges. Badges may not be used as routine identification.

Standards of Employee Conduct and Program Statement 3420.09 dated 2/5/99.

17. CREDENTIALS. Bureau of Prisons credentials, identification cards, . . . may not be used to coerce, intimidate, or deceive others or to obtain any privilege or article not otherwise authorized in the performance of official duties.

SUMMARY OF THE FACTS

Grievant's discharge results from his January 18, 2002, off duty conduct and actions of packing his privately owned 9-mm handgun in unchecked luggage which local law enforcement and federal officials discovered at or about 7:15 a.m. while Grievant was passing through the concourse B security screening/sterile area of the Miami Airport. On that day, Grievant was intending to fly on

FROM : young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:10PM P4

an American Airlines morning flight from Miami to Jackson, Mississippi. Upon finding the handgun, Grievant was arrested for the misdemeanor violation of Florida's License to Carry Concealed Firearm which later resulted in a deferred/dropped prosecution upon his April 5, 2002, completion of a four-hour Miami-Dade County concealed weapons course.

On June 21, 2002, Associate Warden Mary Hulle proposed to remove/discharge Grievant based upon his January 18 off duty misconduct of 1) using his federal credentials to identify himself as a law enforcement officer and 2) attempting to board an American Airlines with a concealed handgun. The June 21 letter stated as follows:¹

June 21, 2002

Dear Mr. Rodriguez:

This is notice that I propose that you be removed from your position of Correctional Officer, 05-007-07, no sooner than thirty (30) calendar days from the date you receive this letter. This proposal is based on the following charges and specifications which are violations of the Standards of Employee Conduct and Program Statement 5558.12, Firearms and Badges:

Charge 1: Off Duty Misconduct

Specification 1: On January 18, 2002, you used your credentials to identify yourself as a law enforcement officer when you attempted to board an American Airlines flight to Jackson, Mississippi, with a concealed weapon in your carry on bag. Your travel was not in connection with the your duties with the Bureau and you had no travel orders from the Bureau. Bureau of Prisons credentials may not be used to deceive others or to obtain any privilege or article not otherwise authorized in the performance of official duties. You were arrested on January 18, 2002, by Officer Dennis Nelson, Miami-Dade Police Department, and charged with Carrying a Concealed Firearm.

Specification 2: On January 18, 2002, you attempted to board an American Airlines flight to Jackson, Mississippi, with your personal

¹ Associate Warden Hulle also included a second charge of Failure to Report Arrest which was later dropped by the Agency.

FROM : young resid

FAX NO. : ~~XXXXXXXXXX~~

Jul. 24 2007 01:11PM P5

9-mm handgun which contained a full clip of ammunition in one of your carry on bags. Additionally, you had two loaded clips and a box of ammunition in another carry on bag. You were not on official travel status. The Bureau did not authorize you to carry a personal weapon or personal ammunition. You were arrested on January 18, 2002, by Officer Dennis Nelson, Miami-Dade Police Department, and charged with Carrying a Concealed Firearm.

In making my proposal, I am considering that you were suspended for fourteen days, July 8, 2001 through July 21, 2001, for failure to obtain appropriate approval before allowing an inmate to leave the institution. This incident occurred while you were a Correctional Counselor, assigned to the Federal Correctional Institution, Yazoo City, Mississippi. I am asking the deciding official to consider this prior discipline in making the decision on this proposal.

* * *

s/ Mary R. Hulle, Associate Warden, Custody

On October 31, 2002, Warden Monica Wetzel issued the Agency's final decision and reasons for removing/discharging Grievant. She stated, in pertinent part, as follows:

In determining what penalty was appropriate, I considered, among other factors, that a charge of off duty misconduct for using your Bureau of Prisons credentials to attempt to board an American Airlines aircraft with a full magazine of ammunition loaded in a 9-mm handgun is a very serious charge in light of your position as a law enforcement officer. While you admitted you were in possession of a 9-mm handgun in your baggage, you disagreed the handgun was loaded. However, in a statement from the arresting officer, which you received, it clearly states, "there was a 9 mm pistol loaded with a full clip of ammunition." This was also witnessed by another police officer. While you claimed that you followed the instructions of the ticket agent in taking your bags directly to the gate, you could not identify the ticket agent who gave you those instructions. Moreover, you did not have any paperwork from the ticket agent that indicates you had a weapon. As a law enforcement officer, you are entrusted with the public's confidence and trust and held to a higher standard of conduct in complying with the law. Your actions, born on and off duty should remain above reproach. The Standards of Employee Conduct, which are annually reinforced during Annual Refresher

FROM : young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:12PM P6

Training, have equipped you with sufficient understanding to refrain from engaging in this type of behavior. Moreover, the longevity of your service with the Bureau of Prisons served to strengthen your knowledge and awareness of the conduct expected of you.

