

BEFORE DOUGLAS BONNEY, ARBITRATOR

In the Matter of the Arbitration Between

FEDERAL BUREAU OF PRISONS,)
U.S. MEDICAL CENTER FOR PRISONERS,)
SPRINGFIELD, MISSOURI,)
)
Agency,)
)
and)
)
AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 1612,)
)
Union.)

FMCS Case No. 15-02504-8
(Lanza-Forrester Suspension)

Appearances:

For the Agency: Steven R. Simon, Esq., BOP-Labor Law Branch-West, Phoenix, Arizona.

For the Union: Evan Greenstein, Esq., Legal Rights Attorney, AFGE, Washington, D.C.

Hearing: April 13, 2016, in Springfield, Missouri.

Last Brief Received: August 8, 2016.

OPINION & AWARD

This case involves a grievance challenging the twenty-one day suspension of April Lanza¹ (“the grievant”) by the Federal Bureau of Prisons (“BOP” or “the Agency”). I heard this case in Springfield, Missouri, on April 13, 2016. A court reporter was present and transcribed the proceedings. At the hearing, the parties stipulated that this case presents no issue of arbitrability, either substantive or procedural, and that the case is properly before me for a decision. Moreover, the parties had a full opportunity to introduce evidence and to examine and cross-examine witnesses. Following the hearing, the parties submitted written briefs, with the

¹ At the time of the incident at issue in this case, the grievant’s last name was Lanza. Since then, the grievant has divorced and remarried. She now goes by her new married last name of Forrester. In this decision, however, I will refer to the grievant by Lanza, which was her last at the time of the incident at issue in this case.

last brief received by mail on August 8, 2016, thus closing the hearing record in this case.

Article 32(g) of the parties' Master Agreement requires the arbitrator "to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing."

Issue

Was the grievant suspended for just and sufficient cause? If not, what is the appropriate remedy?

Findings of Fact

The Agency operates federal prisons and detention centers throughout the United States. This case arose at the at the U.S. Medical Center for Prisoners ("the prison") in Springfield, Missouri, which houses federal prisoners who have serious, often long-term, physical and mental illnesses. The prison sits on a large plot of land nearly a mile square, and it includes a secure building complex where the inmates are housed and additional out buildings.

The BOP prohibits weapons from being brought onto its property, and the prison has many signs reminding staff and visitors of the prohibition against weapons on the property. For instance, signs are posted at the road entrances to the property, along the roads, near the parking lots, and next to the doors through which staff enter the prison at the beginning of their shifts. In order to enforce this weapons ban, staff members reporting to work must pass through a metal detector and must permit any belongings they carry into the prison to pass through an x-ray machine.

The grievant has been a Registered Nurse (RN) for about ten years and began working at the prison in September 2013. At all times material to this case, the grievant worked at the prison as a nurse. The grievant is a good nurse. All of the prison's staff members, including nurses and other members of the medical staff, are trained law enforcement officers. Like many

corrections officers, the grievant owns a gun, specifically a Smith & Wesson 9mm automatic. The grievant also has a valid concealed carry permit and often carries her handgun off duty for personal safety. Her normal practice is to place her gun in a safe at night, but she does not always remember to do so. In early 2015, the grievant was going through a separation, which caused her to feel like she needed to carry her concealed weapon. During that time, she often carried her pistol.

On Monday, February 2, 2015, the grievant returned to work after three days off. As usual, she entered the prison through the regular staff entrance, placed her purse on the x-ray machine's belt, and walked through the metal detector. As her purse went through the x-ray machine, the grievant saw on the x-ray machine's screen that her gun was in her purse. When she saw the image, she exclaimed "oh, my God, that's mine!" The staff member operating the x-ray machine also saw the image of the gun in the grievant's purse but had never before encountered that situation and had no idea what to do. None of the employees working at the staff entrance knew what to do. Someone told the grievant to pick up her purse – which still contained her gun – and sit on a nearby bench while they sorted out the protocol for dealing with the introduction of a gun into the prison. Ms. Lanza sat on the bench – within an arm's reach or so of her gun – for an extended period of time. Ms. Lanza was terrified while she sat on the bench waiting for command staff to decide what to do.

