

Award of the Arbitrator

In the Matter of the Arbitration
Between:

American Federation of
Government Employees

AFL - C10, Local No. 506

and

Department of Justice,
Federal Bureau of Prisons
FCC Coleman Complex
Coleman, Florida

Concerning the Termination of:
Paul McCain

Federal Mediation and Conciliation Service
No 15-51235

Arbitrator: Robert S. Adams

Date of Hearing: February 26, 2015

Location: FCC Administration Building
Room MGM
846 N.E. 54th Terrace
Coleman, Florida 33521

Closing Briefs: April 6, 2015

Date of Award: May 6, 2015

Appearances:

On Behalf of Local 506:

Kenneth Pike, Vice-President
AFGE Local 506
P.O. Box 413
Okahumpka, Florida 33521

On behalf of the Bureau of Prisons:

Meryl White
Labor Management Relations Branch
Employment Law and Ethics Branch
Federal Bureau of Prisons
320 First Street NW, Suite 252
Washington, DC 20534
Tel: (202) 353-4602

Also in Appearance:

David Honsted
Jose Rojas

Witnesses:

Wendell Dulay

Lawrence Howard

Jose Rojas

Kevin Rison

Ronald Rodrigez

Wilian Jackson

Paul McCain

Exhibits Submitted by the Parties:

Joint

J-1 Master Agreement

J-2 Invocation to Arbitrate

J-3 Adverse Action File

Union

U-1 2/16/11 Harry Lappin
Memorandum

Agency

(None)

I - The Issue

(Modified by the arbitrator)

Was the grievant, Mr. Paul McCain terminated from service for just and sufficient cause, and if not, what is the appropriate remedy?

II - The Hearing

This matter came in for Hearing on February 26, 2015 in FCC - Coleman before Neutral Robert S. Adams, mutually selected by the parties from FMCS Roster. Paul McCain (hereinafter referred to as Grievant) was present throughout the Hearing and represented by his Union Representative K. Pike from AFGE and Local 506 (hereinafter referred to as Union). The FCC was represented by Meryl White Labor/ Management Relations (hereinafter referred to as the Agency.)

The matter was recorded and transcription provided by Letha Wheeler & Associates.

After hearing direct testimony cross from all witnesses, examining all exhibits introduced and accepted by the parties, examining applicable provisions policies & procedures along with Master Agreement and closing briefs from both parties was all placed under scrutiny and the following is submitted.

III - Douglas Factors (Douglas v. Veterans Administration 5 MSRP 280 (1981))

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 employees ability to perform at a satisfactory level and it effect upon supervisor's confidence in the employees ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offense;
7. Consistency of the penalty within the applicable agency table of penalties;
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. Potential for the employee's rehabilitation.
11. 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; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

IV - Findings of Fact

1. The Grievant, Paul McCain was employed by the Federal Bureau of Prisons at FCC, Coleman, Florida. FCC is a complex with four separate components to include a Medium Facility, Low Facility, Satellite Camp and two Penitentiaries including the ART.
2. The Grievant was a bargaining unit employee with membership in American Federation of Government Employees Local 506.
3. The parties, herein, are signatory to a collective bargaining agreement referred to as the "Master Agreement" effective July 21, 2014 through July 20, 2017 (for the purpose of adjudicating this matter, the pertinent provisions of the previous Master Agreement effective July 21, 2014, shall be recognized for this hearing.)
4. The Grievant maintained an unblemished seventeen year record of service at FCC and at the time of incident(s), he was employed as (ART) an instructor at the training facility (GS-17).
5. On March 13, 2014 the Grievant appeared for duty at the FCC Training Facility located on the FCC grounds.

6. During the course of duty, it was discovered the Grievant was carrying a sidearm, holstered on his person. The Grievant took the sidearm from his person and locked it in the glove box of his personal vehicle.
7. Supervisory personnel from FCC were informed of the situation and confronted the grievant of the location of the incident(s). Supervisory personnel insisted upon a search of the Grievant's personal vehicle of which the Grievant, accompanied by his Union Representative, refused a search of the vehicle.
8. On or about June 5, 2014, the Grievant, Mr. McCain submitted a sworn statement; as a result of a formal investigation, concerning the situation and series of events on or about March 13, 2014.
9. On September 19, 2014 the Grievant was issued a notice for removal from service as a teacher (GS-1710-11) charging: unauthorized possession of a firearm on institution property and refusal to undergo a search of your personal vehicle.
10. On or about November 7, 2014 the Grievant was recipient to a document, signatory by Warden Lockett, terminating the Grievant from service at FCC-Coleman. (J-3)
11. The "Union" appealed the discipline assessed and requested arbitration of the matter.
12. The Union and Agency did not dispute the basic facts of the circumstances in this matter, moreover, the parties did not contest a timeliness issue for any portion of the administrative procedure.