After careful consideration, I find the charge of Off Duty Misconduct fully supported by the evidence in the adverse action file. . . (Y)our actions are so egregious as to warrant your removal. Alternative sanctions were considered, but I concluded that they would not have had the desired corrective effect. Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker. Your removal is in the interest of the efficiency of the service and is consistent with this agency's table of penalties. It is therefore my decision that you be removed from your position effective midnight November 4, 2002.

The Chronological Series of Events Leading to Grievant's Discharge

Grievant, as noted above, was arrested at the Miami Airport for the misdemeanor violation of Florida's License to Carry Concealed Firearm. The arresting official was Miami-Dade County Police Officer Dennis Nelson. Miami Dade Officer Michael Murray and Sergeant Goodman and FAA Agent Perez were also at the scene. However, only Officer Nelson's reports were entered into the record. They stated, in pertinent part, as follows:

COMPLAINT/ARREST AFFIDAVIT

Defendant [Manuel Rodriguez] is a federal corrections officer. Defendant was not in the official performance of his duties at the time of this arrest. Defendant placed his carry-on suitcase in the x-ray screening devise at Concourse B, Miami International Airport. The suitcase contained a 9-mm pistol and in a second bag there were 9-mm rounds.

This officer responded and verified that there was a gun in the bag. Defendant stated that he was told by an American Airlines employee at the ticket counter that he could check the bag at the gate because he was running late for this flight. Due to the fact that defendant did not inform screening personnel that he had a gun in the suitcase prior to placing it the x-ray machine, he committed the listed violation of

FROM : young resid

FAX NO. ~~252-222-1010~~

Jul. 24 2007 01:13PM P7

law [i.e., the misdemeanor violation of the License to Carry Concealed Firearm].

Defendant was allowed to sign arrest affidavit as a "promise to appear."

s\ D. Nelson, January 18, 2002

OFFENSE-INCIDENT REPORT

Friday, January 18, 2002, 07:15 [a.m.]

[Manual Rodriguez] is a federal corrections officer working for the Bureau of Prisons. At the time of the incident, Defendant was at [the Miami Airport] to take a flight on American Airlines. Defendant was traveling for personal reasons and was not on duty nor traveling in an official capacity. Defendant stated that he went to the American Airlines Ticket counter to obtain a boarding pass. He further stated that he was running late so the ticket agent told him to proceed to his gate and they would check his bag there. Defendant stated that he then told the agent that he had a gun and identified himself as a federal officer. Defendant stated that the ticket agent then told him that they would handle that at the screening point. Defendant then proceeded to the screening point where he placed his bag containing the firearm into the x-ray machine. The security screener observed the firearm and called this officer over to look at the screen.

The bag was physically examined and the firearm was located. Defendant was interviewed by this officer and he stated that he has never flown armed in an official capacity and he had intended to check the bag at the gate as he was instructed to do at the ticket counter.

FAA Agent Perez was on the scene and verified that even under the circumstances that there was a violation committed. Defendant was placed under arrest and allowed to sign A-Form as P.T.A. [a promise to appear]. Police Legal Bureau Attorney Lewis was contacted. Airport Unit A2200, Sgt. Goodman was on the scene. Metro Dade Police Department Shift Commander, Sgt. Burmeister was contacted at 12:19 hours.

s\ D. Nelson, January 18, 2002

On March 20, 2002, Grievant submitted to his chain of command the following affidavit describing his version of the January 18 events as follows:

FROM : young resid

FAX NO. : ~~XXXXXXXXXX~~

Jul. 24 2007 01:14PM PB

1. I have been a employed by the Bureau of Prisons since March 1992.
2. On January 18, 2002, I was running late for a flight to Jackson, Mississippi. I told the ticket agent for American Airlines which flight I was boarding. She informed me the flight was about to board in approximately 5 to 10 minutes. I informed her I had a weapon in one bag and ammunition in the other. The ticket agent told me to go to the security check point and they would check my bags.
3. When the security screeners saw that there was a weapon in my bag they asked why was there a weapon in the bag. I answered I was traveling and I showed them my ticket.
4. The security screeners called the Miami-Dade Police Department. They responded and asked me several questions. They asked if I had a driver's license and I showed them my Mississippi Driver's License. They asked if the bags were mine and whether I knew there was a firearm in it. They asked if I was traveling for business or social. I responded social. The officers asked where I worked because I did not have a Florida ID. I told them I worked for the Federal Bureau of Prisons. They asked [for a] work related ID and I showed them my current FDC Miami identification card.
5. The police officers called the institution to ask why I had a weapon. I do not know what the institution responded. The officer said he was talking to Lt. Yanes and that Captain Kenneth Lee would call him back. We were on the way to the police station at this point.
6. We got to the police station and they put me in an interview room. They took me back to the airport to identify the ticket agent who told me to go to the security check point. The ticket agent was not present.
7. I was taken back to the police station and released after signing a "Promise to Appear."
8. I enter[ed] a plea of Not Guilty on March 6, 2002. I was given deferred prosecution with completion of 4 hours of a Weapons and Forfeiture of Weapons [course]. I will attend the course on April 5, 2002.

