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106 LRP 70059

Davis-Monthan Air Force Base, Arizona and American Federation of Government Employees, Local 2924

Federal Arbitration

06-54859-A

0-AR-4168

November 10, 2006

Related Index Numbers

1.051 Discipline

1.066 Mitigation of Discipline

6.037 Mental Stress

1.087 Safety

37.039 Discrimination and Unfairness

37.045 Excessive

37.069 Just Cause

37.102 Progressive

37.112 Reprimand

37.130 Suspensions

73.003 Carelessness

73.016 Failure to Follow Correct Operating Procedures

78.173 Tools

109.035 Reduction

Judge / Administrative Officer

Barbara Bridgewater

Ruling

Arbitrator Barbara Bridgewater found the grievant guilty of careless work performance. However, concluding he was the victim of disparate treatment, she reduced a three day suspension to a reprimand.

Meaning

The union's showing that one other employee failed to report a lost tool in a timely manner was sufficient to convince the arbitrator that the grievant did not receive fair and equitable treatment as required by the agreement.

Case Summary

The agency proposed the grievant's suspension for 14 days because he admitted he had been careless in conducting his tool inventory. He reported a tool missing four days after he knew of the fact. As a result, the agency had to impound three aircraft and expend 72 hours searching for the tool.

The grievant claimed he had not lost a tool in more than 30 years, his work record for that period was spotless and his concentration during the time in question was affected by the poor health of his father.

Noting the grievant's admission of his offense and the other mitigating factors he cited, the deciding official reduced the suspension to three days.

The arbitrator noted that the grievant committed a serious offense in failing to properly inventory his tools. She also noted that he did not own up to the missing tool for four days. She concluded it was reasonable, after a careful consideration of the Douglas factors and the table of penalties, for the deciding official to conclude a three day suspension was warranted. The arbitrator credited the testimony of a human resources specialist that several employees had received suspensions for careless work.

However, the arbitrator found a fatal flaw in the agency's case. The union established that one other employee had lost a tool and did not report the fact for two days. He received only a counseling notation in his supervisor's file. The arbitrator noted that this employee was not in the same chain of command as the grievant's deciding official, nor was it necessary for the agency to impound aircraft. Nonetheless, the arbitrator found that both employees were guilty of violating the same agency instruction. She concluded that the grievant was the victim of disparate treatment, and the agency was therefore in violation of the fairness and equity clause of the agreement.

Full Text

APPEARANCES:

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Decision and Award

Jurisdiction

This arbitration arises pursuant to the Labor Management Relations Agreement (LMA) between Davis-Monthan Air Force Base (Agency, Employer or AFB) and American Federation of Government Employees, Local 2924, AFL-CIO (Union or AFGE). Barbara Bridgewater served as the Arbitrator and under Article 31 Section 8, the arbitrator's award is binding on all parties. However, pursuant to Article 31 Section 9, either party may file an exception to the award with the Federal Labor Relations Authority.

The hearing was held on 19 July 2006, at the Davis-Monthan AFB courtroom in Tucson, Arizona. Both parties were afforded full and fair opportunity to examine and cross-examine witnesses, introduce relevant exhibits and for oral and written argument. The proceedings were transcribed by Kenneth W. Schippers, CCR No. 50248. The Arbitrator received the transcript on August 19, 2006, and the post hearing briefs were received in a timely manner (as mutually agreed to by counsels for the AFB and Union), on September 11, 2006.

During the hearing, the parties could not agree on a joint submission of the issue. The Agency proposed "Did the Grievant exercise careless workmanship by failing to perform proper tool inventories between 30 March 2005 and 5 April 2005? If yes, was the Agency's 3-day suspension appropriate?" The Union felt the issue should be "Was the disciplinary action based on just and sufficient cause with emphasis on sound employee management relations and was the discipline rehabilitative or punitive, and was the discipline timely?" The Arbitrator, in accordance with her authority, under Article 31 Section 4, framed the issue set forth, below.

Issue

Was there just and sufficient cause for the 3-day suspension of John Pennington, and was the discipline timely? If not, what is the appropriate remedy?