V - Position of the Parties **In Summary**

Position of the Union

The Union representing the Grievant did not contest the facts surrounding the incident, involving the Grievant and possession of his firearm. Moreover, the Union did not contest the firearm was placed in the Grievant's personal vehicle specifically located in the glove box. The "Union" refuted the level of discipline assessed, submitting an argument that an employee with a clear record of seventeen years, inadvertently carried the weapon on the facility, the Union initiated the refusal to search the Grievant's vehicle since in the Union's steadfast opinion supervisory personnel did not possess the authority to search the Grievant's personal vehicle. "The Douglas Factors" and a prior award were submitted in support of the Union position - contesting the severity of the discipline.

The Union refuted the agency's position pointing out the Program Statement 3740-01 regarding searches, supports their position states in part:

“Vehicles. Random visual searches of staff vehicles are prohibited under this policy. But the Agency reserves the right to institute such searches in the future after fulfilling its bargaining obligations with the Union.”

The Union countered the Agency's position that employee vehicles are addressed in this provision. In addition the Union proffered this issue has been subject of dispute.

Union exhibit 1 was submitted in support of their position. (The submitted copy of the document was difficult to read and decipher.)

“From: Harley Lappin, Director
Subject: New Firearm Prohibition Signs

This memorandum provides notice and instructions to Chief Executive Officers for purchasing and displaying new firearms prohibition signs at the entrances to Bureau of Prisons (Bureau Buildings.)

Title U.S.C. 930 prohibits possessing, attempting to possess, or causing to be present, a firearm or other dangerous weapon in a federal facility which includes buildings on Bureau institution grounds. “Federal facility,” in this context does not include institution grounds, parking lots, or parking garages. The statute provides for criminal prosecution of persons violating the provision.

In order to effectively inform and place persons on notice of the law, an easily readable sign is required to be posted at all main entrances to Bureau buildings located on institution grounds. Signs are to be posted at building entrances, and not at the entrances to the institution grounds, parking lots, or parking garages. These signs should be posted in addition to signs required by other Bureau policies, e.g., Program Statement No. 5510.13 Searching, Detaining, or Arresting Visitors To Bureau Grounds and Facilities.”

The signs will read as follows, in both English and Spanish:

Firearms and other dangerous weapons are prohibited in this Federal Facility, Violators may be (unreadable) prosecuted under USC 930(?)

Position of the Agency

The Agency argues the Grievant's actions were so egregious the warden was compelled to terminate the Grievant from service at FCC. The Agency pointed out the signage was conspicuous and clearly restricted possession of weapons. The Agency also made considerable reference to the Grievant's statement that during investigation he placed the firearm in his glove box 99.9% of the time which is an admitted violation of policy. The Agency presented photos of signage conspicuously placed on every BOP entrance and exit restricting firearms on any weapon.

The Agency clarified, during the time of the incident, that refusal to submit to a search of the Grievant's personal vehicle could result in discipline - including termination. The Warden testified that by identifying the Douglas Factors; reviewing the Investigation and Federal Regulations; plus, recognizing his obligation and responsibility to maintain utmost safety for staff, visitors and inmates he was justified in terminating Mr. McCain. Further, the Warden testified that he did not see the possibility of rehabilitation for the Grievant. With reference to the attempted search of the personal vehicle - in order to carry out safe measures the Agency insisted upon an immediate search of the personal vehicle. See program statement 3740.01 Staff Entrance and Search Procedures and 26 CFR 511.13.

VI - Opinion of the Arbitrator and Conclusions

As stipulated, this matter is subject to examination in two segments - A - Possession of a firearm on complex property and B - Refusal to submit to search of the private vehicle. Both grievances were presented in testimony and exhibits. An award is rendered recognizing both issues in the aggregate.