By letter dated March 21, 2001, Associate Warden Robert Thompson, placed Grievant on

"home duty" status with pay. The letter stated as follows:

March 21, 2002

Dear Mr. Rodriguez:

FROM : young resid

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Jul. 24 2007 01:15PM P9

This is to notify you that effective this date and until further notice, your duty station is being changed to your home address, . . . [in] Miami . . .

Your tour of duty will be Monday through Friday, 7:00 a.m. to 3:30 p.m., EXCLUDING FEDERAL HOLIDAYS. Your lunch period will be 11:00 a.m. to 11:30 a.m.. You are to remain in your home during your tour of duty hours, except for lunch or approved leave. You must be available for changes in your assignment, and you must report to the institution should your supervisor or the Human Resource Manager instruct you to do so.

If you desire to take leave, you must call your supervisor in advance and request appropriate leave such as annual, sick, or leave without pay (LWOP). Except for lunch or approved leave, leaving your home during your tour of duty hours will make you subject to being placed on absent without leave (AWOL) status.

This is not a disciplinary or adverse action. You will receive full pay and benefits. You must perform work that is properly assigned to you during this period.

* * *

Sincerely,

s/ Robert Thompson, Associate Warden, Custody

On August 13, 2002, Grievant responded to Associate Warden Hulle's June 21 proposed removal letter as follows:

This letter will suffice as my oral response and written reply to the notice I received on July 16, 2002 which proposed I be removed from my position as a Correctional Officer. The proposal indicated two charges and within the two charges were specifications for: Off Duty Misconduct and Failure to Report Arrest.

This incident happened as a result of me being late to the airport. When I arrived at the American Airlines ticket counter, the ticket agent advised me it was too late to check my baggage that I would have to proceed to the gate to have them checked to be put on the plane. I advised the ticket agent I was transporting my weapon and it was in my luggage, however, it was being transported in accordance with the FAA traveling instructions for transporting weapons on airplanes. I proceeded to the gate as ordered and was subsequently

FROM : young resid

FAX NO. : 954-222-2222

Jul. 24 2007 01:16PM P10

detained for violation of carrying a concealed firearm. I was not boarding American Airlines with my weapon as indicated in the specification. I was arrested at the checkpoint after both Metro-Dade Police and an FAA agent debated extensively whether or not to even charge me with a crime. The reason for the debate was because I only did what the Ticket Agent asked me to do. Per the FAA, traveling regulations, 108.11-Carriage of Weapons, they knew I was carrying my weapons as mandated, unloaded and in separate bags for inaccessibility. However, I did not have the weapon permit required by Florida's State law. If I would have had this concealed weapons permit, I would not have even been arrested.

The question remained still of whether or not the ticket agent had ordered me to proceed to the checkpoint. When they went back to the counter to talk to the Ticket Agent, they found out she had left the job. After they could not get a hold of her to confirm what she'd told me an arrest was imminent. Metro-Dade Police Department considered letting me go, but from pressures from the FAA and the September 11th attacks, I was arrested. Metro-Dade Police Department, still could not decide what or not to charge me with. The Officer who had detained me, consulted their Police Legal Bureau who told me he was going to have to charge me with a misdemeanor for carrying a concealed weapon. I never went to jail but, I was given me a promise to appear in court. My Attorney and the State of Florida resolved the matter. A plea of not guilty was entered and I attended a (4) four-hour concealed weapons class.

I feel the reason I was arrested was all as a result of miscommunication. I would like to say this, had my luggage been checked at the counter like I had originally planned, I would have never been arrested. My weapon would have been placed in the under belly on the plane and I would not have missed my flight.

* * *

As for the matter that I used my credentials or capacity as a Federal Officer, I would never do that. Beside, I know that as an employee with the Federal Bureau of Prisons the Standards of Code of Conduct prohibits such. Each year we get trained not to use our official position or identification to receive favors.