Relevant Provisions of the Agreement

ARTICLE 28

DISCIPLINE AND ADVERSE ACTIONS

Section 1. Disciplinary action is a responsibility of the Employer. Disciplinary actions must be based on just and sufficient cause with emphasis on sound employee-management relations. The Employer recognizes that the prime objective of disciplinary action is rehabilitation, not punishment. Discipline and adverse actions, when applied will be in accordance with law, rule, regulation, and this Agreement. In all aspects, employees will be treated fairly and equitably.

Section 4. For the purposes of this agreement, disciplinary action includes oral admonishment, reprimand, and suspension of 14 days or less. Adverse actions are defined as removals, suspensions for more than fourteen (14) days, reductions in grade or pay taken for cause or furloughs for thirty (30) days or less. Where an employee is subject to discipline, it is agreed that within 30 calendar days of the offense, the Employer's awareness of the offense, or the completion of an investigation of the matter by other than the supervisor, whichever occurs later, the Employer should impose or serve upon the employee one of the following:

a. In the case of oral admonishment, the disciplinary action itself; or

b. In the case of a written reprimand, suspension, or removal, a notice of proposed reprimand, suspension, or removal; or

c. If, for reasons of significantly changed circumstances, further delay in taking the action is anticipated, a notice from the Employer to the employee advising that disciplinary action is being considered, the general basis therefor, and that the

employee will be informed when a decision has been made shall satisfy the requirements of this section.

List of Exhibits

Joint Exhibits:

1. AFB/AFGE Labor Management Relations Agreement

2. Notice of Proposed 14-day suspension, dated 7 July 2005

3. Grievant's 28 July 2005 Response to Deciding Official Jeffrey Peterson

4. *Douglas* Factors

5. Notice of Decision to suspend 3 calendar days, dated 30 August 2005

6. AMARC Instruction 21-107, Tool Control and Accountability

7. Air Force Instruction 36-704, 22 July 1994, Discipline and Adverse Actions

8. Memo to Grievant from Supervisor Earl Wade, dated 21 April 2005

9. Grievant's Tools Inventory Form 309

10. March and April 2005 Calendar

11. AFMC Instruction 21-107, Tool Control and Accountability Program

Agency Exhibits:

1. Memo for Record by Supervisor Earl Wade, dated 20 April 2005, re Grievant's Tool Box Inspections

2. Handwritten Memo by Mr. Wade, dated 5 April 2005

3. Another Memo for Record by Mr. Wade, dated 20 April 2005, re Grievant's Tool Box Inspections

4. Quality Assurance Impoundment Log

5. AFMC Form 310 Lost/Found Item Report, dated 5 April 2005

Union Exhibits:

1. Agency e-mails dated 5 May 2005 re 14-day proposed suspension

2. 2005 Lost Tool Trend Analysis -- AMARC Quality Assurance

3. Supplemental Sheet to Employee Work Folder, dated 14 December 2004, re Theodore Rodriguez failed to report a tool missing for two days.

Background

On 5 April 2005, John Pennington (Grievant) told his supervisor he had lost a tool (hex to 1/4 adapter). The last time Grievant recalled seeing the tool was on 30 March 2005, four days earlier. Grievant has worked as an Aircraft Mechanic for the Aerospace Maintenance and Regeneration Center (AMARC) at Davis-Monthan AFB since 1995. From 1977 to 1995, he was an aircraft mechanic at the Naval Station Alameda Rework Facility. Prior to that, he was in the navy for four years. Grievant is the president of AFGE Local 2924 (he has held that position for four years).

On 21 April 2005, Earl Wade (Aircraft Mechanic Supervisor) issued a Memorandum (J-8) entitled "Subject: Possible Disciplinary Action" to the Grievant that states, in part, "I have received some preliminary information ... The matter I am investigating include the following: a. Failure to abide by Tool Control Procedures ... this letter serves as notice that I am reviewing that information, and based on my completed review may result in an active investigation and possible disciplinary action."

On 7 July 2005, Supervisor Wade gave the Grievant a "Notice of Proposed Fourteen (14) Day Suspension" (J-2) for "Careless Workmanship -- Failure to perform proper tool inventories."

