IN ARBITRATION BEFORE MICHAEL D. GORDON, NEUTRAL

COUNCIL OF PRISON LOCALS, AFGE,
LOCAL 3947

and

Joshua Harstad Suspension Grievance
FMCS No. 15 03260-8

FEDERAL BUREAU OF PRISONS

ARBITRATOR'S DECISION AND AWARD

This grievance challenges the suspension of Joshua Harstad ("Grievant"). It arises under a master collective bargaining contract ("Agreement") between Council of Prison Locals, American Federation of Government Employees ("Union") and Federal Bureau of Prisons ("Agency" or "BOP"}) covering certain employees at its Rochester, Minnesota, correctional institution ("Facility").

A hearing was held March 23, 2016, in Rochester, Minnesota. Evan S. Greenstein appeared for the Union. Jennifer A. Spangler represented the Agency. The hearing was officially reported. The parties received full opportunity to examine and cross-examine witnesses, to introduce relevant exhibits and to argue. The record closed with receipt of written briefs on or before June 9, 2016.

ISSUE

Pursuant to Agreement Article 30, Section h(1), the issues are:

> Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?

SELECTED PORTIONS OF AGREEMENT

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS

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 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 d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigation and disciplinary/adverse actions.

1. When an investigation takes place . . . any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee;

. . .

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 the 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.

SELECTED PORTIONS OF STANDARDS OF EMPLOYEE CONDUCT ("Rules")

8. INTRODUCTION OF CONTRABAND

Per 28 CFR §500.1(h), contraband is defined as "material prohibited by law, or by regulation, or material which can reasonably be expected to cause physical injury or adversely affect the security, safety, or good order of the institution."

Introducing or attempting to introduce contraband into or upon the grounds of any Federal correctional institution, or taking or attempting to take contraband out of it, without the CEO's knowledge and consent, is prohibited.
. . .

* * *

Attachment A. Standard Schedule of Disciplinary Offenses and Penalties ("Disciplinary Schedule")

1. This table is intended to be used as a guide in determining appropriate discipline to propose according to the type of offense committed. The offenses listed are not inclusive of all offenses.

2. Ordinarily, penalties proposed should be within the range of penalties provided for an offense. In aggravated cases, a penalty outside the range of penalties may be imposed. . . .

3. The deciding official considers relevant circumstances, including mitigating and aggravating factors, when determining the appropriate penalty. The range of penalties provided for most offenses is intentionally broad, ranging from official reprimand to removal. While the principles of progressive discipline are normally applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the fist offense, up to and including removal. . . . This is especially true in cases where there is no indication the employee would be corrected by a lesser penalty, or if the offense is of such a nature that reoccurrence could jeopardize security or bring disrepute on the Bureau of Prisons. . . .

* * *

NATURE OF OFFENSE: Introduction of contraband

EXPLANATION: Nature of article and degree of involvement are primarily considerations in determining severity of the penalty.

FIRST OFFENSE: 10-day suspension to removal.

SECOND OFFENSE: 15-day suspension to removal.

THIRD OFFENSE: Removal.

RECKONING PERIOD: 2 years.

FACTS

Grievant is a Correctional Officer at the Facility with about five years seniority. He received a copy of the applicable Rules on February 4, 2014. He had no discipline before the events giving rise to this grievance and was considered a good, sometimes outstanding, employee.

When he reported to work about 11:30 p.m. on August 28, 2014, Grievant brought his personal bag that inadvertently contained his licensed, 9 mm pistol loaded with ten rounds of ammunition onto Facility grounds and then into the building where it was checked routinely by X-ray security.[1]

Screening Officer Donald Miller noticed the firearm as the bag underwent X-ray examination. He asked Grievant if his bag contained a weapon. Grievant expressed palpable surprise and told Miller he had put the pistol in his bag when he went family camping over the weekend and had forgotten to remove it. At Miller's suggestion, he immediately took the bag to the trunk of his personal vehicle. Miller told morning watch Lieutenant David Sladek about the incident after processing

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[1] On November 8, 2007, the Agency and Union entered a MOU regarding electronic searches of staff ("2007 MOU"). It said nothing specific about discipline but described X-ray procedures and provided:

> Employees will be allowed to take any items not able to clear the metal detector or X-ray machine to their vehicles, unless doing so would jeopardize the safety, security, or good order to the institution.