The Grievant, has ascertained the necessity and personal well being to carry a loaded firearm to and from FCC Coleman since he may encounter relatives of inmates, who are acrimonious to the particular relative's incarceration. The Grievant has a routine of securing his 9mm "hot" weapon in the locked glove box of his personal vehicle prior to entering the training facility. The term "inadvertently" is compelling in this specific situation. When the Grievant observed the adverse action of bringing a firearm on the premise he attempted to rectify the adversity of the action by placing the 9mm weapon in the locked glove box of his vehicle.

Testimony and evidence does not reveal the Grievant making any attempt to expose the weapon or expose another individual to the weapon.

Testimony and closing arguments from the Union and Agency consistently makes reference to the “Douglas Factors” (Douglas v. Veterans Administration 5 MSRP 280 (1981)). These factors will also assist this Arbitrator formulating a response and decision in this matter. The relevant testimony and exhibits have been held up to the relevant factors for examination. Moreover, this Arbitrator has recognized and relied upon the “seven tests” in determining just cause, established by Arbitrator Carroll Daugherty in his award 46 Las. Arb. (BNA)359 1966, which are similar and significant in making an appropriate assessment and determination. (Recent Award Adams FMCS 141003-50035 A– November 7, 2014)

The Douglas Favor will primarily be held up to “possession of firearm on BOP property”:

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:

Without hesitation, any incident involving a weapon, most particularly a “hot” firearm, is an extremely serious issue. This arbitrator is familiar with all calibers and categories of firearms (active duty military) and holds unconditional respect for proper handling of any and all firearms. Moreover, a respect for safety in the work environment is held in the highest regard. The Grievant carried a personal firearm for safety to and from FCC Coleman property and the firearm was not issued or carried during the course of assigned duties. When the Grievant carried a holstered 9mm into the training center, of the three categories found in factor 1 - inadvertent - identifies the situation. The firearm was not intended or used to carry out a malicious act or for personal gain. Also the Grievant’s personnel record does not reflect any previous adverse activity or inappropriate use of a weapon. Upon questioning by Supervisory personnel, both on the scene and during the investigation, the Grievant readily admitted to possession of the firearm in the classroom and immediately placed the 9mm in his personnel vehicle locked in a glove box.

2. The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position:

The Grievant was selected to be a teacher involved in Annual Refresher Training which indicates certain level of reliability. In addition the Grievant’s record indicates a promotion over the course of employment indicating above average work performance.

3. The Employee’s Past disciplinary record:

In this matter it is important to note that the Grievant’s seventeen year record is clear from any infraction or adverse action. Any prior incident similar to the situation(s) at hand would significantly alter this arbitrator’s decision making process.

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability:

As previously stipulated - the Grievant has maintained a seventeen year continuous history of employment with a clear record. Any issue of lack of dependability or issues of working with other employees was not presented or documented.

5. The effect of the offense upon the employees ability to perform at a satisfactory level and it effect upon supervisor's confidence in the employees ability to perform assigned duties:

The Grievant and his supervisor shall come to a strict understanding of proper action and guarantee of no future infractions as a part of rehabilitation.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offense:

The hearing testimony reflects upon an incident that mirrors many or all the factors found in this situation, but two incidents have sufficient noteworthy differences.

Without question, the tragic incident at the Tallahassee facility involved a weapon in a personal vehicle and resulted in senseless fatality. The death of a colleague / fellow staff member was extremely emotional and heartfelt by all, including the warden.

1. Warden Lockett briefly described another incident involving a staff member and weapon but discipline assessed did not result in termination.

2. Warden's Lockett's testimony reflected the following answers to the question of another incident which is found on page 111. Direct from Warden Lockett:

Q. And in this case was Mr. McCain's conduct an isolated incident or was the conduct repeated?

A. Warden Lockett responded, "You know, as I was going through the Douglas Factors, you know, one of the things that, you know, you want to look at is that okay, is this clearly a mistake? And, again, like I mentioned before, you know, there's a staff member who was out on a camping trip and he used a bag and then he came back in the next day and forgot he left his weapon in it. And it was clearly a mistake. Is that one of those types of situations? This is clearly not a mistake."