When the incident happened, I first displayed my Mississippi driver's license. The Officer questioning me at the scene asked where do I work? I responded I work for the Bureau of Prisons and that I had recently transferred down here at FDC Miami that I was traveling back to Mississippi to retrieve some documentation and for pleasure. The trip was leading into my weekend. He asked for my identification

FROM : young reSid

FAX NO. : ~~XXXXXXXXXX~~

Jul. 24 2007 01:18PM P11

and I showed it. That is the only time my job ever came up. However, as a matter of record, I have traveled many times before and I have never been detained or arrested for transporting my weapon in this mannerism as I described above. I did not violate P.S. 5558.12, Firearms and Badges. I have a right as a citizen of the United States to bear arms. Working for the Bureau of Prisons does not preclude me from owning a firearm. What I know now is that I should have sought a Florida conceal weapon's permit. That is the reason why my attorney entered a plea of not guilty on the misdemeanor charge. The charges were subsequently withdrawn with a stipulation that I agreed to attend a pre-trial diversion referral forum. I attended the four (4) hour class and the case was dismissed. After this incident, I was working nights from 10:00 p.m. to 6:00 a.m., and had been working consistently since being placed on "Home Duty." Prior to being placed on home duty, I was subjected to travel to Yazoo, Mississippi, to challenge the merits of a pending disciplinary action in Arbitration. This case is still pending arbitration but the agency denied me from attending by placing me on home duty. This case is now being used against me in my present case. I asked you not use this case in imposing your decision for that reason because it is pending arbitration.

Per Article 6, of the Master Agreement, I have a right to direct and pursue my private life without interference by the Employer, except in situations where there is a nexus between my position. I have cleared this matter up in the courts and asked you take this into consideration prior to imposing discipline . . .

By letter dated September 17, 2002, Warden Wetzel advised Grievant she would issue the Agency's decision whether or not to remove/discharge him within the next fifteen days. She also provided him with a copy of a July 1, 2002, unsworn letter signed by Miami-Dade Police Officer Dennis Nelson (i.e., Grievant's arresting police officer at the Miami Airport on January 18) which stated the handgun found in his unchecked luggage on January 18 was loaded. Officer Nelson appeared at the June 5, 2003, arbitration and as recited in his July 1, 2002 (unsworn) letter, he testified that he and his partner, Miami-Dade Police Officer Michael Murray, "physically checked

FROM : young resid

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Jul. 24 2007 01:19PM P12

the bags that Rodriguez identified as his [and found] . . . a 9-mm pistol loaded with a full clip of ammunition."

On October 31, 2002, Warden Wetzel, signed and issued the above quoted discharge letter removing Grievant from his correctional officer position effective November 4, 2002. And finally on November 29, 2002, AFGE filed the instant grievance with Warden Wetzel protesting, among other things, Grievant's March 21, 2002, placement on home duty by Associate Warden Thompson, and his November 4 removal.

The November 29 grievance stated, in pertinent part as follows:

[Section] 5. Federal Prison System Directive order, or Statute violated: 5 USC, Master Agreement, and any other applicable laws rules and regulations.

[Section] 6. In what way were each of the above violated? Be specific. In July 2002, Officer Manuel Rodriguez received a proposal letter for termination from the Federal Bureau of Prisons, Federal Detention Center Miami, Florida. Officer Rodriguez responded timely, in writing, and orally to the agency's proposed actions. In the meeting, the Warden advised both Mr. Rodriguez and I [AFGE Representative/Local President Eric Young] that she would abstain from issuing a decision in his case until his pending Arbitration hearing was resolved in Yazoo, MS, however, indicated the grievant would remain in a home duty status. Moreover, she advised Mr. Rodriguez she was dropping the charge (s) and specification(s) of the "Failure to notify" the agency of the off duty misconduct. In rendering her decision, the Warden noted her actions were based on a specific document (Policeman's affidavit), a document that was not provided to the grievant. She indicated this was the underlying reason why she had placed the grievant in a home duty status, even though, he had been working on a shift for several months after the incident. An employee should have the right to be presented with all the evidence of an agency's investigation if the agency utilizes the information to justify its proposal. The agency committed a harmful procedural error and violated the employee's due process rights. Furthermore, we contend by placing the grievant in a home duty while trying to terminate the employee is contrary to the Contract, applicable laws,

FROM : young resid

FAX NO. : ~~252-222-2222~~

Jul. 24 2007 01:20PM P13

rules and regulations. On 11-4-02, abandoning her earlier agreement, Officer Manuel Rodriguez was removed from employment. Mr. Rodriguez has been treated in a disparaged manner compared to other employees, for similarly charged offenses. Therefore, the Union contends the termination was not for just and sufficient cause and was not in the efficiency of service.

[Section] 8. Requested remedy (i.e., what you want done) Ensure the Employer uses alternative means when placing employees on Home Duty; Order make whole remedy (not limiting, all lost premium pay, lost overtime, differential, and Sunday Pay) in accordance with Back Pay Act. Reinstatement the employee back to his position as Correctional Officer. Rescind any and all disciplinary actions from the personnel records and/or files maintained by the agency. Order Management Officials for training; any other actions deemed appropriate.

ISSUES

IS THE GRIEVANCE ARBITRABLE? AND IF SO;
WAS GRIEVANT'S REMOVAL TAKEN FOR JUST AND SUFFICIENT CAUSE, OR IF
NOT, WHAT SHALL BE THE REMEDY?