Specifically on 5 April 2005, you reported a lost tool (hex to 1/4 adapter) while working on Aircraft 79-0704. The adapter was stored, along with other small tools, in a container located in your toolbox. When you reported the lost tool, initially, all assumed that the tool was lost in the vicinity of Aircraft 79-0704. Later you reported that the last time you had actually seen the tool was while you were working on Aircraft #78-0659 which was on 30 March 05. Workplace records indicate that you worked on

Aircraft 78-0659, 78-0647 and 79-0704 from 30 March 05 to 5 April 05. Furthermore, you indicated that you were not certain the tool was in your toolbox during the inventories. Specifically, you stated, "I don't count the items in the container, I just look in the container." IAW AMARCI21-107, tools will be inventoried and accounted for prior to personnel departing from the work site, at the end of the shift, before engine runs and aircraft launches. In addition, AFMC Form 309 is annotated at each location prior to leaving the work site by documenting the end-of-job and end-of-shift inspection in the appropriate blocks. Your failure to perform the proper end-of-job and end-of-shift tool inventories resulted in three (3) Aircraft impoundments and the expenditure of approximately seventy-two (72) man-hours in search efforts.

On 29 July 2005, Grievant sent his Response to the Notice of Proposed 14-day Suspension (J-3) to the deciding official, Jeffrey Peterson AMARC/MAB (Chief Aircraft Division). Therein, Grievant stated:

According to guidance provided by AMARCI21-107 it would appear that I may not have performed a proper inventory of my toolbox as charged. There was no malice in this matter and the oversight was certainly unintentional. It appears that I had simply become complacent with a quick visual of the small items in question rather than a full count. I would like to note other mitigating circumstances surrounding the incident as well.

In late March of 2005,1 was notified that my father's health was deteriorating rapidly and that he was not expected to live long. ... I was not as focused at work as I normally would be. In 33 years of federal service, this is the first time that I have lost a tool. Clearly, the fact that my father was dying was taking a toll on me both mentally and emotionally.

I have spent a fair amount of time during breaks and lunch communicating with coworkers. Of the individuals that I have spoken with who have dealt with lost tool situations, nobody reports receiving anything other than a 971 entry over the matter. I was not able to locate anyone who had received even so much as a reprimand for a lost tool, let alone a 14-day suspension. ...

My record over the course of my 33 years of Federal Service speaks for itself. I have never lost a tool prior to this incident. I have no disciplinary actions in my file. In short, there is nothing in my record to indicate that I am a careless employee as charged. This was a one time incident and there have been no reoccurrences. I would also like to reiterate the fact that during the timeframe in question, I was unusually distracted by my father's failing health.

When consideration is given to my lack of previous discipline, my impeccable work history, length of employment, mitigating circumstances as well as the lack of others receiving similar discipline for the same offense, I sincerely hope that you will determine that a 14-day suspension is simply not warranted in this case. ...

On 30 August 2005, the deciding official, Jeffrey Peterson (Chief, Aircraft Division) reduced the discipline to a 3-day suspension. The Notice of Decision to Suspend Three (3) Calendar Days [J-5] states, in part:

"I took into consideration the fact that you were dealing with your father's ailing health, your years of federal service and the fact that you do not have any previous disciplinary history. I also considered the fact that you did take responsibility for your actions in this case by admitting that you did not follow the proper to tool box procedures, and that you did report the lost tool to management once you were aware of it. However, the facts of this case do support that you were negligent in not performing the proper tool box procedures ... over a period of time. You performed your inspections in such a negligent fashion that you failed to realize that you had lost a tool until days later, which resulted in three aircraft impoundments and hours of searching for the lost tool. I feel that your misconduct in this case was very serious and is unacceptable, ...

Pre-Hearing AFB Tour

On 19 July 2005, prior to commencing the

instant hearing in the Davis-Monthan AFB courtroom, the Arbitrator toured the Grievant's work area with both the Union and the Agency. During that tour, the Arbitrator was shown the Grievant's toolbox and various aircraft.