7. Consistency of the penalty within the applicable agency table of penalties:

Reflected in Factor 6.

8. The notoriety of the offense or its impact upon the reputation of the agency:

No report of media or public notice was encountered in this incident.

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;

Response is detailed in conclusions.

10. 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;

Obviously, the Grievant understood a firearm is not to be taken into any facility at FCC. The Grievant did not refute the rule or applicable regulation. The Grievant did not attempt to hide the 9mm for the purpose of transporting the weapon into the training complex. Signage and warnings were adequately posted concerning possession of a weapon; however, this particular incident of possession can not be construed as a blatant act of disregard for the established rules and regulations. Clarity of vehicle search regulations will be opined separately.

11. Potential for the employees rehabilitation:

Respectfully, this arbitrator can not concur with the position of the Warden concerning rehabilitation in this particular matter. The Grievant is subject to rehabilitation.

Search of Personal Vehicle

12. 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; and

13. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Factors 12 and 13 are significant to the incident of the personal vehicle attempted search.

A. To be succinct - the language in the governing rules and regulations are ambiguous and conflicting. For instance, Program Statement 3740-01 is not steadfast in allowing the immediate search of an employee's vehicle.

B. The Grievant's statement from the investigation, conducted by Officer Dulay "99.9%" of the time does not appear to be a blatant disregard for the rules and regulations or confession of guilt.

The statement (99.9%) must be interpreted as explaining the Grievant's standard procedure and understanding in handling the personal firearm.

C. The Grievant appeared truthful and forthright in discussing his actions and placement of the firearm in the glove box. Testimony from the Grievant during the hearing and transcript of instruction conducted by Mr. Dulay indicates Mr. McCain clearly understood the policy and serious violation that occurs when a firearm is brought into a facility; however, he was not clear on the policy concerning possession of a firearm in his personal vehicle. Reference was made to a memorandum from Field Director H. Lappin which stated:

Dated February 16, 2011.

“Title 18, U.S.C. Section 930 prohibits possessing, attempting to possess, or causing to be present, a firearm or other dangerous weapon in a Federal facility, which includes buildings on Bureau institution grounds. “Federal facility” in this context, does not include institution grounds, parking lots, or parking garages. The statute provides for criminal prosecution of persons violating the provision”.

D. The Union Representative intervened and advised the Grievant to reject a request to search his vehicle. (This Arbitrator is not condoning or in full agreement with the Union subjecting the Grievant to possible insubordination while holding constant to their position.)

During the Hearing the following response was provided:

Direct from Captain Howard:

“I then asked Mr. McCain was he in possession of a firearm. Mr. McCain told me, yes, it was in his vehicle.

At that time I told Mr. McCain that I needed to search his vehicle to make the area safe. His union, rep. Mr. Ron Rodriguez was notified who met at the training center. Mr. McCain asked could he speak in private to his union rep. which I allowed him to do. Myself, and Mr. Rison stepped outside of the office area and let Mr. Rodriguez and Mr. McCain speak. Upon the conclusion of their meeting I entered back into the office where Mr. Rodriguez informed me that Mr. McCain was going home sick and he was not consenting to the vehicle search. I informed Mr. McCain that if he left the premises although he already — there was already a serious incident with the weapon, that if he left the premises he was not granted any type of leave and he would be placed on AWOL status. I asked Mr. McCain again what he-- I needed his keys, would he consent to the search of his vehicle. Mr. McCain said no, I will not. I'm going to follow my union representation's advice and I'm going home.”

The Union and the Agency are at loggerheads over the appropriate ruling concerning employee vehicles and need to search. The Union representative placed the Grievant in a perplexing position by advising him not submit to a search of his personal vehicle by Supervisory personnel.

It is this Arbitrator's opinion and must conclude that mitigating circumstances surfaced during the entire event of the search process and must be recognized in assessing the appropriate discipline.

Arbitrator Berger Esq. adjudicated a somewhat similar case involving a corrections employee and a firearm (FMCS Case No. 14-01355-6). Arbitrator Berger was also confronted with determining if the discipline assessed was appropriate and if not what is the remedy. My colleague's comments were compelling in particular paragraph two on page 11 of his award which states:

"Based on the evidence presented at the hearing, there is no question that the Grievant violated a clearly-stated prohibition when he brought his firearm on the Bureau property. Indeed, the Union does not challenge that conclusion. The only question in this proceeding is whether the imposition of a 21-day suspension was a permissible Agency response given the totality of circumstances surrounding the Grievant's misconduct."

