

In the Matter of the)	
Arbitration Between)	
)	
UNITED STATES BUREAU OF PRISONS-)	FMCS Case No. 13-02216-7
LEAVENWORTH PENITENTIARY)	
)	Termination of William Adams
and)	
)	
AMERICAN FEDERATION OF GOVERNMENT)	
EMPLOYEES-COUNCIL OF PRISON LOCALS-)	
LOCAL 919)	

The hearing in the arbitration between the United States Bureau of Prisons-Leavenworth Penitentiary and the American Federation of Government Employees-Council of Prison Locals-Local 919 was held in Leavenworth, Kansas on October 31, 2013. The Agency was represented by Jennifer Spangler, Esq. The Grievant was in attendance and represented by Daniel Bethea, National Representative. The Neutral Arbitrator was Mark Berger, Esq. The parties were given a full opportunity to present evidence, and examine and cross-examine all witnesses.

The parties agreed that the question presented was whether the Grievant, William Adams, was terminated for just and sufficient cause, and if not what remedy is appropriate. They stipulated that the dispute is properly before the instant Arbitrator for resolution pursuant to the terms of the governing labor contract, and further agreed that the Arbitrator may reserve jurisdiction for a period of sixty days to resolve any disputes that may arise in the implementation of the award.

FACTS

The United States Bureau of Prisons Penitentiary in Leavenworth, Kansas is responsible for the supervised detention of over 1,700 medium-security inmates and

over 400 minimum-security inmates. Warden Claude Maye is the Chief Administrative Officer of the facility. He is assisted by a number of high-level administrative personnel. Line personnel include individuals performing a wide variety of functions in the facility. They are represented by Local 919 of the American Federation of Government Employees-Council of Prison Locals.

There is a labor agreement between the Federal Bureau of Prisons and the Council of Prison Locals which includes a requirement that terminations be supported by just and sufficient cause. William Adams, a unit member represented by the Union, was terminated by the Warden and filed a grievance protesting that decision. On behalf of the Grievant, the Union maintains that the Agency lacked just and sufficient cause to support its termination decision, while the Agency insists that the circumstances surrounding the discharge amounted to just and sufficient cause. This disagreement between the parties is the dispute that is before the instant Arbitrator.

The circumstances leading to the Grievant's discharge can be traced to a staff meeting that was held in the Education Department on Thursday, December 6, 2012. The meeting was led by Ms. Valerie Vazquez who had recently taken over the position of Supervisor of the Education Department. According to the testimony of the Grievant and a coworker, supported by the testimony of Ms. Vazquez, the meeting included discussion of the allocation of new assignments to Department personnel. One of the positions at issue was that of Literacy Coordinator because the holder of that position was undertaking a new assignment.

According to the testimony of the Grievant, Ms. Vazquez specifically spoke to him about the Literacy Coordinator position and asked if he was interested. He

responded that he wanted a little time to think about it, and Ms. Vazquez agreed. None of this testimony was rebutted in the testimony presented by Ms. Vazquez.

Following the staff meeting, the Grievant talked to the individual who had served as the Institution's Literacy Coordinator, and after that conversation he decided that he was interested in the Literacy Coordinator position. The next day, sometime after 3:00 p.m. on December 7, 2012, he called Ms. Vazquez and asked if he could talk to her. At this point in time inmates had already left the Education Department area and only staff members were present. Ms. Vazquez said she was free to talk with the Grievant and he then went to her office.

The interchange between the Grievant and Ms. Vazquez in her office was an extremely short one, lasting approximately 51 seconds according to the video introduced as evidence in the hearing. The video only revealed the Grievant in the hallway area. However, based on when he turned left to enter Ms. Vazquez's office and when he appeared back in the hallway, a period approximately of 51 seconds had expired. The recording was visual only, with no audio available.

The testimony of the Grievant and Ms. Vazquez was largely consistent in describing the verbal interchange that took place inside the office. The Grievant sat down and began the conversation by asking about the Literacy Coordinator position. Ms. Vazquez then responded that she had already assigned the position to someone else. The Grievant asked why the decision had been made, and Ms. Vazquez responded by indicating that she would not discuss the reasons. The Grievant then said "Well, I guess we are done here." Ms. Vazquez conceded that at no point did the Grievant ever use any inappropriate language, nor did she testify that he raised his

voice at any point during the interchange. The exchange was short and abrupt, even though Ms. Vazquez testified that she did not view the conversation as over.

After making his final comment, the Grievant stood up and left Ms. Vazquez' office. Ms. Vazquez testified that upon leaving he slammed the door closed causing the covering over the door to shake. The Grievant testified that he did not slam the door and did not hear any sound from the door covering upon exiting the office.

