

A MATTER IN ARBITRATION

In a Matter Between:)		
)		
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, FIELD OPERATIONS, SAN DIEGO,)	Grievance:	Suspension of Robert Harrington
)		
(Employer))	Hearing:	March 16, 2010
)		
and)	Award:	May 25, 2010
)		
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES/ NATIONAL BORDER PATROL COUNCIL LOCAL 2554,)	McKay Case No.	10-017
)		
(Union))		

DECISION AND AWARD
GERALD R. MCKAY, ARBITRATOR

Appearances By:

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a Collective Bargaining Agreement, which exists between the above-identified Union and Employer.¹ Unable to resolve the dispute between themselves, the parties selected this Arbitrator in accordance with the terms of the contract to hear and resolve the matter. A hearing was held in Imperial, California on March 16, 2010. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The Arbitrator received a copy of the briefs from the parties on or before April 26, 2010. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

¹ Joint Exhibit #1

ISSUE

Was the two-day suspension of the Grievant for just and sufficient cause, and only for reasons as will promote the efficiency of the Service?²

RELEVANT CONTRACT LANGUAGE

Article 32 Disciplinary and Adverse Actions

M. The parties that letters of reprimand, suspension of less than fifteen (15) days, and other adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the Service.

BACKGROUND

The Grievant has worked as a Border Patrol Agent for just over 14 years. He spent most of those years in the El Centro Sector working out of the Calexico office. His job as a Border Patrol Agent consists of “apprehending illegal aliens, making arrests of people that illegally cross the border, and processing those particular aliens.”³ On October 27, 2007, the Grievant apprehended a number of illegal aliens and had placed them in his patrol van. Because the Employer’s policy requires him to remain on station during the entire duration of his shift, the Grievant called for transport to have the aliens that he had apprehended transported to the holding facility for processing. The individual sent to transport the Grievant’s apprehended aliens was a Border Patrol intern. The intern was a new employee to the job and was in the process of learning how to function as a Border Patrol Agent.

² Transcript page 6

³ Transcript page 26

The intern arrived with his transport vehicle and backed it up so that the rear doors of his vehicle faced the rear doors of the Grievant's vehicle. The doors of the two vehicles were then opened for the purpose of transferring the detained aliens from the Grievant's vehicle to the intern's vehicle. In the process of doing this, two of the detained aliens escaped and ran away. According to the Grievant, they ran from his custody, entered the New River and returned to Mexico. After an investigation, the Employer concluded that the Grievant had failed to maintain proper control of the two detainees by not physically securing them while transferring them from one van to the other. As a result of what the Employer considered to be his negligence in carrying out his duty as a Border Patrol Agent, the Grievant was suspended for two days.⁴

In his response to the allegations that he was negligent in the transfer of prisoners, the Grievant told Roy Villareal, the Deputy Chief Border Patrol Agent at that time, that the Employer's prisoner transfer system was "ridiculous" from a safety standpoint. The Grievant asserted that there should be five people assigned to do a transfer of this nature. The Grievant also asserted that the transfer should not take place in the field, but should take place in the detention stations Sally Ports. The Grievant insisted that the manner in which he transferred the prisoners was the same system used by all the other Border Patrol Agents. He was not, according to the Grievant, negligent in his actions. Furthermore, the Grievant asserted, other Border Patrol Agents who allowed detained aliens to escape were disciplined less harshly than the Grievant, receiving less than two-day suspensions. The Grievant asked that his suspension be removed and he be compensated for lost pay.

⁴ Agency Exhibit #1

A number of examples of other Border Patrol Agents who were disciplined for similar conduct were introduced during the course of the hearing. In Case No. 1, an agent on July 9, 2007 was given a written reprimand for failing to secure aliens in custody, resulting in their escape.⁵ In that particular case, the agent, on April 27, 2007 had apprehended two illegal aliens. The agent placed the two subjects into the service vehicle, then the agent responded to another illegal entrant, and apprehended that entrant while leaving the first two illegal aliens in the agent's service vehicle without locking the vehicle. When the agent came back to the vehicle, the first two illegal aliens have absconded, and the agent was not able to relocate them.⁶

In a second case, a senior patrol agent received a written reprimand for failing to secure an alien in custody resulting in the escape of the alien. In this particular case, on March 8, 2006 at about 9:00 p.m., the agent, along with the assistance of another agent, apprehended a group of undocumented aliens that had made an illegal entry into the United States via the New River on the west side of the downtown Calexico port of entry. The agent called for transport and as he was escorting a male subject to the transport vehicle, the subject managed to get free, jumping into the New River and absconding back into Mexico. For this negligence, the agent received a written reprimand.⁷

On December 5, 2006, a Border Patrol Agent received a written reprimand for failure to secure an illegal alien in custody resulting in the escape of the alien.⁸ In that case, on June 8, 2006, the agent had been assigned to transportation duties during the 8:00 a.m. to 4:00 p.m. shift.