Stipulation

Steps 1, 2 and 3 grievance documents included a notation that Article 28 Section 4 was included in those three steps, but only Step 3 specifically mentioned a 30-day delay. (Transcript page 183)

Position of the Agency

On 21 April 2005, Mr. John Pennington (Grievant) was given a notice of "Possible Disciplinary Action." This letter was signed by Grievant's supervisor Mr. Earl Wade. (Joint Exhibit 8) The letter was given to Grievant in accordance with the Labor Management Relations Agreement (LMA) between Davis-Monthan AFB and AFGE 2924; specifically Article 28, Discipline and Adverse Actions, Section 4, allows the Agency to advise an employee disciplinary action is being considered in the event the Agency believes the action will be served more than 30 days after the incident.

Grievant Exercised Careless Workmanship by Failing to Perform Proper Tool Inventories Between 30 March 2005 and 5 April 2005

Mr. Earl Wade testified on behalf of the Agency. Mr. Wade has been a civilian supervisor at AMARC for the last two years and gained 20 years of aviation experience while serving on active duty with the Air Force. (Transcript page 11) He earned a master's degree in aeronautical science with specialization in safety. Mr. Wade also has a bachelor's degree in aeronautical science with a major in business administration. (Transcript page 12).

On 5 April 2005, Grievant told Mr. Wade he had lost a tool. (Transcript page 19) When Mr. Wade asked Grievant when he had last seen the tool Grievant told him sometime the previous week. Mr. Wade then questioned Grievant about his required tool inventories. Grievant told him that he doesn't actually count the items in his toolbox, rather would typically look into the box. (Transcript page 21) Mr. Wade memorialized Grievant's admission that he doesn't "count the items" with a 5 April 2005 handwritten note, (Agency Exhibit 2) and typed 20 April 2005 memorandum. (Agency Exhibit 3)

According to Mr. Wade, Grievant was required to physically count the small items that are stored in containers within their tool kit. (Transcript page 29)

In Grievant's response to the proposed 14-day suspension he stated: "According to guidance provided by AMARCI 21-107 it would appear that I may not have performed a proper inventory of my toolbox as charged ... It appears that I had simply become complacent with a quick visual of the small items in question rather than a full count." (Joint Exhibit 3)

In addition to admitting to not performing a proper inventory in his response to the proposed disciplinary action, Grievant confirms the same during his testimony at the hearing. (Pages 135, 165 and 166)

Grievant further acknowledges his misconduct by advocating for a reprimand as the appropriate penalty. (Transcript page 146)

The Agency's 3-day Suspension Was Appropriate

On three separate occasions Grievant testified that losing a tool is a very serious offense. (Transcript page 156, 160 and 161)

Responsible Agency officials such as Mr. Wade and Mr. Peterson also agreed this was a very serious event. In his testimony Mr. Wade explained the nature and magnitude of the Agency's search effort. (Transcript pages 32-36)

Mr. Peterson testified that he has never seen three aircraft impounded under these circumstances in his 30-year career in aircraft maintenance. (Transcript page 76)

The Agency's Notice of Decision to Suspend

found Grievant had committed the offense of careless workmanship -- failure to perform proper tool inventories. Mr. Jeff Peterson was the deciding official and he found substantial mitigating factors that required reducing the penalty to a 3-day suspension. (Joint Exhibit 5) As noted in the decision letter, Mr. Peterson took into consideration the failing health of Grievant's father; his length of federal service; lack of disciplinary history and Grievant's admission that he did not follow proper tool box procedures. (Joint Exhibit 5 and Transcript page 82)

Mr. Peterson testified that he completed a lengthy *Douglas* Factor analysis in an effort to help him determine the appropriate penalty given the facts of this case. (Transcript page 81 and Joint Exhibit 4)

Mr. Peterson also consulted the Agency's table of penalties and considered recommendations from civilian personnel specialists. (Transcript page 77)

Ms. Candace Shirley also testified for the Agency. Ms. Shirley is the Civilian Personnel Officer at Davis-Monthan AFB. As such, she manages the various administrative programs as they pertain to the 1400 civilian employees at Davis-Monthan AFB. She has 28 years of federal personnel experience. (Transcript page 97-97)