Eventually, Special Investigative Agent Scott Anderson reported to the entrance and secured the weapon, the grievant's holstered 9mm automatic. Although no bullet was in the chamber, the gun did contain a magazine with seven bullets in it.

Following this incident, the Agency placed Ms. Lanza on home duty for over three months while an investigation proceeded. Although the Agency paid Ms. Lanza while she was

assigned to home duty, she missed out on her regular overtime opportunities, which she testified vaguely were substantial. Once the investigation was concluded, Director of Nursing Janet Beyer – Ms. Lanza’s boss – recommended that the Agency “remove” the grievant from the federal service, which is the government’s way of saying it intended to fire Ms. Lanza. The grievant and the Union appealed the proposed removal. During that appeal process, Ms. Lanza submitted a written statement to Warden Linda Sanders. The grievant also met with the Warden for a personal discussion. As a result of those appeals, the Warden decided to reduce the punishment from removal to a suspension of twenty-one (21) days. The Union then submitted this dispute to arbitration in accordance with the provisions of the Master Agreement.

Positions of the Parties

Agency: The Agency’s argument is straight-forward and simple: The grievant was suspended for just and sufficient cause. Specifically, the Agency argues that a twenty-one day suspension for the inadvertent introduction of a loaded firearm into a federal prison is proper, citing decisions of arbitrators and the Merit Systems Protection Board (“MSPB”) in support. In response to some of the arguments that the Union presaged at the hearing, the Agency further argues that the grievant received due process, that the screening process for contraband is essential to institutional security, that the Union’s attempt to shift the blame to the employees working at the entry point is baseless, and that the Warden’s decision deserves substantial deference. For all of these reasons, the Agency asks that the grievance be denied in its entirety.

Union: The Union posits a much longer and more intricate series of arguments in support of its basic contention that the suspension here was without just cause. Specifically, using the so-called seven tests of just cause and with reference to several other similar arbitration decisions, the Union argues that the Agency subjected the grievant to disparate treatment by

suspending her but taking no disciplinary action against the x-ray machine operator and other employees working at the staff entrance on February 2, 2015. The Union further argues that the Agency's choice of penalty was unreasonable because "Warden Sanders was defensive and sarcastic" when describing how she decided to reduce the discipline from removal to a twenty-one day suspension and because the Agency failed to practice progressive discipline in direct violation of the labor agreement. Moreover, the Union contends that the Agency has implemented a zero tolerance policy with respect to unintentional introductions of guns into BOP facilities, violated its promise that the entry searches will not result in punishment, and failed to properly apply the Douglas Factors. For all these reasons, the Union submits that the suspension was without just cause and asks for make-whole relief as a remedy.

Opinion

Under Article 30(b) of the parties' Master Agreement, a suspension for more than fourteen days constitutes an "adverse action." Article 30(a) of the Master Agreement provides that "disciplinary and adverse actions . . . will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply." In light of this just cause provision, the Agency bears the burden of proving that it had just and sufficient cause to suspend the grievant. In assessing the just cause question, an arbitrator must be certain that the alleged misconduct occurred and that the penalty was warranted. *See Federal Bureau of Prisons*, 131 LA 536, 542 (Betts 2012).

These standards mirror the requirements that the MSPB must apply in considering a federal employee's appeal of an adverse action under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 7101, *et seq.* "If the employee elects so to proceed, and the union or the agency invokes binding arbitration, . . . the arbitrator is to apply the same substantive standards

that the Board would apply if the matter had been appealed” to the MSPB. *Cornelius v. Nutt*, 472 U.S. 648, 652 (1985). Under the CSRA, “the decision of the agency shall be sustained . . . only if the agency’s decision . . . is supported by a preponderance of the evidence.” 5 U.S.C.