⁵ Agency Exhibit #11A

⁶ Agency Exhibit #11A

⁷ Agency Exhibit #11B

⁸ Agency Exhibit #11C

At approximately 9:30 a.m., he reported to an area known as the Customs Compound to pick up four subjects that had been arrested by Agent Julio Chavez to transport them to Calexico Station for processing. The agent removed two female subject from Agent Chavez' vehicle and secured them in the backseat of his vehicle. As he attempted to remove the subjects from Agent Chavez' vehicle, one of the other subjects pushed the other subject into the agent, and proceeded to run across the commercial bridge and abscond back into Mexico. As a result of this negligence, the agent received a written reprimand.⁹

On October 18, 2006, a Senior Border Patrol Agent received a written reprimand for failure to secure an alien in custody resulting in the escape of the alien.¹⁰ In this case, at approximately 11:15 p.m. on May 29, 2006, the agent apprehended two illegal aliens in Zone 14, approximately 2.5 miles east of the Calexico port of entry. The agent placed the subjects in custody in the back of his service vehicle and continued to work while awaiting the transport van that would convey the subjects to the Calexico station for processing. At approximately 11:45 p.m., the agent observed another individual illegally entering the United States in the area known as the "Projects." The agent parked his vehicle and proceeded to give foot chase to catch the subject. The agent subsequently apprehended the subject and returned to his vehicle to secure him with the other subjects already in custody. He opened the backdoor of his vehicle and discovered that the two subjects he apprehended earlier had escaped. The agent searched the area but was not able to locate the two escaped subjects. As a result, the agent received a written reprimand.¹¹

⁹ Agency Exhibit #11C

¹⁰ Agency Exhibit #11D

¹¹ Agency Exhibit #11D

In June 2006, a Senior Patrol Agent received a written reprimand for failing to secure an alien in custody resulting in the escape of the alien.¹² In that case, on April 1, 2006 at 7:00 p.m., the agent gave chase to two alleged undocumented aliens that had just made an illegal entry into the United States by climbing over the international boundary fence about 7/10 of a mile west of downtown Calexico port of entry. The agent apprehended one of the subjects, handcuffed him to a chain-linked fence to give chase to the remaining subject. The second subject was also apprehended about two blocks west from the previous apprehension. The agent called for a vehicle to secure the second subject and subsequently returned to the location of the subject who initially had been apprehended. When he returned, the first subject had managed to free himself from the handcuffs and had escaped. As a result, the agent was given a written reprimand.

In November 2005, a Senior Patrol Agent received a written reprimand for failing to secure an alien in custody resulting in the escape of the alien. In that case, on April 8, 2005, the agent, along with another Senior Border Patrol Agent, went into the Indio Bus Station to inspect the Greyhound Bus passengers. The agent encountered a male subject who claimed to be a U.S. citizen but appeared to be lying. The agent transported the male subject to the Indio Border Patrol Station for a further interview and to perform a search of the subject through IAFIS-IDENT. The male subject stated that he could prove his citizenship by providing his birth certificate located at a residence nearby. The male subject was driven to the residence. When they arrived, the male suspect told the agent that he needed to go into the house from the backyard. Although the male suspect was handcuffed and taken to the backyard, the suspect ran

¹² Agency Exhibit #11E

over the wall in the backyard and absconded. As a result of the negligence of the officer in allowing him to escape, he was given a written reprimand.