After leaving Ms. Vazquez' office the Grievant walked down the hall to his own office. The video reveals that he did so at a normal pace with no sign of any agitation. He then entered his office and remained there for a short while. He testified that he spent the time logging off his computer, putting on his jacket, getting his backpack and preparing a leave slip for Ms. Vazquez because he was leaving work at that time.

Thereafter the video shows the Grievant walking in the hall toward the exit. It also shows Ms. Vazquez coming in view in the hall and the Grievant passing her as he left. According to Ms. Vazquez, she attempted to engage the Grievant in conversation at that point in order to continue her conversation with the Grievant after its abrupt end in her office. She testified that the Grievant did not respond to what she said other than by stating "just write me up." According to the Grievant, Ms. Vazquez asked about why he slammed the door as he left and he responded that he had not slammed the door. He denied making any reference to Ms. Vazquez writing him up.

Ms. Vazquez then returned to her office and in a short while called down to Control to inquire if the Grievant had left the facility. Control responded that he had. Although there was some discrepancy over the exact time at which the Grievant left the facility, the investigator reviewing the events ultimately determined that it was at 3:17

p.m., even though the Grievant had a shift that ended at 3:30 p.m.

On Monday morning the Grievant spoke to Ms. Vazquez and apologized for the way the meeting had gone the previous Friday. It was also on Monday that Ms. Vazquez denied the leave time request that the Grievant had left in her mailbox before he departed on Friday. Based on these events Ms. Vazquez wrote the Grievant up both for the interchange between the two and for his early departure from the facility without permission. These were converted into specific charges of unprofessional conduct, absent without leave, and failure to follow leave procedures.

It was recognized that the amount of time it would take for an employee in the Education Department to leave the facility varied because there were multiple gates that had to be opened before the employee could depart. Therefore, employees regularly left their offices before the exact end of their shifts. Portal to portal policy established that the workday started and ended at Control, not at the point that an employee arrived at his or her work station.

According to the Grievant, it was practice to put a leave slip in the Supervisor's mailbox if an employee was leaving early. Evidence was introduced showing leave slips that had been submitted on one day and approved on another. However, Ms. Vazquez testified that permission must be obtained before an employee may leave early, regardless of when the leave slip is signed, and the Grievant had not obtained such permission when he left work early on December 7, 2012.

Thereafter, an investigation was initiated into the December 7 incident between the Grievant and Ms. Vazquez. The evidence produced consisted of the submission of Ms. Vazquez, an oral reply by the Grievant and the video of the Grievant in the hall

during the relevant time period.

In the meanwhile, the Grievant continued to work at the facility's Education Department with no further incident. The Grievant was also subjected to an annual evaluation for the period ending March 31, 2013. The evaluation was completed on April 15, 2013 with concluding comments of both Ms. Vazquez and the Associate Warden reflecting fully acceptable work.

Nevertheless, the investigation proceeded and the evidence that was assembled was presented to the Warden for review. The material before him included the submissions of Ms. Vazquez and the Grievant, but not the video or the investigative report. The Warden also had before him the fact that the Grievant had received a 21 day suspension in June, 2012 for unprofessional conduct. The discipline in that case had not been grieved. Based on what was available to him, the Warden concluded that the alleged misconduct had occurred and that the appropriate penalty was discharge. This was reflected in the Warden's discharge letter to the Grievant dated May 7, 2013.

The Warden, in his testimony at the hearing, indicated that he placed very little weight on the charges of absent without leave and failing to follow leave procedure. Instead, the Warden felt that the charge of conduct unbecoming a correctional professional, based on the interchange between the Grievant and Ms. Vazquez, was the core of the Grievant's misconduct. The Warden emphasized that proper respect is due between correctional personnel because of the unique nature of a correctional institution. Should inmates sense conflict between staff there is a risk that they may use that knowledge to their advantage.

The Warden further stated that he had never before encountered any

correctional officer under his supervision with multiple disciplinary incidents so close in time. It led him to believe that he could not rely on the Grievant to follow institutional procedures and he questioned the Grievant's ability to continue working with his Supervisor. No mitigating circumstances were found by the Warden to justify reducing the penalty, nor did he believe that alternative sanctions would be adequate.

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

2. To be treated fairly and equitably in all aspects of personnel management;

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.

DISCUSSION

The administration at the United States Bureau of Prisons' Penitentiary in Leavenworth, Kansas is responsible for the safety and security of over 2,000 prisoners along with the staff guarding and servicing them. This is an environment involving the confinement of individuals who have been convicted of federal offenses. As Warden

Maye emphasized in his testimony, the environment is not the same as that of a civilian employer in the private sector.