Ms. Shirley testified that one of her responsibilities is to ensure disciplinary actions meet the requirements of applicable Air Force Instructions. (Transcript page 98) Ms. Shirley personally reviewed Grievant's action before it was issued and agreed all aspects were in compliance with applicable regulations. (Transcript page 103)

Ms+. Shirley explained the Agency's Table of Penalties (Joint Exhibit 7) and how it was applied in this particular case. According to Ms. Shirley, the Table of Penalties is a guide for supervisor use when determining the appropriate penalty. Grievant was charged with careless workmanship which is discussed in paragraph 24-C; for the first offense the range of penalties is reprimand to removal. (Transcript page 100) Ms. Shirley's testimony also addressed "just cause." (Transcript pages 103-104)

Ms. Shirley is familiar with the various penalties issued for misconduct throughout Davis-Monthan Air Force Base. She testified that employees have been suspended and removed from federal employment for a "first offense. (Transcript page 107) The testimony of Ms. Shirley directly rebuts Grievant's testimony that "as long as I have been in this business of 33 years, I have never seen a federal employee get a three day suspension ... for this kind of occurrence." (Transcript page 146)

The Union contends Grievant's penalty is disproportionate to Mr. Rodriguez who was given a "971 entry" for untimely reporting of a lost tool (Union Exhibit 3) There was no evidence this tool was lost on a live aircraft and that three aircraft were impounded causing 72 manhours of search efforts. The Union failed to introduce any relevant evidence concerning the facts and circumstances around this incident. Given the lack of evidence, the Agency contends this exhibit is of no value for penalty comparison purposes.

Discipline Was Timely

Management became aware of the misconduct on 5 April 2005. On 21 April 2005, Mr. Earl Wade issued Grievant notice of possible disciplinary action in accordance with Section 4 of Article 28. By the terms of the LMA the 21 April 2005 notice satisfied the requirements of Section 4.

Section 4 does not mandate disciplinary action within thirty days; rather the language clearly states the Employer should serve "one of the following." Had the drafters of the agreement desired a "statute of limitation" they would have included the mandatory language.

In addition, by Grievant's own testimony, any delay in processing this action did not impact his ability to review relevant documents, interview witnesses, or conduct any other business related to his response in this matter. (Transcript page 176)

Discipline Was Not in Retaliation for Grievant's Previous Union Activity

Grievant alleges Mr. Earl Wade issued the

Notice of Proposed 14 day suspension as a result of Grievant's previous union activity. (Transcript page 180-181) However, when asked if the Deciding Official issued the 3 day suspension as a result of his previous union activity Grievant responded "Well, no, I don't think so." (Transcript page 181)

The imposition of discipline upon a union official while refraining from disciplining others equally culpable violates 5 U.S.C. § 7116(a)(1) and (2). *Veterans Administration, VA Medical Center, Shreveport, Louisiana,* 5 FLRA 216 (1981).

A violation of 5 U.S.C. § 7116(a)(2) can be found in dual motive situations. A dual motive case involves a management action where a legitimate basis for the action exists but union activity considerations are also involved and played a part. If, in a dual motivation case, it is determined that the management action against the employee would have occurred even absent the union activity, a 5 U.S.C. § 7116(a)(1) allegation will be dismissed. *Army Military Traffic Management Command,* 16 FLRA 881 (1984); *Department of the Air Force, 410th Combat Support Group, K.I. Sawyer AFB, Michigan,* 33 FLRA 352 (1988).

There are two elements in a discrimination case as set forth in *Letterkenny Army Depot,* 35 FLRA 113 (1990). It must be established that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Letterkenny* is followed today. *Indian Health Serv., Crow Hospital., Crow Agency, Montana,* 57 FLRA 109 (2001).

Given Grievant's testimony that the Deciding Official wasn't motivated by his previous union activity any retaliation argument is without merit.

Conclusion

As the Authority has recognized, the enforcement of a contractual just cause standard presents two questions: whether discipline was warranted, and if so, whether the penalty assessed was appropriate. *See, e.g., United States Dep't of Justice, Immigration & Naturalization Serv., New York Dist. Office*, 42 FLRA 650, 658 (1991).

