

arresting police officer testimony, asserts that Grievant knew that the woman stopped for drugs. The Grievant denied that there was any discussion of drugs, or that he knew the lady had purchased drugs. (Tr. p. 475, p.478)

A short time after leaving the residence, five or ten minutes, the Grievant was stopped by City of Miami police officers. There is a dispute as to the discussion that occurred during this stop. Sergeant Richards, of the Miami Police Department, testified that Grievant kept repeating, "I can't go to jail," that he worked for the Bureau of Prisons, that he was going through some hard times, including a divorce. Richards also testified that Grievant said that had taken the woman to the house to buy marijuana but that he had no idea she was purchasing cocaine, both of which were found on the woman. (Tr. p. 70) Richards also verified that his arrest affidavit stated: "At which time one glass pipe with cocaine residue, one cigarette plastic baggie, with suspect cocaine residue was recovered from defendant's vehicle floorboard, in plain view." He also testified that it was on the driver's side near the car's accelerator. (Tr. p. 72)

Grievant denies that any of the drug related items found in his vehicle belonged to him. (Tr. p. 480) No similar drug related material was found in the car's trunk. All of this occurred at approximately 6:00 PM. After being taken to the police station and subsequently to the TGK or County Jail Facility, the Grievant was bonded out at one or two o'clock in the morning. (Tr. p. 480, 481)

The following day Grievant called his supervisor, Mr. Hammond, to advise him that he had been arrested and that he needed a few days off to get an attorney. During a subsequent telephone discussion with Hammond, Grievant was requested to come into the facility for a urinalysis. The results were negative. (Tr. p. 482, 483)

On August 9, 2007 Grievant was placed on home duty which required that he remain in his home unless leaving to eat. Anytime he left he had to contact his supervisor. (Tr. p. 483) On August 27, 2007 Grievant received a notice of Proposed Indefinite Suspension Without Pay. Two days later on August 29, 2007 Grievant's

lawyer attended a court hearing on behalf of the Grievant at which the court took no action on the Grievant's case. His lawyer informed him that the "no action" determination was based on a lack of evidence. (Tr. p. 484)

Following his indefinite suspension, Grievant filed on November 13, 2007, a grievance appealing that decision. On December 26, 2007 the Union invoked arbitration on this issue. On March 14, 2008, Grievant was given notice of a decision to remove him from Federal Service effective March 18, 2008. On April 8, 2008 a second Grievance was filed on behalf of the Grievant contesting his removal. This was followed on May 12, 2008 by notice by the Union of its intent to invoke arbitration of Grievant's removal.¹

The parties have requested that while the two grievances arise out of the same events they have requested separate rulings on the indefinite suspension issue and the removal issue.

Issues

1. Was the indefinite suspension of Grievant for just and sufficient cause or if not, what shall be the remedy?
2. Was the removal of the Grievant for just and sufficient cause, or if not, what shall be the remedy?

Relevant Contract Language

ARTICLE 30 – DISCIPLINARY AND ADVERSE ACTIONS

¹ Employer's post hearing brief p. 10.)

Section a. The provisions of this article apply to disciplinary and adverse actions, which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.

...

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

...

Section g. The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.

ARTICLE 32 – ARBITRATION

...

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by Statute.

The arbitrator shall have no power to add to, subtract from disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

Discussion

Indefinite Suspension

The Employer indefinitely suspended the Grievant on August 27, 2007 asserting, that when arrested on August 8, 2007 he was in possession of “one glass pipe with cocaine residue and one clear plastic bag with suspicious cocaine residue” which had been recovered from the floor board of his vehicle. The Employer contends that the Grievant was less than forthcoming in his explanations concerning his arrest, his statements to the arresting officers and his general denial of the conduct at issue in the criminal charges. Specifically, the Warden referenced the “uncontested and spontaneous statement made to the officers that: “I took her to buy some marijuana, but I didn’t know she was going to also buy cocaine. Can you please give me a break. I’m going through a divorce.” Further, the Employer contends that as a law enforcement officer, Grievant was subject to a higher standard of off duty conduct.

(Jt. Ex. # 3, Tab L)

The Union argues that an indefinite suspension is not authorized by statute. It contends that suspensions are for disciplinary reasons and not for the purpose of conducting an investigation. It also contends that the Employer has failed to establish a reasonable cause for the indefinite suspension. It points to the Warden’s

testimony that an indefinite suspension was warranted because of the “unresolved administrative issues based on the police report.”²

The Union contends that the Employer has failed to prove by a preponderance of evidence the charges alleged in indefinite suspension notice. First it argues that the requirements of legal possession have not been proven. Second, the standards for legal possession cited in several federal cases have not been met. It also points to what it contends is conflicting testimony by the arresting officers.³

The testimony of the arresting officers is persuasive in demonstrating that Grievant was aware of the purpose of his female companion’s request to stop at the house where drugs were purchased. However, the Employer is less persuasive in its argument that the arrest severely compromised the ability of the Grievant to function effectively in his job. Simply, there is nothing in the record to support this contention. As noted below, other law enforcement officers have been arrested for off duty conduct and received either no discipline or short term suspensions. Because of this, I must conclude that an indefinite suspension was not for just and sufficient cause.