The Warden also noted that the special character of the Penitentiary environment imposes special obligations on the institution's staff. Interactions that may be tolerable in other contexts are not necessarily acceptable within the prison environment. In light of this, the Warden's approach in requiring a greater degree of discipline among prison staff is clearly warranted.

Nevertheless, as Warden Maye also observed, each disciplinary incident must be evaluated on its merits. Not every incident of unprofessional conduct is the same, nor will the circumstances and background of an employee engaging in such misconduct be identical to that of other prison staff members who have committed similar acts.

In evaluating the incident at issue in this arbitration Warden Maye placed special emphasis on what he viewed as the disrespect shown by the Grievant to his Supervisor during their December 7, 2012 exchange. There are, of course, an infinite number of ways that disrespect can be shown by a subordinate to a superior. At the higher end of the continuum one can envision disrespect being shown through a public interchange involving offensive language, threatening gestures and the use of a loud voice. As Ms. Vazquez candidly testified, however, none of that occurred in her interchange with the Grievant. No one else was present, and the Grievant did not say a single offensive word, make any inappropriate gesture, nor did he speak to Ms. Vazquez in a loud voice.

What did happen is that the Grievant inquired about the opportunity to assume the Literacy Coordinator position which he understood had been offered to him the day before. He was told, however, that the position had already been filled. Ms. Vazquez,

in her testimony, did not dispute any of this.

Not surprisingly, the Grievant reacted to what he felt was the withdrawal of an offer, which naturally disappointed him, by inquiring about it. Ms. Vazquez was well within her rights in declining to explain why someone else received the position. But Ms. Vazquez also made it clear in her testimony that the decision was not going to change. Very abruptly, the Grievant ended the conversation and left the room.

Given the finality of the decision, nothing would have changed had the Grievant remained in the room. Nevertheless, the departure was abrupt, and clearly Ms. Vazquez was taken aback. However, the fact remains that the interchange between the two was entirely civil, all inmates had left the area, absolutely no one else was in the room or able to hear the conversation, Ms. Vazquez had not directed the Grievant to remain, and no specific inappropriate conduct or words were used by the Grievant. The decision as to how to respond to the Grievant's actions must account for all of these considerations.

Ms. Vazquez also indicated that the Grievant slammed the door as he left the room. However, stating that the Grievant slammed the door is a characterization. In this Arbitrator's judgment, to have slammed the door would have involved a purposeful action by the Grievant designed to demonstrate his anger by creating a loud noise as he left the room. The problem is that this is entirely inconsistent with the character of his interchange with Ms. Vazquez in the room. Moreover, as the video of him heading toward his office clearly reveals, there is absolutely no sign of agitation on the Grievant's part after he left Ms. Vazquez's office.

This does not mean that Ms. Vazquez was inaccurate in describing how she

perceived the door was closed. Rather, it is a recognition of the fact that doors are sometimes closed with more force than necessary through accident or inadvertence rather than as a purposeful act. The evidence of the Grievant's conduct in Ms. Vazquez's office as well as the video of his walking to his office after he left her office is inconsistent with the suggestion that he closed the door forcefully and loudly and in anger. Rather, the circumstances suggest that his mind was on the disappointment he was feeling and as a result he was not conscious of how he was closing the door. The evidence leads to the conclusion that if the door was closed with more noise than Ms. Vazquez thought appropriate, it was more likely an accident rather than a purposeful act of slamming the door designed to demonstrate anger or offense.

After leaving Ms. Vazquez's office the video reveals the Grievant walking down the hall to his office, remaining inside a short time, and then leaving wearing his jacket and carrying his backpack. He walked at a normal pace down the hall toward the exit, but before he reached it the video reveals him passing by Ms. Vazquez.

According to Ms. Vazquez, at this point she asked the Grievant about the interchange that had just occurred in her office. She testified that his response was "Just write me up." The Grievant's testimony was that she asked why he slammed the door and he responded that he had not done so. However, regardless of what was said, the video reveals that the interchange was extremely short and the Grievant continued on to the Control area in order to exit the facility.

The parties are in obvious disagreement as to exactly what was said during the hall interchange between the Grievant and Ms. Vazquez. The Union was particularly concerned that the Agency might have been automatically taking the word of a

Supervisor over that of the Grievant even though there was no other supporting evidence to confirm the Supervisor's testimony.