The Agency modified its entrance and search policy on July 17, 2013. After a June 11, 2014, hearing arbitrator Charles J. Murphy issued a decision on September 24, 2014, finding the unilateral policy had been impermissibly implemented under Agreement Article 3 and FLRA 7114(b)(3) and ordered certain remedies discussed below ("*Murphy Award*"). The FLRA upheld the decision at 68 FLRA 546(2015).

other arriving officers.[2] Grievant then informed Sladek who told him to remove his vehicle from Facility grounds.

By August 29, Warden Brian Jett had written statements from the three participants. He placed Grievant on home duty and referred the matter to the BOP Office of Internal Affairs ("IA").[3] IA called the Department of Justice's Office of Inspector General ("OIG") to investigate. On October 15, OIG Investigator Gary Popadowski received the case. In mid-December, he interviewed Miller, Sladek and Grievant who fully admitted their respective actions. The OIG investigation concluded on April 10, 2015. IA forwarded it to Jett on May 6. A proposal to remove Grievant for introduction of contraband (firearm) issued on May 19.[4]

Grievant replied to Acting Warden Michael D. Smith on May 19. He apologized profusely for his unintentional actions.

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[2] BOP Program Statement 3740.01 requires retaining the bag inside the X-ray machine and immediately notifying the Operations Lieutenant. Miller and Sladek each claimed ignorance of the policy.

[3] The incident originally was filed as a criminal matter, but the US Attorney declined prosecution on December 16, 2014.

[4] Previously, in September 2004, the OIG issued a memo critical of BOP for untimely discipline. In October 2006, BOP determined that local investigative packets should be completed and forwarded to OIG within 120 calendar days after OIG authorized a local investigation.

Smith found Grievant had no prior discipline, acknowledged the seriousness of his actions and accepted responsibility for it. He also concluded Grievant knew he could not bring a firearm onto the Facility and the misconduct posed a serious threat to institutional safety.[5] As a result, at the suggestion of HR, on June 15, Smith determined a 21 day unpaid suspension, not removal, was the appropriate discipline.[6] Grievant began his suspension on June 18.

This grievance followed on June 16. Arbitration was invoked July 16.

AGENCY POSITION

The grievance should be denied. Grievant's suspension is not clearly excessive, disproportionate, arbitrary, capricious or unreasonable. The Agency is entitled to deference and discretion in exercising its management functions. The Agency considered all relevant factors. In any event, no attorney fees should be awarded.

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[5] Gun lockers are provided to employees at Guaynabo, Puerto Rico and some locations where staff housing is available.
In 2006, an employee in Tallahassee, Florida brought a gun into an institution and killed an OIG agent and injured BOP staff.

[6] Although OIG concluded Miller violated BOP reporting procedures, no discipline was proposed or imposed on Miller or Sladek.

The Agency has the burden of proving misconduct and that the discipline imposed is reasonable and promotes the efficiency of the service. MSPB harmful error standards apply.

The Agency conducted a fair investigation. Popadowski interviewed all involved in the incident and reviewed X-ray pictures of Grievant's bag.

Any Union contention the investigation took too long lacks merit. The Agreement contains no specific time line for completing an investigation or issuing discipline. No time requirements can be created in arbitration without adding to, altering or modifying the Agreement contrary to Articles 32(h), 30(d)(1) and the relevant, reasonable circumstances. The investigation and disciplinary decision only took 10 months, hardly an unreasonable time.

The Rule regarding weapons is reasonable. Without question, Grievant violated it. The Law Enforcement Officer's Safety Security Act of 2004 and the parties' mutually negotiated Rules require contraband be approved by proper authority. Grievant had no such permission. Any situation at MDC Guaynabo, Puerto Rico, to store weapons in lockers does not apply to the Facility.