POSITION OF THE PARTIES, DISCUSSION & FINDINGS - Arbitrability

The Agency asserts three procedural arbitrability arguments it contends defeats and/or bars the instant grievance prior to reaching its merits. It contends the grievance is not arbitrable, thus, the undersigned should dismiss or deny it since: i) within Section 5 of the November 29 grievance, AFGE failed to specifically identify "what section of [the] rule, regulation or statute the Agency allegedly violated (hereinafter, arbitrability issue #1); ii) in the course of the arbitration hearing, over the objection of the Agency, AFGE attempted to unilaterally modify the grievance in violation of CBA Article 32-a by adding discrimination as a defense to Grievant's discharge (hereinafter, arbitrability issue #2); and iii) AFGE by filing the grievance with Warden Wetzels, filed the

FROM : young resid

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Jul, 24 2007 01:21PM P14

grievance with the wrong party in violation of CBA's Article 31-f-2 (hereinafter, arbitrability issue #3).

Arbitrability Issue #1.

As to arbitrability issue #1 (i.e., that AFGE failed to specifically identify the rule, regulation or statute the Agency allegedly violated), the undersigned finds the Agency's position(s) unfounded since the only pertinent issue before the undersigned is whether just cause existed to remove the Grievant.

In short, under the facts and circumstances of this disciplinary case (emphasis supplied), it is clear, and the undersigned so finds, that when AFGE alleges the Agency has violated a rule, regulation or statute (which it clearly does in Section 5 of the Grievance), it is up to AFGE at some point in the proceeding to identify same. Nonetheless, whether or not AFGE can or chooses not to identify such rule, regulation or statute, or even abandons such charge, goes to the merits of the case and does not relieve the Agency from its initial and sole burden of proving up just cause to remove the Grievant from his position.

The Agency, moreover, fails to cite any prior arbitration award(s) and/or contract language holding or stating that a disciplinary grievance challenging a removal (or any lesser discipline) can be summarily dismissed on the limited grounds the Union has failed to identify what section of any rule, regulation or statute the Agency allegedly violated.

While it is true that the Agency points to the American Federation of Government Employees, Local Union 922, Forrest City, AR and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, AR, FMCS 01-14974 (2002), and Federal

FROM :young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:22PM P15

Transfer Center Oklahoma City, OK. vs. AFGE Local 171, Oklahoma City, OK., FMCS 01-05831 (2002), arbitration decisions to support its arbitrability issue #1 position, the undersigned notes that both are contract grievances where the burden of proof rested solely with AFGE to prove its case. The instant case being a disciplinary matter, the Agency has the initial burden of proving just cause to sustain the discipline which must be shown or proven by a preponderance of the evidence before the Union's case and its defenses (including the Agency's alleged violation(s) of any rule, regulation or statute) are even reached. Thus, both arbitration decisions the Agency points to in support of its arbitrability issue #1 are deemed inapplicable and unpersuasive.

And finally, if the Agency truly believes its case and/or burden of proving just cause to remove the Grievant was in any way prejudiced, harmed, or compromised by its inability to determine, learn or ascertain what rule, regulation or statute AFGE alleges it violated, there exists alternative ways to remedy or fix such problem(s) short of dismissing the grievance. The Agency was a liberty to seek a delay or continuance of the arbitration hearing to secure additional evidence or witnesses to refute any of AFGE's proffered evidence, arguments and/or charges of its (i.e. the Agency's) violation of any rule, regulation or statute in this matter. However, no such delay or continuance of the arbitration was requested by the Agency at or prior to the hearing, nor does the Agency argue or contend in its post-hearing brief it was in any way prejudiced or harmed in preparing and presenting its case for any reason.

Thus, Agency's arbitrability issue #1 requesting that the grievance be dismissed is deemed unfounded and denied.

Arbitrability Issue #2

FROM : young resid

FAX NO. ~~501-230-0000~~

Jul. 24 2007 01:23PM P16

Regarding arbitrability issue #2, the Agency, pointing to Article 32-a's language (cited above), contends alternatively the grievance is not procedurally arbitrable since AFGE unilaterally and unlawfully attempted to modify the instant grievance by adding discrimination as an issue.

The undersigned, in short, also finds the Agency's second arbitrability argument unfounded. Indeed, overlooked by the Agency, yet clearly stated within Section 6 of the grievance is AFGE's charge that Grievant "has been treated in a disparaged manner compared to other employees, for similarly charged offenses." The undersigned reads the word "disparaged" as used in this sentence as interchangeable and/or one in the same as dissimilar, disparate and/or discriminatory. Accordingly, it cannot be found that AFGE is "unilaterally [or otherwise] modifying the grievance by adding discrimination as a defense to Grievant's discharge." Such charge, it appears, has existed from the initial November 29, 2002, filing date of the grievance.