NOTE:

This Arbitrator would be remiss if the Opinion and Conclusions did not include two brief comments of concern for the parties review. Editorializing or intervening in the affairs of an Agency or Union has not and is not practiced: however, two areas of concern deserve comment.

1. The matter before the parties initially occurred on March 13, 2014 and the matter came on for hearing almost a year later on February 26th 2015.

{This is not an attempt to find fault with any person or either party}

With a firm recognition and respect for due process, precious time necessary to investigate and prepare and most of all provide assurance that every step of the administrative process is carried out, it is without question time is necessary to complete these critical tasks. And, a year time period from origination to hearing is not unusual particularly where termination is assessed. A lengthy gap in the time frame makes a problematic situation even more difficult for everyone involved.

2. As opined in this Award, the parties declared numerous rules and regulations regarding the applicable provision that presides over weapons in a personal vehicle and authority to search a personal vehicle. Moreover, arguments and testimony referenced language and prospective language in the Master Agreement as it pertains to the authority and process for searching an employee's personal vehicle.

The parties would benefit to take necessary time and steps to collaborate on a mutually agreeable resolution to these two issues, when not confronted with a specific grievance.

VII - DECISION

Arbitrator William J. LeWinter: Adjudicated similar matters involving weapons, safety in the workplace and appropriate discipline and confirmed:

“The arbitrator must be fully cognizant that he is taking into his hands the Employer’s personnel policies. The arbitrator does not live with the parties, he has not actually experienced the problems management may have which might require strong disciplinary measures. *** At the same time, while he must use great restraint, an arbitrator must do essential justice and take the actions necessary to achieve it.”

This matter solicits a decision concerning the Agencies burden to prove sufficient just cause necessary to terminate the Grievant. As noted, the issue giving rise to the discipline is twofold:

The basis for this Arbitrator’s decision and resulting award applied a detailed examination of the information submitted to the two issues individually and in the aggregate. As presented in the OPINION and CONCLUSIONS the “Douglas Factors” received meticulous scrutiny and the pertinent points were addressed.

Without question, any and all handling of any firearm is serious and requires the handler’s complete attention and respect. And, it is understood the Warden along with all staff members must maintain the lofty task of assuring a safe environment for employees, visitors and inmates. With due respect to the Warden’s decision making process this Arbitrator must disagree with his appraisal of the possession and search incident when compared to the factors illustrated in the Douglas document. Comparatively, the discipline assessed would be upheld, by this Arbitrator, if this employee or any employee attempted to defy the “no weapons” policy/regulation by purposely carrying the weapon into the restricted building or this was a second occurrence or the employee removed the personal weapon from it’s holster or the employee provided a falsehood when questioned on the issue.

Many Arbitrators including Arbitrator Berger (see references in FMCS case 14-01355-6 January 20, 2015) have articulated points for consideration found in “Douglas Factors” and in certain circumstances have found it necessary to refute the position of the Warden or governing authority in public sector cases. The Warden in this instance can not be faulted for allowing emotion to enter from a recent adverse situation and unyielding concern for safety into the decision making process.

It must be clear this incident can not be treated lightly and fervent discipline is necessary to guarantee all employees understand this is a serious matter; however, for the reasons cited above the discipline assessed is excessive. The cessation of full employment must be overturned.

Grievant Paul McCain’s personnel record will reflect a thirty (30) day suspension from service and his personnel record will cite the facts in this matter.

VIII - AWARD

Paul McCain will be returned to service in the same or similar position from the date March 13, 2015 with all rights and benefits returned. Any loss in wages will reflect a thirty (30) day suspension of wages at straight time. NOTE: The Union’s request for a thirty day extension will not be charged against the Agency when calculating reimbursement. When loss in wages are tallied, the Agency will calculate *sixty days less straight time*. All seniority, vacation, sick leave, pension and rights are returned and intact.

Any request for premium pay or interest is denied.

Jurisdiction will be retained for ninety (90) days from this date in order to review any issues concerning the provisions of the award.

Signed this 6th day of May 2015.

Robert S. Adams
Arbitrator