Grievant's 21 day suspension is reasonable. Consistent with the Merit System Protection Board ("MSPB"), the Agency considered all relevant "Douglas Factors" and exercised management discretion within tolerable, reasonable limits.[7] Its discretion is entitled to due deference.

Smith determined Grievant's actions could have jeopardized the Facility's safety, security and well being of staff and inmates. His analysis is supported by BOP Assistant Corrections Administrator Jaysen Relvas and HR Specialist Ryan Larson. Together with the nature and seriousness of Grievant's offense in relation to his duties, Smith also considered his good record, lack of previous discipline, acceptance of responsibility and likely rehabilitation. Smith's decision is consistent with discipline imposed in similar cases and within the Rules' standards. It should not be changed.

Union citations of arbitration decisions mitigating penalties in certain cases are not persuasive. Their facts are distinguishable, they ignore more recent decisions sustaining Agency imposed penalties; and, they did not consider a serious shooting incident inside FCI Tallahassee.

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[7] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

In the unlikely event the Union prevails, attorney fees are inappropriate.[8]

UNION POSITION

The Agency failed its burden. Grievant's suspension should be reversed under the "*Murphy Award.*" Alternatively, although firearms are a dangerous threat to others and have no place in the Facility, a 21 day suspension is too severe under the circumstances and should be reduced to a written reprimand. Grievant should be made whole (including missed overtime opportunities and shift differentials) and the Union should be awarded attorney fees.[9]

As a suspension exceeding 14 days this dispute is governed by MSPB precedent. It requires preponderant evidence of every element of the Agency's case and careful, reasoned consideration of the Douglas Factors.

Under the circumstances, Grievant's suspension was not for just and sufficient cause as required by Article 30 §a. The Agency violated several of the seven factors generally used by arbitrators to determine just cause.

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[8] For reasons explained in the Decision below, it is premature to summarize the Agency's attorney fee position.

[9] The Union reserved specific claims and facts supporting its request until after issuance of this Decision and Award.

First, the Agency applied its policies discriminatorily. Neither Miller nor Sladek received any counseling or discipline although OIG concluded Miller participated in misconduct under Program Statement §3740.01 §6(h). Sladek admitted misconduct; and, Smith recognized policy violations and lack of appropriate training. There is no reasonable basis for the disparity between these similarly situated employees.

Second, the Agency did not properly communicate its policies. Sladek and Miller said they were unfamiliar with applicable policy, Smith acknowledged mistakes had been made and training was ordered after the incident. Grievant's was a case of first impression.

Third, Grievant's penalty was inappropriate. Given other arbitration decisions, it was disproportionate to discipline properly imposed at other locations under similar, or perhaps more egregious, circumstances. Cases cited by the Agency are distinguishable. Grievant unintentionally brought the pistol onto the Facility, immediately admitted and accepted responsibility for his actions and followed instructions to remove the firearm from the Facility.

Grievant's discipline was not progressive. Thus, it contravenes Article 30 §c.

Discipline was untimely under Article 30 §d. Smith knew all facts by August 29. He had no reason to investigate or delay resolution. The investigation was a charade that befouled the Agreement's timeliness requirement. As found in a 2004 DOJ investigation, the Agency has a history of untimeliness. Another suspension was reversed in arbitration due to a 3 month delay in interviewing the subject employee. In 2006, the BOP General Counsel ordered that investigations should not last more than 120 days. There were 265 days between the incident and Grievant's proposed removal. No evidence discloses OIG investigative policies. The Agency should not be allowed to farm out investigations to avoid its contractual obligations.

The Agency exercised a zero tolerance policy that prevented a true penalty analysis. It applied strict liability without consideration of intent. It automatically, without discretion, applied a 21 day suspension. This allows the arbitrator to determine the appropriate disciplinary level.

The results of electronic security searches are not meant to be punitive under the 2007 MOU. On August 28 the system worked. The gun did not enter the Facility's secure confines.