The undersigned observes further that even if it were true, *arguendo*, that AFGE was attempting to modify the instant grievance by adding discrimination as an issue, same is insufficient grounds to find or hold that the case is not arbitrable. In short, by the Union adding discrimination as an issue in this matter goes to the merits of its defense of the case and, thus, would not even come into play until the Agency first proves just cause to sustain the discipline, nor does the issue relieve the Agency from its initial just cause burden of proof.

Thus, Agency's arbitrability issue #2 requesting that the grievance be dismissed is deemed unfounded and denied.

Arbitrability Issue #3.

Regarding arbitrability issue #3, the Agency further alleges, alternatively, the grievance is

FROM : young resid

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Jul. 24 2007 01:24PM P17

contractually barred since AFGE filed it with the "wrong party" (i.e., Warden Wetzel) in violation of Article 31-f-2 (hereinafter, f-2). AFGE disagrees vehemently. It contends the grievance was correctly filed with Warden Wetzel in compliance with Section f-1 of Article 31 (hereinafter, f-1).

F-2 requires that "when filing a grievance against the Chief Executive Officer of an institution/facility (here Warden Wetzel), . . . ; the grievance will be filed with the appropriate Regional Director." F-1's language, on the other hand, is much broader. It recites and requires that grievances "be filed with the Chief Executive Officer of the institution/facility (here Warden Wetzel), if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over."

Says and argues the Agency, f-2's language controls, thus, the grievance should have been filed with the Regional Director, and not Warden Wetzel, since:

In Section 6 [of AFGE's November 29, 2002 grievance], the Union addresses the actions of Warden Wetzel, e.g., 1) Warden Wetzel approved the home duty assignment of the Grievant, 2) In a meeting Warden Wetzel stated that she would abstain from issuing a decision until the Grievant's pending Arbitration case was resolved, 3) Warden Wetzel noted her actions were based on a specific document (Policeman's Affidavit), 4) Mr. Rodriguez has been treated in a disparaged manner compared to other employees, for similar charged offenses.

It is quite obvious to the most casual observer, that the grievance is addressing the actions of Warden Wetzel. Therefore, the grievance should have been filed with the appropriate Regional Director as provided for in Article 31, Section f.2., *Agency Exhibit 1*, page 68 of 94.

Having carefully reviewed the original November 29 grievance filing, and particularly its Sections 6 and 8, the undersigned notes that AFGE specifically protests, among others, two Agency

FROM : young resid

FAX NO. : [REDACTED]

Jul. 24 2007 01:25PM P18

"actions." First (and obviously) Grievant's removal, and second, his March 2002 placement on home duty by Associate Warden Robert Thompson² - who Warden Wetzel, without question, had "disciplinary authority" over. In light of Thompson's (as opposed to Warden Wetzel's) "action" of placing Grievant on home duty, it follows the grievance arguably falls under f-1's language, and, thus, appropriately filed with Warden Wetzel.

Alternatively, Warden Wetzel is still the proper Agency official with whom to file the instant grievance when f-1 is read and/or interpreted in just a slightly different way. In holding same, the undersigned observes that the words "action" and "pertains to" as recited in f-1 are very broad and open ended. The words "action of an individual," likewise, can arguably be read or interpreted to mean or refer to the "action" of the aggrieved employee. That said, the undersigned also finds f-1 controlling, since on its face, the November 29, 2002 grievance clearly "pertains to the action" of possessing a concealed and/or loaded handgun on January 18, 2002, at the Miami Airport "of an individual," i.e., the Grievant Manuel Rodriguez, "for which the Chief Executive Officer of the institution," i.e., Warden Wetzel "has disciplinary authority over."

Under either interpretation or reading of f-1's language, the undersigned finds Warden Wetzel as the appropriate Agency official for AFGE to have filed the instant grievance as it did on November 29, 2002. Accordingly, the Agency's arbitrability issue # 3 requesting that the grievance be dismissed is deemed unfounded and denied.

² For example, the third sentence from the bottom of Section 6 of the grievance states, "Furthermore, we contend by placing the grievant in a home duty while trying to terminate the employee is contrary to the Contract, applicable laws, rules and regulations." Whereas, the first sentence under Section 8, entitled "Requested remedy (i.e. what do you want done)" AFGE further states, "Ensure the Employer uses alternate means when placing employees on Home Duty."