§ 7501(c)(1). The CSRA further provides that “the agency’s decision may not be sustained . . . if the employee . . . shows that the decision was not in accordance with law.” 5 U.S.C.

§ 7501(c)(2).

As part of its review of agency-imposed discipline, the MSPB has the authority to reduce penalties in adverse action matters. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 302 (1981) (requiring that discipline result from a careful and reasoned analysis of twelve factors). These so-called Douglas Factors include: (1) the seriousness of the offense; (2) the effect of the offense on the employee’s ability to perform at a satisfactory level and its effect upon the supervisors’ confidence in the employee’s ability to perform assigned duties; (3) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; (4) the notoriety of the offense or its impact upon the reputation of the agency; (5) whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; and (6) 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. An agency’s failure to consider a significant mitigating circumstance in choosing a penalty may warrant reversal of the agency’s decision, *VanFossen v. U.S. Dep’t of Housing & Urban Dev.*, 748 F.2d 1579, 1581 (Fed. Cir. 1984), but the MSPB has indicated that it “will not disturb a removal if it is the maximum reasonable penalty which may be imposed considering all relevant factors in a case.” *Murphy v. Dep’t of Navy*, 25 M.S.P.R.

333, 338 (1984). In other words, an agency's decision with respect to penalty is entitled to significant deference.

Here, there is no question that the grievant violated the BOP's explicit and well-publicized policy prohibiting staff from bringing a gun onto BOP property. The grievant admitted that she broke the rules by inadvertently and unknowingly bringing her Smith & Wesson 9mm automatic into the U.S. Medical Center for Prisoners in her purse on February 2, 2015. In its brief, the Union essentially concedes this point. Thus, the Agency has shouldered the first part of its burden here by establishing that the grievant was guilty of misconduct.

The Union's only argument that even touches on the first part of the just cause calculus is its claim that the results of employee searches are not meant to be punitive and that the Murphy Award requires that the suspension in this case be overturned. As Arbitrator Gordon opined in his recent arbitration decision, "the *Murphy Award* is of no moment here." *FCI-Rochester* at 14. For the reasons elucidated by Arbitrator Gordon, I reject the Union's arguments based on the Murphy Award.

The real question in this case is whether the twenty-one day suspension imposed as punishment for the grievant's misconduct was reasonable. All of the other arguments raised in the Union's brief really go to this second step of the just cause analysis.

Both the Union and the Agency rely on the so-called seven tests of just cause, which are drawn from Arbitrator Daugherty's decision in *Enterprise Wire Co.*, 46 LA 359, 362 (1966). The seven tests have been subjected to withering academic criticism. See John Dunsford, "Arbitral Discretion: The Tests of Just Cause," in *Arbitration 1989: The Arbitrator's Discretion During and After the Hearing*, Proceedings of the 42nd Annual Meeting of the National Academy of Arbitrators, Gruenberg, ed. (BNA Books 1990) 23. But, regardless of whether Arbitrator

Daugherty's analytical rubric is sound or not, the vast majority of labor arbitrators have long held that the specific concepts the Union relies on in this case – notice, consistency of treatment, and the imposition of an appropriate penalty – are required under the elastic concept of just cause. Because I agree with the weight of arbitral authority on these matters, I will address each of the Union's arguments in turn.

I first consider the Union's argument that the Agency unfairly subjected the grievant to disparate treatment when it suspended her but took no action against the employees who botched the search procedures once the x-ray machine revealed the gun in the grievant's purse. In order to constitute disparate treatment, the charges and the circumstances surrounding the charged behavior must be substantially similar. *Lewis v. Dep't of Veterans' Affairs*, 113 M.S.P.R., 657, 663 (2010). "When an employee raises an allegation of disparate penalties in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." *Id.*

In this case, the grievant brought a gun into the facility in clear violation of well-publicized BOP policy. At worst, the employees working the entrance on February 2, 2015, failed to follow BOP policies on responding to an incident involving the introduction of contraband into a prison. Thus, the circumstances surrounding these two incidents are not substantially similar. Even assuming *arguendo* that the circumstances were substantially similar, however, the Agency adequately proved that it had a legitimate reason for the difference in treatment, specifically that the introduction of contraband presents a more serious threat to institutional security than does the failure of employees to follow protocols for responding to the identification of a gun at the facility's entrance. Thus, I reject the disparate treatment claim.