The binding *Murphy Award* requires Grievant's suspension be overturned with a full remedy. *Murphy* effectively nullified Program Statement 3740.01. It ordered the Agency to (1) cease and desist from enforcing the July 17, 2013 search policy until an alternative was negotiated and (2) "make whole" employees negatively impacted by the policy.

Under the Douglas Factors, Grievant should not have been suspended since only one of its factors even arguably constituted an aggravating circumstance. All others favor complete or partial mitigation. The Agency did not consider all relevant factors or exercise its discretion within tolerable limits of reasonableness. Grievant's discipline is excessive, disproportionate, arbitrary, capricious and unreasonable. If not completely reversed, it should be significantly mitigated.

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DECISION

Generally

The Agency shoulders the burden of proving "just and sufficient cause." The phrase is purposefully ambiguous so relevant facts about each particular discipline can be weighed and balanced. Generally, progressive discipline applies but it does not have to occur in any fixed order and certain egregious misconduct may warrant termination for a first offense. Corrective action is favored over punitive discipline. Prior treatment of similar situations, if any, is important if those incidents are truly comparable. Essentially, under the test, management must establish by convincing evidence that (1) the employee engaged in wrongdoing and, (2) under the totality of circumstances, the penalty it imposed is proportionate to the offense. More particularly, these principles essentially are found in Agreement Article 30 and the Douglas Factors.

Misconduct

Grievant unquestionably engaged in significant misconduct on August 28, 2014. He acknowledges it. The Union admits it. Arguments that no discipline should result are unpersuasive.

The Agency is incorrect that timeliness is a non-factor in disciplinary decisions. Article 30 §d speaks of "timely disposition." In the absence of expressly limiting language, this permits a full or partial arbitral remedy for undue delay when justified by circumstances. However, in this case, circumstances do not nullify disciplinary action.

In what otherwise might be a fatal time line for such simple and undisputed facts, nothing indicates Grievant's ultimate discipline resulted from stale facts or other factors materially prejudicing him. The Warden can not be faulted for turning information he preliminarily learned for unbiased investigation and review. A thorough investigation is crucial in any discipline. Significantly, because the suspension was finite rather than a prolonged period without pay, Grievant suffered no extra hardships from the passage of time.

Moreover, the *Murphy Award* is of no moment here. Initially, it is uncertain how it applies to Grievant whose misconduct occurred before the *Murphy* hearing. If it did apply, Grievant's treatment depended on a negotiated new agreement that, almost two years later, has yet to be reached.

Moreover, it expressed "concerns that the restoration of the status quo would negatively impact the Agency's ability to effectively police entry on to its facility grounds." It is somewhat difficult to reconcile these concerns with a strict reading of isolated portions of the remedy.

Most likely, they arose from an understanding that the previous provisions and certain uncontested provisions in the disputed policy would remain in effect until a new understanding was negotiated on the limited outstanding issues. It is highly unlikely they were intended to completely nullify all entrance and search security policies.[10]

Moreover, the Union's requested *Murphy Award* remedies excluded investigations and discipline for actions "criminal in nature." Although Grievant's behavior ultimately was determined not "criminal", at least until the formal investigation was complete, it properly was regarded as potentially "criminal in nature."

Treatment of Miller and Sladek does not impact Grievant because their conduct is not equivalent. Bringing a loaded gun onto and into the Facility materially differs from failing

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[10] See, *Bendixsen Award,* (Estill, SC) (2016) at pp. 11-12.

to keep a bag in the screening machine or allowing the gun to leave the premises to eliminate its potential danger. Grievant's violation arose from a well-known, common sense, self evident prohibition whereas Miller and Sladek, at most, failed to follow a rather obscure administrative protocol for dealing with a discovered firearm. Also, Union contention that Grievant should be absolved because Miller/Sladek were not disciplined is irreconcilable with its position that he should be excused because the screening process worked and resulted in the gun's quick removal.

Finally, the documents referenced above at footnote 4 have no demonstrable relevance to Grievant's situation. Likewise, events in Puerto Rico and Tallahassee are murky and not relevant to current facts.[11]

Discipline

Accordingly, Grievant's misconduct is evident. The nettlesome issue is the degree of appropriate discipline.