Making credibility judgments in a case such as this is understandably difficult. However, it is this Arbitrator's belief that the exact version of the interchange is not controlling. As long as the words used were not overtly disrespectful, which is confirmed by the testimony of the Supervisor, exactly what was said makes less of a difference than the fact that the Grievant clearly was not prepared to stop and talk with his Supervisor even though she may have made a comment that called for something more than a brief one sentence response.

It is fair to conclude that the Grievant did not handle himself well in his interchange with Ms. Vazquez. Although he did not say anything overtly offensive, nor did he raise his voice or physically handle himself in an antagonistic manner, the fact remains that he cut off an interchange which his Supervisor had not concluded. Even the Grievant recognized the inappropriateness of how all this transpired as demonstrated by the fact that he apologized the next workday for how the contact between the two developed.

In short, the Grievant did not handle himself as he should have with Ms. Vazquez because of his abrupt termination of the interchange between the two. The question then becomes what consequence should arise as a result of this.

As the record of penalties imposed by the Agency reveals, and consistent with the testimony at the hearing by Warden Maye, no two disciplinary cases are identical. Therefore, the penalty imposed must reflect the totality of circumstances applicable to the employee's misconduct. Moreover, as an instance of discipline imposed on a

federal employee that is challenged in an arbitration proceeding, the role of the Arbitrator with respect to the penalty determination is to apply the same rules as the Merit System Protection Board (MSPB).¹ In doing so the Arbitrator must not substitute his or her judgment for that of the official responsible for the penalty decision.²

In this case Warden Maye considered the evidence that was supplied to him along with the fact that the Grievant had recently been given a 21-day suspension.³ He also weighed the unique nature of the prison environment, particularly the fact that any sign of dissension between staff members could be manipulated by inmates to their advantage. He judged that the Grievant was unlikely to be able to work with his Supervisor in the future, and believed that rehabilitation and alternative sanctions would be insufficient. These considerations led the Warden to conclude that termination was the appropriate penalty.

The judgment of Warden Maye in determining what penalty to impose in this case is entitled to the utmost respect and deference. The Warden is the official charged with the duty to maintain the safety and security of the facility, and he is the one with the broadest overview of all of the factors relevant to insuring proper maintenance of the facility. As the responsible Agency official, "due weight [must be given to the Warden's] primary discretion in maintaining employee discipline and efficiency."⁴ Thus, where the penalty imposed is within legal limits, it should be sustained unless it is "so harsh and

¹ Where this is not done the Arbitrator's "penalty determination is not entitled to deference, and the Board will conduct its own analysis." *Cambridge v. Department of Justice*, 111 M.S.P.R. 152, 157 (2009).

² In *McManus v. Dep't of Justice*, 81 M.S.P.R. 672, 657 (1999) the MSPB so held in the context of the mitigation of a penalty by an administrative law judge.

³ The prior penalty, while relatively recent, involved an offense of an entirely different character.

⁴ *Stuhlmacher v. U. S. Postal Service*, 89 M.S.P.R. 272, 280, ¶ 20 (2001).

unconscionably disproportionate to the offense that it amounts to an abuse of discretion."⁵ In the very broadest sense, disagreeing with the Warden in the instant case is not something that should be lightly undertaken.

However, as described below, the judgment reached herein by the instant Arbitrator is that the termination penalty should be rescinded and replaced by a 28-day suspension. But this should not be understood as second guessing the Warden. Rather, it is a reflection of the fact that the full range of relevant circumstances and evidence was not available to the Warden when he made his decision.

As the Warden testified at the hearing, he was presented with the evidence packet prior to reaching his decision. That packet contained written statements from the Supervisor describing what her position was with respect to the interchanges she had with the Grievant on December 7, 2012. However, in a case such as this, a cold and dry written statement does not give a fair reflection of what actually happened. That comes out in testimony and cross examination which, unfortunately, the Warden was not able to hear when he made his decision.

It is true that the abruptness of the Grievant's termination of his conversation with Ms. Vazquez is revealed, but this can be viewed as a reasonable effort by the Grievant to avoid a confrontation since, according to his testimony, a commitment to allow him to take up the Literacy Coordinator position had withdrawn without his knowledge. Despite this disappointment, the Grievant was at all times civil and did not say or do anything that could be construed as unprofessional. Instead, it was his action in

⁵ Batten v. U.S. Postal Service, 101 M.S.P.R. 222, 226, aff'd per curiam, 208 F.Appx. 868 (Fed. Cir. 2006), citing Parker v. U.S. Postal Service, 819 F.2d 1113 (Fed. Cir. 1987).

withdrawing from the interchange that forms the basis of the Warden's conclusion that the Grievant acted unprofessionally and with disrespect.