FROM : young resid

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Jul. 24 2007 01:26PM P19

POSITION OF THE PARTIES, DISCUSSION AND FINDINGS - Merits

This being a disciplinary/removal grievance, it is the Agency's sole burden of proving by a preponderance of the evidence just cause existed to remove Grievant for the reasons declared by the Agency. The "preponderance of the evidence" is defined in 5 CFR 1201.56(c)(2) as:

(t)hat degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

According to Warden Wetzel's discharge letter, and later confirmed in her testimony here, only two overlapping reasons or charges were considered by her to justify Grievant's removal. They are his January 18, 2002, off duty misconduct of 1) using his Bureau of Prisons credentials to identify himself as a law enforcement officer when he attempted to board an American Airlines flight to Jackson, Mississippi with a concealed 9-mm handgun in his carry-on bag; and 2) that the 9-mm handgun was loaded. In its post-hearing brief, the Agency argues and states further "it has proven that [Grievant] used Bureau of Prisons credentials to obtain privileges not otherwise authorized in the performance of his official duties." The Agency also asserts in its post-hearing brief that the "sustained charge against the Grievant was not a result of his arrest. The charges relate to his underlying conduct."

The Credentials Charge

To sustain the credentials charge, the Agency must prove or establish Grievant unlawfully or wrongfully used his Bureau of Prisons credentials to identify himself on January 18 at the Miami Airport and/or that by the use of his credentials he obtained privileges not otherwise authorized in

FROM : young resid

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Jul. 24 2007 01:27PM P20

the performance of his official duties. The record evidence of the case, however, fails to support the charge.

According to Grievant's written submissions and testimony, on January 18, when detained by Officer Nelson, he first displayed his Mississippi driver's license, and only when asked by Nelson where he was employed or worked, he responded FDC Miami, and, likewise, only when asked for his work identification, he produced same. Officer Nelson's testimony corroborates the Grievant in all respects.

Nelson, among other things, confirmed and testified that, 1) only when asked, did Grievant provide and display his Agency credentials and identification, and, 2) at no time on January 18 did Grievant ask for any favors.

On this evidence, the undersigned finds the Agency's credential charge unfounded.

The Loaded Handgun Charge

Speaking for the Agency, Warden Wetzel was abundantly clear in her discharge letter and testimony that her decision to remove Grievant was largely the result of her belief that Grievant's handgun was loaded. Grievant, to the contrary, in all of his written submissions and again in his testimony here, maintains vehemently that his handgun was not loaded. He further maintains and testified he was lawfully carrying his private unloaded handgun in one of his bags, whereas, it's ammunition and clips were packed in a separate bag.

To support its contention that Grievant's handgun was loaded (and, thus, its overall case), the Agency points to Miami-Dade Police Officer Dennis Nelson's testimony (and letter) which confirm that upon searching Grievant's luggage on January 18 in the security area of concourse B, he and his

FROM : young resid

FAX NO. ~~XXXXXXXXXX~~

Jul. 24 2007 01:28PM P21

partner observed a "9-mm pistol loaded with a full clip of ammunition." Warden Wetzel further testified that once the Agency received confirmation of the loaded pistol from Officer Nelson, Grievant was placed on home duty and then discharged. And as stated in her October 31, 2002, discharge letter and reiterated in her testimony here, she deemed Grievant's off duty action of taking a loaded handgun to the Miami Airport "so egregious as to warrant [his] removal."

Standing by themselves, Officer Nelson's observations, including his letter and testimony, appear to totally undermine Grievant's assertions that his 9-mm handgun was packed separately from its ammunition and, thus, not loaded. Nelson's observations, however, when viewed with all of the record evidence, fails to prove or establish by a preponderance of the evidence that Grievant's handgun was truly loaded. Accordingly, Grievant's removal shall be set aside.

The undersigned finds Grievant's assertions that his handgun was unloaded both credible and convincing based upon the following. First, because of his demeanor, professionalism and presence shown at the arbitration. Second, because of his many years of law enforcement training and experience. And third, and most importantly, because Officer Nelson's January 18, 2002, arrest and incident reports, which he confirmed and testified as being true and accurate, fail to state or in any way mention the handgun he observed and seized on January 18 was loaded. Nelson's January 18 Complaint and Arrest Affidavit, in fact, fatally impeach his "loaded gun" testimony by reciting that **"in a second bag there were 9-mm rounds,"** which precisely matches Grievant's statements and testimony since the beginning of this case.

The undersigned finds the Agency's case further undermined and fatally flawed by its failure to submit testimony, affidavits or reports from any of the officials (other than Officer Nelson) who

FROM : young resid

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Jul. 24 2007 01:29PM P22

were also at the scene and/or who had knowledge of the January 18 incident. According to Officer Nelson, Officer Michael Murray, FAA Agent Perez, Miami-Dade Sergeant Goodman and the screening personnel were at the scene, whereas, Miami-Dade's Legal Bureau Attorney, Mr. Lewis and Miami-Dade Sergeant Burmeister were contacted on January 18. However, none of these individuals testified, nor were their reports even proffered to confirm or corroborate that Grievant's handgun was truly loaded.