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[11] The Union attached a May 27, 2016, affidavit to its brief containing new alleged facts about the *Bendixsen Award*. The *Award* has been reviewed; however, since new evidence can not be submitted without joint approval after close of the evidentiary hearing, the affidavit has been given no weight.

Without question, Grievant has been a good Correctional Officer with significant seniority who innocently committed a single negligent act which he immediately tried to correct and immediately and fully acknowledged to his superiors. It is very unlikely he will repeat his misconduct no matter the degree of discipline imposed.

On the other hand, the nature of Grievant's offense, given his duties, position and responsibility is serious. The Agency's disciplinary response should put others on notice that the misconduct has meaningful negative consequences.

The Agency has not applied consistent discipline in similar situations. It issued a 15 day suspension to a Cumberland Officer who had a gun in his personal vehicle on prison premises and prevaricated about his actions. See *Applewhaite Award* (2013). Significantly, in 2015 Smith suspended a Senior Officer Specialist at the Facility for bringing two ammunition boxes onto the premises. Moreover, the Agency's Standard Schedule of Offenses and penalties generally list discipline ranging between a 10 day suspension and removal for a first offense.

The varying penalties weaken both the Agency's consistency justification and the Union's claim of an absolute zero tolerance policy always resulting in 21 day suspensions.

Nor have arbitrators reacted uniformly. Some experienced arbitrators uphold suspensions for 21 days based solely on the fact the employee was responsible for the unintentional presence of a firearm on prison property and the Agency's assurance that the Douglas Factors had been considered. Agency claims are given wide deference without close analysis whether appropriate weight, in fact, had been applied. For instance, *Durham Award* (2013) (Houston, TX Correctional Officer with prior contraband discipline suspended 30 days for negligently introducing a firearm in the X-ray security area); *Gandel Award* (2015) (Brooklyn, NY Senior Officer suspended 21 days for unintentionally bringing a loaded firearm to the X-ray machine); *Bendixsen Award* (Recreational Specialist suspended 21 days for unknowingly taking a firearm into the X-ray security area).

Other respected arbitrators more closely analyze application of relevant factors to determine if they are proportionate and reasonably balanced in the interest of the

service. In other words, the Agency's entitlement to due deference in setting penalties is not immune to careful scrutiny.

Thus, the *Brand Award* (2010) (Atwater, CA) (20 day suspension reduced to a written reprimand); *Mehlman Award* (2012) (Correctional Officer's 21 day suspension lowered to 2 days because although the Agency considered the Douglas Factors, it did not apply progressive discipline which resulted in a penalty that was overly harsh, excessive and beyond reasonable discretion); *Foster Award* (2013) (Fairton, NJ) (21 day suspension reduced to 2 days since, under the circumstances, the original penalty was not reasonably proportional).

The two arbitral approaches are irreconcilable. All cases are recent. The pro-Agency decisions did not expressly reject the pro-Union decisions. Nor could one decision technically overturn another without the parties' mutual agreement. The differences depend less on minute factual differences than the individual sensibilities of the arbitrators.

Certainly, leading authorities disfavor limited analysis of relevant factors that basically determines only that misconduct occurred and an assurance that the Douglas Factors have been considered rather than arbitral review of the existence and weight justifiably due each factor. Thus, St. Antoine, *The Common Law of the Workplace, The Views of Arbitrators*, 2nd Ed., BNA, 2005, §1.107 (the chosen level of discipline itself depends on many factors and must be "just". It should bear a rational relationship to the infraction's seriousness and frequency and, except for the most serious offenses, imposed gradually in increasing levels with the intent to correct, not punish. For most offenses one or more warnings should issue before suspensions and suspensions should precede discharge). See, Elkouri and Elkouri, *How Arbitration Works*, 7th Ed., Kenneth May, Editor, BNA, 2012, §15.28 (court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct); Brand and Biren, *Discipline and Discharge in Arbitration* , 3nd Ed., BNA, 2015, Ch. 2.I.V.C.