Next, this is clearly not the parties' first rodeo with respect to the discipline of employees who inadvertently introduced a gun into a BOP facility. Thus, I must consider the effect of prior relevant arbitration awards that the parties have cited in support their respective positions. Specifically, the parties introduced and highlighted nine past arbitration decisions involving strikingly similar facts. The following table includes the basic details of the cited cases.

Recent Gun-Contraband Discipline Arbitration Awards in BOP Cases					
Award Date	Arbitrator	Institution	Recommended Discipline	Discipline Imposed	Arbitration Award
10/18/10	Brand	USP-Atwater	Removal	20 day suspension	Written Reprimand (20 days of back pay)
8/14/12	Mehlman	MDC-Brooklyn	Removal	21 day suspension	Written Reprimand (21 days of back pay)
4/29/13	Foster	FCI-Fairton	Removal	21 day suspension	2 day susp. (21 days of back pay)
7/29/13	Durham	FDC-Houston	Removal	30 day suspension ²	Grievance Denied
11/29/14	Yaffe	FCI-Allenwood	Removal	45 day suspension ³	2 day suspension on gun charge (33 days' back pay) ⁴
1/5/15	Gandel	MDC-Brooklyn	Removal	21 day suspension	Grievance Denied
1/20/15	Berger	FCI-Mendotta	Removal	21 day suspension	5 day susp. (16 days of back pay)
3/23/16	Bendixen	FCI-Estill	Removal	21 day suspension	Grievance Denied
7/1/16	Gordon	FCI-Rochester	Removal	21 day suspension	10 day susp. (11 days of back pay)

² In the FDC-Houston case, the Agency suspended the grievant for 30 days in part because he had been suspended for a prior weapons-related incident within months of inadvertently bringing a gun into the facility. That fact distinguishes the FDC-Houston case from the present case at least in part.

³ In the FCI-Fairton case, the Agency suspended the grievant for 45 days for three charges of misconduct. Arbitrator Foster's award does not state how the Warden parceled out the originally imposed suspension among the three charges of misconduct.

⁴ Arbitrator Foster's award sustained the discipline for two charges, including the firearm violation, but he reduced the suspension from 45 days to 12 days and indicated that 2 days was the proper length of suspension "for the unintentional bringing of the firearm into the facility." Foster Award at 8.

All nine of the cited arbitration decisions involved employees who inadvertently brought a gun into a BOP prison or detention facility. In each instance, the Agency initially proposed removal, but the responsible warden reduced the penalty to a long suspension, usually twenty-one days. Each of these cases was decided by experienced and well-respected labor arbitrators, some of whom upheld the lengthy suspensions as imposed and others of whom overturned lengthy suspensions, all on essentially the same facts. Arbitrator Gordon concluded, correctly in my view, that “[t]he two arbitral approaches are irreconcilable. . . . The differences depend less on minute factual differences than the individual sensibilities of the arbitrators.” *FCI-Rochester* at 19. For these reasons, the previous arbitration awards provide little, if any, helpful guidance for the decision of this case. Ultimately, my decision depends on whether – in light of the Douglas Factors and the Master Agreement’s specified preference for progressive discipline – the Agency imposed a reasonable penalty.

In this case, Warden Sanders testified very generally that she imposed a twenty-one calendar day suspension after consulting with responsible human resources personnel and based on her consideration of the Douglas Factors including mitigating factors such as the grievant’s good work record and forthright admission of error. But Warden Sanders did not provide any details about how she considered the relevant Douglas Factors. Instead, her invocation of the Douglas Factors struck me as rote and devoid of meaningful consideration and analysis.