It is logical and fitting that a written report documenting the seizure of a loaded handgun would be generated by one or more of the above individuals who were at the scene or had knowledge of the incident for, among others, two obvious reasons. First, the carrying of a loaded gun into the security area of and airport constitutes a federal felony under the above referenced 49 United States Code, Section 46505 - Carrying a Weapon or Explosive On An Aircraft. And second, January 18, 2002, was only three months after the infamous "9/11" attack and during the time armed troops were patrolling the Miami Airport.

As part of its case, the Agency submitted a January 31, 2002, letter from the Miami-Dade County Police Department to the Agency's regional director confirming that Grievant was "arrested" on January 18 "for violation of License to Carry Concealed Firearm." Such letter, however, further undermines and weakens the Agency's overall case because it too fails to recite or mention the handgun was loaded.³

³ The agency also submitted a January 18, 2002, internal memo to Associate Warden Thompson from Captain Kenneth Lee stating that Captain Lee had just spoken to Officer Nelson who informed Captain Lee, among other things, that on January 18 Grievant had been "detained at security checkpoint at the Miami International Airport for attempting to enter through the metal detector with a weapon and ammunition in his luggage." Such internal memo also undermines the Agency case since it too fails to recite or mention that Grievant's handgun was loaded.

FROM : young resid

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Jul. 24 2007 01:30PM P23

In summary, and based upon the entire record as submitted, the preponderance of the evidence confirms and establishes only what Officer Nelson observed and documented on January 18, 2002, i.e., that on such date, at or about 7:15 a.m., one of Grievant's two suitcases was found to contain a 9-mm handgun and "in a second bag there were 9-mm rounds," and further, according to Officer Nelson's reports, "due to the fact [Rodriguez] did not inform the [the Miami airport concourse C] screening personnel that he had a gun in the suitcase prior to placing it in the x-ray machine, he committed the listed [misdemeanor] violation [of Florida's License to Carry Concealed Firearm]."

The preponderance of the evidence, likewise, fails to show that Grievant, as charged by the Agency, unlawfully, wrongfully, or in violation of its rules and regulations, used his Agency credentials to identify himself on January 18 and/or by use of his Agency credentials he obtained privileges not otherwise authorized in the performance of his official duties.

And finally, the record is undisputed that all that resulted from the January 18 incident was Grievant receiving a dismissed prosecution for his misdemeanor arrest for the violation of Florida's License to Carry Concealed Firearm and his attendance at a four-hour concealed firearms class, which AFGE labels as essentially no different than Grievant receiving a dismissed misdemeanor speeding ticket after completing a four-hour defensive driving school.

In light of the above and the entire record in this matter, and since the Agency contends the "sustained charge[s] against the Grievant w[ere] not a result of his arrest . . ." the undersigned finds that Grievant's removal was not taken for just and sufficient cause.

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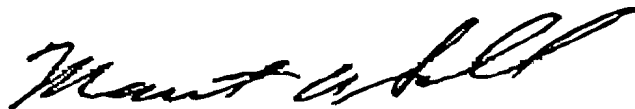
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Jul. 24 2007 01:31PM P24

REMEDIES & AWARD

1. Just cause did not exist to remove or otherwise restrict Manuel Rodriguez for his off duty actions and conduct on January 18, 2002. Accordingly, the instant grievance is sustained and Rodriguez's removal effective November 4, 2002, is set aside.
2. Not later than Monday, November 17, 2003, or unless another date is mutually agreed upon by the parties, Rodriguez shall be reinstated to his former position and rank at FDC Miami, and shall promptly be paid all back pay retroactive from November 4, 2002, until his reinstatement, including shift differential and lost overtime, if any, plus interest as authorized by statute or regulations. All of Grievant's employment privileges and benefits (including but not limited to seniority, pension, health benefits and insurance, vacation and holiday accruals, etc.) shall also be promptly restored retroactive to November 4, 2002. However, subtracted from Rodriguez's back pay shall be any 1099/W-2 income paid or payable to Rodriguez for the period November 4, 2002, up to and including his reinstatement. Rodriguez shall fully cooperate with the Agency and provide all salary and income records requested by the Agency to compute his back pay.
3. Rodriguez shall also be paid and made whole for all shift differential and lost overtime, if any, plus interest as authorized by statute or regulations, and all other privileges and employment benefits he lost for the time period he was placed on home duty.
4. All references to Grievant's removal shall be stricken from the Agency's files and personnel file(s) pertaining to Manuel Rodriguez.
5. In light of the above findings and remedies, and unless specifically addressed and resolved, all other claims, demands or issues raised or argued by the parties are unnecessary to reach or decide and, thus, are deemed moot and/or denied.
6. The undersigned arbitrator reserves jurisdiction only to resolve any back pay or benefit dispute(s). This Opinion and Award is otherwise final and binding on the parties.

Signed and mailed to this 5th day of November, 2003



Martin A. Soll, Esq., Arbitrator