In this case it is undisputed Grievant committed careless workmanship by failing to perform proper tool inventories between 30 March 2005 and 5 April 2005. The only question remaining is whether the assessed penalty is appropriate. Mr. Wade and Mr. Peterson both testified that in their lengthy careers this is the first time they have seen a lost tool result in the impoundment of three aircraft. The Agency suffered significant monetary loss by consuming 72 manhours of search efforts. The Deciding official properly weighed the relevant *Douglas* Factors and significantly reduced the proposed suspension from 14 days to 3 days. The installation's Civilian Personnel Officer concurred with the action and found it to be in compliance with Air Force Instructions.

Accordingly, the Agency's penalty was appropriate and should be sustained by Arbitrator.

Position of the Union

When an agency takes adverse action against an employee for misconduct, that agency bears the burden of proof. *King v. Nazelrod,* 43 F.3d 663, 666 (Fed. Cir. 1994). To sustain its action in the current instant, Agency must prove that it complied with the requirements of the discipline and adverse action provision of the Agreement. That Agreement requires that all discipline and adverse actions be based on just and sufficient cause with emphasis on sound employee management relations, be rehabilitative not punitive, and timely.

In this case, the Agency failed to meet its burden. It cannot prove that the discipline was constructive and for just cause, was based on sound management relations, was rehabilitative or timely.

Agency Failed to Meet the Just Cause Test

In determining whether or not "Just Cause" occurred, arbitrators look at the seven-part Just Cause

Test, which includes these elements:

1. Did management give the employee forewarning of the possible disciplinary consequences for the employee's conduct?

2. Was the rule reasonably related to the orderly, efficient, and safe operation of the business?

3. Did management make an effort to discover whether the employee did, in fact, violate or disobey a rule before administering discipline?

4. Was the investigation conducted fairly and objectively?

5. At the investigation, did the administrator obtain substantial evidence that the employee was guilty as charged?

6. Have the rules, orders, and penalties been applied without discrimination to all employees?

7. Was the degree of discipline administered reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his or her service with the employer?

Agency has the burden of proof to show that they took into account each of these elements. In the present instance, Agency failed to meet its burden.

The first element where the Agency failed to meet its burden related to the fact that the discipline imposed upon Mr. Pennington was not consistent with that imposed upon other employees. Testimony and documents presented at the hearing showed that another employee, Theodore Rodriguez lost a tool in an aircraft. He did not receive a suspension but instead he was given a 971 entry, which is part of the supervisor's personnel file kept on an employee. (See T.P. 148-149, Union exhibit 3)

In addition to the disparity of discipline between Mr. Pennington and Mr. Rodriguez, testimony showed additional differential treatment in the way the incident with Mr. Pennington transpired compared to other employees. Documents presented at the hearing showed that other employees lost tools on aircrafts and those planes were not impounded.

The issue regarding the impounding of planes was a significant fact since that was one reason the agency used as a reason for imposing the penalty it did upon Mr. Pennington. Agency, however, failed to explain why it did not impound the planes in the other situations, yet felt compelled to impound planes when Mr. Pennington lost a tool.

The facts presented clearly show that Agency did not impose discipline fairly, nor did it let Mr. Pennington know that suspension could result from his action. Consequently it failed to meet its just cause burden with regard to these elements; therefore, the allegations presented against Mr. Pennington should be dismissed and the Union's grievance on this count upheld.

Another factor that should have been taken into account with regard to the penalty imposed upon Mr. Pennington was the fact that for 33 years he never lost a tool. He accomplished this even though he was never told how to do a tool inventory, given any training on how to do a tool inventory, or told what accounting for his tools meant. Moreover, the agency should have taken into account that he never received any discipline before, he followed the guidelines with respect to the lost tool, and was forthright in his reporting that there was a lost tool.

Since the Agency did not adequately take into account Mr. Pennington's years of service, or his actions after he identified there was a lost tool, it failed to meet its just cause burden with regard to this Just Cause element; therefore, the allegations presented against Pennington should be dismissed and the Union's grievance on this count upheld.