The nature and seriousness of the offense, the employee’s job as a law enforcement officer, and the fact that the grievant had clear notice that the Agency prohibits weapons on its property all weigh in the Agency’s favor. The introduction of contraband – especially a gun – into a prison is clearly a serious problem that prison administrators must respond to effectively in order to maintain the security of the institutions they run. In addition, because law enforcement

officers are expected to set an example for other Federal employees and for the public at large, they are properly held to a higher standard of conduct. *See Martin v. Department of Transportation*, 103 M.S.P.R. 153 (2006).

But the other relevant Douglas Factors weigh heavily in favor of a less severe penalty than the twenty-one day suspension actually imposed. For instance, the grievant is a good nurse, had no prior discipline, is still able to perform her job and work with her colleagues despite her misconduct, and showed a clear potential for rehabilitation in her discussions with Warden Sanders in which Ms. Lanza accepted the Warden's suggestion that she keep her gun in a separate "hot" bag marked with a ribbon or other indicator. Two of the Douglas Factors, however, stand out as particularly important. First, the penalty imposed in this case dramatically exceeded the minimum ten day suspension established in the Agency's table of penalties for the introduction of contraband. Warden Sanders failed to explain adequately why she rejected the minimum specified suspension in favor of twenty-one days in light of all the other factors that suggested a less severe penalty was warranted. Second, the facts of this case clearly indicated that lesser alternative sanctions would be adequate and effective to deter future conduct by Ms. Lanza. On this record, it is quite obvious that the grievant has been adequately chastened by her experience and will not repeat her inadvertent misconduct by bringing a gun back into the facility. When properly and carefully considered, it is obvious that the Douglas Factors countenanced a less severe penalty than the one the Agency imposed here.

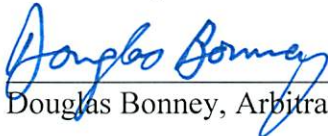
In this case, the grievant committed a serious violation of the BOP's rules and deserved a significant punishment. But, even so, the twenty-one day suspension imposed was "so unreasonably disproportionate as to be arbitrary." *FCI-Rochester* at 21. As a remedy, the grievant's twenty-one day suspension is converted to a ten day suspension, which is the

minimum penalty provided for introduction of contraband under the relevant table of penalties. Moreover, the Agency shall make the grievant whole for monetary losses resulting from the excessive penalty.⁵ Any claims for attorney's fees are premature at this point but may be made consistent with normal post-decision procedures. Accordingly, I will retain jurisdiction for ninety (90) days over questions related to attorney's fees and other appropriate post-award matters including the implementation of the remedy I have ordered.

Award

1. The grievant's twenty-one day suspension lacked just and sufficient cause because it was excessive and unreasonable and did not promote the efficiency of the service.
2. The suspension is converted to ten days.
3. The Agency shall correct the grievant's personnel records to reflect the ten day suspension and to delete all references to the imposition of a twenty-one day suspension.
4. The Agency shall make the grievant whole for monetary losses in excess of a suspension of ten days.
5. I retain jurisdiction for the sole purpose of resolving issues regarding attorney's fees and the implementation of the remedy.

Dated: August 30, 2016



Douglas Bonney, Arbitrator

⁵ The grievant testified that she lost significant overtime opportunities during the three and a half months she was on home duty, but the Union offered no specific evidence showing how much overtime the grievant lost. In its brief, the Union specifically requested that I include missed overtime opportunities in the back pay award. The relevance of the loss of overtime opportunities during the grievant's stint on home duty is unclear to me. If the Union seeks to recoup missed overtime during the period of home duty, I do not think that issue is properly before me in this case, in which the sole issue is whether the Agency had just cause to suspend the grievant for 21 days. But, if the grievant missed overtime opportunities during the time she was suspended in excess of the first ten days of her suspension, then the back pay award should probably include missed overtime pay. If the parties dispute that the remedy should include overtime missed during the last 15 days of the suspension and cannot resolve it themselves, they can always bring it back to me during the time in which I have retained jurisdiction.