More importantly, the Agreement supports close arbitral review. Article 30 §c endorses progressive discipline designed "primarily" to correct and improve employee behavior except for "egregious" offenses. Also, the Disciplinary Schedule ordinarily adopts progressive discipline as a guide to consider whether the employee would be corrected by lesser discipline with little likelihood of reoccurrence. It says the disciplinary level for a first time introduction of contraband primarily turns on the nature of the article and the degree of involvement. Unlike disciplinary response for other violations that permit an official reprimand, it lists possible penalties ranging from a 10 day suspension to discharge.

As previously mentioned, Grievant's misconduct was serious and warrants stern discipline. Significantly, Grievant's misconduct was enhanced because the gun was loaded. Still, under the circumstances, a 21 day suspension is so unreasonably disproportionate as to be arbitrary.

A lesser suspension adequately serves the same ameliorating purpose where an employee with substantial, unblemished service and a good record (a) negligently introduces a firearm that is detected before it passes through

security and (b) immediately and fully admits behavior that is not a frequent problem at the facility and which (c) he is very unlikely to repeat. At the same time, the overly harsh suspension is not in the interest of the efficiency of the service since it likely may dissuade future violators from candidly and forthrightly disclosing similar misconduct.

On this record, a 10 day suspension is appropriate. It underscores to Grievant that he must be more careful and self-aware; and, it tells others that similar actions will result in sharp discipline. It also fits within minimum penalties in the Disciplinary Schedule. It accommodates the deference due management's disciplinary decisions.

Remedy

Grievant's 21 day suspension is converted to a 10 day suspension. He shall be made whole for monetary losses resulting from the excessive penalty.[12]

Attorney fees are entitled to consideration under the Backpay Act ("BPA"), 5 U.S.C. §5596 and §7701. But not at

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[12] Questions regarding the make whole amount, including whether it includes possible overtime and/or shift differentials is remanded to the parties. If necessary the matter can be referred back to this Arbitrator pursuant to the retention of jurisdiction described below.

this time. Such claims, if appropriately made, are best decided separately in post Decision and Award procedures that focus on the specific issues raised by the particular circumstances. See, *Allen and U.S. Postal Service*, 2 M.S.P.R. 420, 1980) and Elkouri and Elkouri, *How Arbitration Works*, 7th Ed., Kenneth May, Editor, BNA, 2012, pp. Ch. 18.5.E.

Accordingly, jurisdiction will be retained for claims, if any, for attorney fees and any related amounts. The Union shall have a reasonable time (presumably 60 days) to make its claims, together with the reasons, amounts and supporting evidence. The Agency shall reply within a reasonable time thereafter (presumably within 60 days). Affidavits and/or other supporting documents should accompany each filing. Unless compelling circumstances exist, there will be no need for an in-person evidentiary hearing or argument.

Meanwhile, the parties are urged to pursue a voluntary resolution of the attorney fee question. Absent appropriate appeal, Grievant's backpay shall not be delayed by any attorney fee question.

Retention of jurisdiction is not meant to indicate if attorney fees will be awarded or, if so, the amounts involved.

AWARD

1. Grievant's 21 day suspension was excessive and did not promote the efficiency of the service; and, accordingly, it lacks just and sufficient cause.

2. The suspension is converted to 10 days. Grievant's record shall be corrected and; since he would have received such benefits but for the Agency's actions, he shall be made whole for monetary losses in excess of 10 days.

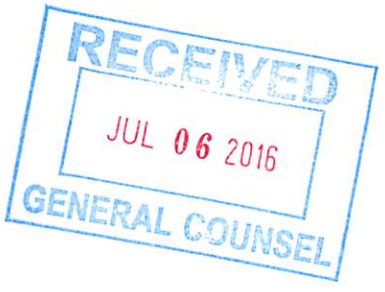
3. Without prejudice to either party's position, jurisdiction is retained regarding any issues regarding possible Union entitlement to attorney fees.

4. The Arbitrator shall retain jurisdiction for the sole and exclusive purpose of resolving questions, if any, arising from the remedy.

July 1, 2016

Date

MICHAEL D. GORDON, ARBITRATOR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