Agency Action Was Not Based on Sound Management Relations

The Agency's action was not based on sound management relations. As Union President, Mr. Pennington had a naturally contentious relationship with Agency management. He filed both grievances and Unfair Labor Practice actions against management officials, including his supervisor and manager who were involved in the decision to suspend him. Moreover, the Agency management

suspended Mr. Pennington for actions that no other person received anything greater then a 971 entry.

Given this gross disparity in the treatment of Mr. Pennington compared to similarly situated employees, one must conclude that a motivating factor had to be his union involvement. This type of response to Mr. Pennington without a doubt has a chilling effect upon employee management relations and cannot be allowed to stand. As a result, the allegations presented against Pennington should be dismissed and the union's grievance on this count upheld.

Agency Action Was Not Timely

There is no dispute that the Agency action was not timely. The contract in this regard was very clear. After the Agency conducted its investigation it had a specific amount of time to take action. It did not meet this timeline.

Mr. Pennington stated that if the discipline would have been timely the proposal would have been given in May, not July, of 2005 and the decision in July, not September, of 2005. When asked how long of a delay there was Mr. Pennington indicated that it was approximately 60 days. Mr. Pennington indicated that the delay in the imposition of penalty caused him a lot of stress. In addition to causing him personal stress, Mr. Pennington, as Union President was concerned about the delay harming the integrity of the contract. (T.P. 152)

The facts presented clearly show that the Agency did not follow the contract time limits when imposing discipline upon Mr. Pennington. Consequently it failed to meet its contractual obligation; therefore, the allegations presented against Mr. Pennington should be dismissed and the Union's grievance on this count upheld.

Conclusion

For all the foregoing reasons, the Agency failed to prove: (1) the disciplinary action in this case met the just and sufficient cause standard; (2) that the discipline was timely; and (3) the penalty was reasonably related to sound management relations.

Therefore, the Union asks that the Arbitrator find the Agency committed an unjustified personnel action by suspending Mr. Pennington and sustain their grievance in its entirety. The Union further requests that the Arbitrator rescind Mr. Pennington's suspension and eliminate all references to it from his personnel file.

The Union asks that, pursuant to the Back Pay Act, 5 U.S.C. § 5596, the Arbitrator grant Mr. Pennington all back pay with interest (including annual leave, sick leave, and retirement benefits) he would have received but for the Agency's unjustified personnel action. The Union also requests that all other appropriate relief be provided to Mr. Pennington.

In the event that the Arbitrator mitigates Mr. Pennington's suspension to a lesser sanction, the Union requests that all the above requested relief, with the exception of the pay corresponding to the lesser sanction, be provided to Mr. Pennington.

Finally, should the grievance be sustained in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction for purposes of resolving any question of attorney's fees to which the Union may be entitled based on the Arbitrator's findings.

Decision

Grievant's testimony established that he inventories his tools 5-10 times a day. However, the Grievant admitted that he was guilty as charged of careless workmanship failure to perform proper inventories, during interviews with Supervisor Wade and to the deciding official, Chief of the Aircraft Division Jeffrey Peterson, and during the instant 19 July 2006 arbitration hearing. Because on March 30, 31, April 4 and 5, 2005, he signed the tool inventory form (J-9) indicating that he had all of his tools, when in fact he did not.

Therefore, based on the Grievant's admission that he was guilty of the charged offense, it was reasonable for Mr. Peterson to conclude that a 3-day suspension was warranted.

In administering discipline, the testimony of Mr. Peterson established that he was thorough in considering all of the facts and circumstances of the Grievant's offense, including consideration of Grievant's state of mind at the time because of his father's failing health, his 33 years of federal service, and the fact that he had no prior discipline and no negative comments in his performance evaluations. And Mr. Peterson also considered all of the *Douglas* Factors in an appropriate and detailed manner. (J-4) And Grievant's acknowledgement that his union activities were not a factor in Division Chief. Peterson's decision to suspend him for three days showed that the Agency did not implement discipline for retaliatory purposes.

Further, the testimony of the Civilian Personnel Officer, Candace Shirley, established that she reviewed the disciplinary action documents and the Agency was in full compliance with applicable Air Force instructions, law, rules and regulations.