Significantly, the Warden also did not have available to him the video that formed part of the investigation. Unfortunately, the timing of the investigation was such that it was not included in the investigative packet which the Warden received. In this Arbitrator's judgment the video was an important piece of evidence because it demonstrated the fact that the Grievant was not overtly agitated during the episode on December 7, 2012, a factor which lessens the severity of any offense he caused.

Based upon the testimony at the hearing, this Arbitrator concludes that the Warden also did not have the Grievant's full-year evaluation available to him when he made his penalty decision. The Warden testified that he did not believe the Grievant could continue to work with his Supervisor after the incident in question. However, the Grievant's full year evaluation signed by both Ms. Vazquez and the Associate Warden found the Grievant's work performance fully satisfactory, a conclusion which strongly supports the view that the Grievant, in fact, was able to work with his Supervisor following the December 7, 2012 interchange between the two.

Significantly, the evaluation was prepared approximately four months after the December 7th incident. It reported fully acceptable work performance by the Grievant for a substantial period of time after the incident at issue in this proceeding. Moreover, the conclusion that the Grievant could continue to work with his Supervisor is further bolstered by the fact that the Grievant took the affirmative step of apologizing for the way the December 7th interchange transpired at the next available opportunity.

Properly understood the instant decision should not be viewed as a reversal of

the judgment of Warden Maye in this case. Rather, it is a reflection of the fact that the full range of relevant circumstances was not made available to the Warden when he reached his decision. The Warden could not weigh all relevant factors because the evidence made available to him and on which he based his decision did not include important information, and therefore the penalty decision he made was unreasonable in light of the totality of the circumstances as they actually existed.⁶

The Douglas factors, which govern the imposition of disciplinary penalties, require that the penalty imposed relate to the nature and seriousness of the offense.⁷ However, in this instance the full scope of the nature and seriousness of the offense was not adequately presented to the Warden when he made the penalty decision, and this resulted in the imposition of an unreasonable penalty. Given the complete evidence as presented through testimony and cross examination at the hearing as well as through documentary and video evidence, it is this Arbitrator's conclusion that the Agency lacked just and sufficient cause to warrant the Grievant's termination for the incident that took place on December 7, 2012.

Nevertheless, the Grievant did leave the facility before his scheduled end of shift, and although he left a leave slip for his Supervisor, he had not obtained permission to depart early before he left. However, all inmates had left the area, the Grievant had

⁶ "Mitigation is appropriate only where the agency failed to weigh the relevant factors or the agency's judgment clearly exceeded the limits of reasonableness." *Balouris v. U.S. Postal Service*, 107, M.S.P.R. 574, 576-577 (2008).

⁷ *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280, 305 (1981) states that relevant factors in the review of a penalty decision include 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."

time available that could be used to cover the minutes involved, and there was legitimate uncertainty as to whether securing after the fact approval for leaving early would be acceptable. In accord with the Warden, I view this as the minor portion of the Grievant's transgression on December 7, 2012.

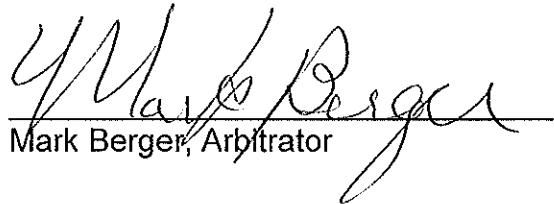
Nevertheless, some fault can be found in the Grievant's abrupt termination of his interchanges with Ms. Vazquez. At the very least he was disappointed that a commitment that he felt that he had received had been rescinded, and he may have been cutting his conversation short because he felt nothing further could be achieved and continuing the interchange could have proven counterproductive. It is true that no inmates were around when this occurred, but this remains inappropriate conduct between the Grievant and his Supervisor.

In light of the fact that the Grievant previously received a 21-day suspension, albeit for an offense of an entirely different character, this Arbitrator believes that something more substantial is required in response to the December 7, 2012 incident. That is why the termination is being replaced by a 28-day suspension. Having heard and evaluated the Grievant's testimony at the hearing, it is my strong belief that the Grievant will not engage in misconduct in the future.

AWARD

The Agency lacked just and sufficient cause to terminate the Grievant based on the incident that occurred on December 7, 2012. However, the facts and circumstances warrant imposing a 28-day suspension for the Grievant's actions on that day.

As a remedy the Grievant shall be promptly reinstated to his former position and made whole for all losses incurred beyond the 28-day suspension authorized by this ruling. Consistent with the agreement of the parties, jurisdiction is hereby retained for a period of 60 days to resolve any disputes which may arise in the implementation of this award.


Mark Berger, Arbitrator

Kansas City, Missouri
January 21, 2014