Removal

During Grievant’s indefinite suspension, he continued to be the subject of an ongoing investigation by the Office of internal Affairs. This investigation produced a number of affidavits including affidavits from the Grievant, his supervisor, and one of the arresting officers, Ed Joseph. (Jt. Ex. #3, Tabs G, H, I, J) Based on this investigation, which was completed on October 5, 2007, with an additional note on or after November 13, 2007, the Employer issued a letter proposing Grievant’s removal from employment from the agency. ⁴

² Union’s post hearing brief, p. 6

³ Union’s post hearing brief p. 9

⁴ Employer’s post hearing brief p. 9

The Employer argues that at the time of his arrest Grievant was in possession of a glass crack pipe, cocaine, and other discarded drug paraphernalia and that he had aided and abetted in the illegal drug purchase by a private citizen. The Employer contends that it has met the preponderance of evidence standard through statements of law enforcement officers versus the “weak generalized denials” of the Grievant.⁵

The Employer asserts that the Grievant, as a law enforcement officer, is held to a higher standard than non-law enforcement civil service members. Further, Grievant’s arrest affected his ability to function effectively in his job due to impaired judgment and credibility. Thus no suspension could serve to rehabilitate him. Removal of the Grievant is the only appropriate course of action.

As stated in the parties’ Agreement, Article 30 Disciplinary and Adverse Actions, supra, discipline and adverse actions... “will be taken only for just and sufficient cause and to promote the efficiency of the service,....” That article also endorses the ...”concept of progressive discipline...”

While the Grievant did use exceedingly bad judgment, the record does not support the Employer’s contention in specification (A) that at the time of his arrest he was in possession of drugs. The drugs were found on the person of the woman, not on the Grievant. The drug paraphernalia could have been placed by the woman on his side of the vehicle or scattered there during the arresting officers’ search. It is reasonable to assume that the two large bags, brought into the car by the woman could have been opened by the arresting officers and their contents, during a search, scattered about Grievant’s vehicle. I must conclude that drug possession by the Grievant has not been established by a preponderance of evidence. His drug tests were negative. Finally, due to a lack of evidence, no further action was taken by the arresting authorities.

⁵ Employer’s post hearing brief p. 12

The Union's arguments as to specification (B) are less persuasive. The arresting

officers' testimony was credible concerning what they stated was Grievant's spontaneous statement to them "...I took her to buy some marijuana, but I didn't

know she was going to also buy cocaine." While I view Grievant's behavior as exhibiting extremely poor judgment I do not believe that the employer has established a just and sufficient cause for the Grievant's removal.

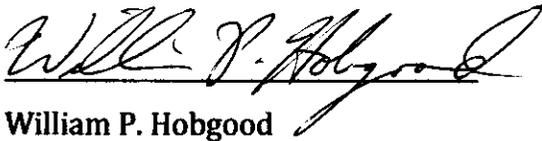
The Grievant acknowledges that he engaged in bad judgment in putting himself in the position he was in on August 7, 2007. He stated that he had expressed his remorse for this situation both to his supervisor and the warden. **(Tr. p. 489)**

In addition to the above, there are several mitigating factors to consider in fashioning the appropriate discipline. First, his twenty year length of government service highlighted by a clean disciplinary record. Second, his outstanding performance appraisals and the testimony of his supervisor as to his performance has to be considered when fashioning any penalty. Third, the Employer has applied lesser degrees of discipline for employees who have engaged in inappropriate off duty conduct. In a disciplinary log from 2005 to 2008, in which a number of offenses were listed, there was one incident of off duty conduct in 2006 resulting in an arrest. In that case a thirty day (30) suspension was recommended with a ten (10) day suspension actually imposed. In a second off duty arrest for disorderly conduct, no action was taken. **(U. Ex. #9)**

Based on the above, I must conclude that removal for the Grievant's off-duty conduct was excessive.

Awards

1. Indefinite Suspension Issue - Indefinite suspension reduced to a ten day suspension
2. Removal Issue - Grievance Sustained
3. Remedies proposed by the Union - Parties have 30 days to submit briefs on back pay interest and Attorney's fees.



William P. Hobgood

June 6, 2009