Moreover, Ms. Shirley's testimony that several employees have been suspended for 14 days for careless workmanship was not rebutted. (T-107). And Air Force Instruction 36-704 (J-7) clearly sets forth penalties for a first offense -- of careless workmanship that could cause possible major damage to aircraft -- that range from reprimand to removal.

However, in an incident that parallels the present controversy, Theodore Rodriguez failed to report that he had lost a tool for two days. Yet, Mr. Rodriguez was not disciplined, his supervisor merely made a 971 notation. Thus, the documentary evidence that counsel for the Union introduced (U-3), coupled with Grievant's testimony established that Rodriguez committed the same violation as the Grievant, by losing a tool and not reporting the fact that he had done so for two days. And notwithstanding that the Grievant took twice as long to report a missing tool, both employees were shown to be guilty of violating AMARC and AFMC Instructions 21-107 tool inventory procedures. And although Mr. Rodriguez was not in Deciding Official Peterson's chain of command at the time of his offense (T90), Union Exhibit 3 persuasively established that the Grievant was treated disparately for commission of the same offense. Because Mr. Rodriguez' supervisor made a 971 notation in his file for the two days that Rodriguez inventoried his tools improperly. Whereas, Grievant was suspended for three (3) days for the four days that he was careless.

However, the evidence did establish that during the four days that Grievant inventoried his tools in an improper manner he was assigned to work on three different aircraft, and all three of them had to be impounded to insure that there would not be any foreign object damage. Thus, Grievant's careless workmanship was shown to have serious consequences.

However, notwithstanding that fact, the absence of imposition of any disciplinary action against Rodriguez, coupled with the fact that both Grievant and Rodriguez were guilty of carelessly inventorying their tools, convinced the Arbitrator that the Grievant was treated disparately.

In so concluding, the Arbitrator fully considered the testimony of Mr. Peterson and Mr. Wade that they had never experienced anything of this magnitude Grievant's offense of not reporting a lost tool for four days and the Agency having to search three aircraft. And in that regard, the 2005 Lost Tool Trend Analysis (U-2) did show 7 instances where tools were lost on aircraft, and only one was impounded. Moreover, there was no evidence that in any of those 7 instances, the employee did not report the lost tool in a prompt manner. And as Mr. Wade testified, employees who report lost tools in a timely manner are not disciplined.

However, although the Grievant's offense was very costly to the Agency and he was guilty of engaging in wrongdoing for a longer period of time than Rodriguez, Grievant's commission of the same offense as Rodriguez convinced the Arbitrator that he was not treated in a fair and equitable manner, as required by Article 28, Section 1 of the Agreement. Therefore, the 3-day suspension is to be reduced to a written reprimand.

With respect to the Union's contention that the discipline was not imposed in a timely manner, as counsel for the Agency argued, under sound arbitral case law, use of the word "should" rather than "shall" or "must" in Article 28, Section 4 established that the 30-day requirement is permissive rather than mandatory. Moreover, Supervisor Wade's 21 April 2005 memorandum (Joint Exhibit 8) satisfied the 30 days requirement because within that time frame the Agency gave the Grievant notice that he could be subject to disciplinary action. And by doing so, Agency Management acted in accordance with the "or ... notice ... to the employee advising that disciplinary action is being considered" language of that provision.

Therefore, the Arbitrator finds that the Agency's imposition of disciplinary actions was timely.

Conclusion

For the reasons stated above, the Arbitrator finds that because of the evidence of disparate treatment there was not just and sufficient cause to suspend the Grievant for three days for careless workmanship -- failure to perform proper tool inventories. Therefore, the penalty for his offense is to be reduced to a written reprimand.

Award

The discipline was imposed in a timely manner. However, based on the evidence of disparate treatment, there was not just and sufficient cause for the 3-day suspension of John Pennington. Therefore, the appropriate remedy is to rescind the suspension, issue a written reprimand to Mr. Pennington and make him whole. The Arbitrator will retain jurisdiction in this matter for six months to assist the parties in implementing this award, should the need arise.

Statutes Cited

5 USC 5596
5 USC 7116(a)

Cases Cited

5 FLRA 216
33 FLRA 352
35 FLRA 113
42 FLRA 650
43 F.3d 663
16 FLRA 881