In another incident in 2005, an agent was given a one-day suspension for failing to secure an alien resulting in the escape of the alien. This officer had also received a written reprimand for failing to operate proper caution while operating a government vehicle and received a one-day suspension for carelessness in operating a government vehicle. The one-day suspension was mitigated to a letter of reprimand. This agent, it was determined, on May 19, 2005 observed three vehicles pull off the interstate in the westbound lanes. By the time the agent was able to get into the westbound lane, only one vehicle remained. The agent approached and stopped the vehicle on the driver's side, identifying himself as a U.S. Border Patrol Agent. He determined that the driver of the vehicle was in the United States illegally. The agent placed him under arrest and handcuffed the driver. As the agent was reading the driver's identification, he noticed a passenger in the backseat of the vehicle was moving towards the passenger side rear door. When he went around the back of the vehicle towards the passenger side door, the passenger had already exited the vehicle and ran away. The agent ran after the passenger, but was not able to apprehend him. When he returned to the vehicle, he discovered that the handcuffed alien had also fled. For this, the agent first was suspended for one day, and then had the suspension reduced to a written reprimand.¹³

Also in 2005, another agent received a failure to secure an alien in custody resulting in the escape of the alien. This individual received a written reprimand.¹⁴ The agent in that case on

¹³ Agency Exhibit #11G

¹⁴ Agency Exhibit #11H

August 8, 2005 went into the Indio Bus Station with the other agent who also received a written reprimand. The male subject who was apprehended at the bus station ultimately escaped. This agent and the other agent referenced earlier both received written reprimands.¹⁵

On April 15, 2008, an agent received a five-day suspension for non-compliance with policy, standards, or instructions issued by the Service, failure to secure aliens in custody resulting in their escape and negligence resulting in loss of government property. The facts that supported the first charge established that on September 23, 2007, the agent responded to provide transportation for two separate subjects to the Calexico Station. When the agent arrived, he stopped his vehicle, placed the gear selector lever in park, and exited the vehicle, leaving the keys in the ignition and the engine running. Subsequently, a female subject was able to move from the passenger seat into the driver's seat and drive the vehicle into Mexico. The facts supporting the failure to secure aliens in custody resulting in their escape established that on September 23, 2007, the agent placed one male subject into the rear compartment of his service vehicle K3717, and he placed one female subject in the front seat with her hands handcuffed behind her back. He placed the seatbelt on her and closed the door. He heard the male subject yelling to the female subject and when he looked, the female subject had moved into the driver's seat and placed the vehicle into drive ultimately driving into Mexico. In the third charge concerning the loss of government property, the Grievant was charged with the loss of the vehicle, binoculars, global positioning system device, radio battery, ATV helmet, and all the

¹⁵ Agency Exhibit #11H

other items that were in the vehicle stolen by the two illegal aliens as a result of the agent's negligence.¹⁶

On November 19, 2009, an agent received a written reprimand for failing to secure to an alien in custody resulting in his escape. On September 2, 2009, the agent apprehended two subjects. He loaded them into the transport compartment of his vehicle in order to relocate them, but failed to properly secure the door of the compartment. As a result, one of the subjects escaped from his vehicle. For his negligence, the agent was given a written reprimand.¹⁷

In May 2009, an agent received a letter of reprimand for failing to secure an alien in custody resulting in his escape. In this instance, on April 17, 2009, the agent reported that illegal alien Eric Rodriguez-Salazar escaped from custody while he was being escorted to a service vehicle. The agent was unable to apprehend the escaped detainee. As a result, he received a written reprimand.

Officers are informed that it is their responsibility when escorting aliens in custody to "take every reasonable precaution to prevent their escape."¹⁸ Officers are informed "when an escape does occur, a complete report should be made immediately thereafter. Appraisals of the facts and circumstances surrounding an escape will be made and disciplinary action taken when the facts justify it." Deputy Chief Patrol Agent Roy Villareal testified that he has been the Deputy Chief Patrol Agent of the El Centro Sector since January 2007. He was the deciding official in the Grievant's case with respect to the level of discipline. Deputy Villareal testified

¹⁶ Agency Exhibit #11I

¹⁷ Agency Exhibit #11J

¹⁸ Joint Exhibit #9

that he was not aware of any incident where an alien escaped from the custody of a Border Patrol Agent where the Agency did not find the agent negligent and impose discipline. He testified, "... I'm not aware of any escapes that have not resulted in some sort of action, disciplinary action."¹⁹

Deputy Chief Villareal stated that he decided to impose a two-day suspension on the Grievant rather than any lesser level of discipline. According to Deputy Chief Villareal, when he needs to impose discipline, first he relies on his subject matter expert which, in his case, was Ms. Julie Brown, a Labor and Employee Relations Specialist. After listening to this individual, he considers the "Douglas factors," and looks at similar discipline imposed on other employees for similar conduct. Deputy Chief Villareal stated that, "... we try to be consistent with how we impose discipline ...". He testified that in the case of the Grievant, he selected two days for a suspension because "In this particular case, based on the response, a lack of any accountability, and then the progressiveness of the action is what led to a two-day recommendation and an ultimate sustainment of two days."²⁰ According to Deputy Chief Villareal, he considered the Grievant's oral reply as not indicating any sense of responsibility for the escape. Deputy Chief Villareal stated:

"In essence, that simply there was no wrongdoing. It wasn't his fault that -- that the escape occurred and it was a result of what was labeled as a systemic problem, that there's no sense of ownership of what had occurred, any responsibility on his behalf."²¹

¹⁹ Transcript page 73

²⁰ Transcript page 75

²¹ Transcript page 76

When asked what the Grievant should have done, Deputy Chief Villareal stated, "... In the transfer of an alien, it's incumbent upon us to make sure that we secure whether it's the vehicles, the aliens, or whatever, that that's done as securely as possible."²²

Deputy Chief Villareal stated there was another officer involved in the transfer in addition to the Grievant. That officer was not disciplined at all. When asked why, Deputy Chief Villareal stated, "Interns pose a different situation for us in regards to reprimands or -- I'm sorry -- disciplinary action. And I don't recall what, if any action we did take against Mr. Powers."²³ Deputy Chief Villareal indicated he did not believe that any discipline was taken and he was not aware of any discipline taken against Mr. Powers, the driver of the transport vehicle.

On cross-examination, Deputy Chief Villareal acknowledged that the Grievant did not intentionally allow the two aliens to escape. Deputy Chief Villareal provided an expanded observation with respect to what he considered the Grievant's obligation in the alien transfer for the transport. He stated:

"Well, again, procedurally this is done on a daily basis. It's incumbent upon the agent; in this particular case, Mr. Harrington, who's the senior agent on the scene, to make sure that every aspect is safeguarded, from the handling of the alien, each individual alien, from one officer to the next, from one vehicle to the next. It's standard procedure. It's how we conduct our business on a daily basis."²⁴

Deputy Chief Villareal acknowledged that the obligation of the agent is to "take every reasonable precaution to prevent escapes."

²² Transcript page 76

²³ Transcript page 77

²⁴ Transcript page 84

Gerald Powers was the transport driver on the night the two illegal aliens escaped from custody. He described his recollection of the incident in the following manner:

“Mr. Harrington had called for transport. I was working transport duties that night or that afternoon, whatever it was. Went down and met Mr. Harrington’s vehicle. He said that he had four illegal aliens inside. I backed my vehicle up to his back to back, probably ten or 15 feet in between us. He removed one of the detainees from his truck and took him to the front of my vehicle and was talking to 841, which is the camera room. When he was done with them, he brought him back to me. I put him at the vehicle, started to do a search. And in the middle of my search, two detainees -- I heard him holler, “Stop,” looked up, had two of the aliens that were inside the back of his vehicle running toward the New River.”²⁵

Mr. Powers testified that he had been a Border Patrol Agent since January 2007. He testified that as far as he knew backing vehicles up in the manner in which he did was the typical protocol for transporting illegal aliens. The Grievant’s claim that the opening of his back door puts the aliens in the custody of the transporting agent, according to Mr. Powers, is completely incorrect and lacks any concern for the safety of the transporting officer. The transporting officer has to search the aliens that he puts into his truck so his back is to the Grievant’s vehicle. When the two aliens ran away and went into the New River, Mr. Powers testified, he initially gave chase but when they went into the New River he stopped. According to Mr. Powers, the New River “it’s the most polluted waterway in North America.”²⁶

Genaro Larios testified that he works for the Border Patrol as an agent and has done so for approximately 8 years. In his experience, Mr. Larios testified, there are many “getaways.” He described a getaway in the following manner, “Well, getaway is like someone that we

²⁵ Transcript page 89

²⁶ Transcript page 95

couldn't get, either he ran away from us, he did -- he just got away."²⁷ He provided the following example of a getaway, "I'm chasing after someone or I have someone really close in my hands already, taking him to my vehicle, he does whatever he does, we struggle, and he takes off and he got away."²⁸ If an individual gets away, according to Mr. Larios, he lets them go because he normally has other people in custody that he needs to retain in custody. He stated that it is very common for Border Patrol Agents to have getaways.²⁹

Arturo Alcaez testified that he is a Border Patrol Agent and has been doing this work for 17 years and 10 months. It is virtually impossible for officers to secure more than a few aliens, according to Mr. Alcaez, because the Agency does not supply the Border Patrol Agents with sufficient materials to do so. He testified that he has detained around 60 aliens at one time. When asked how he keeps control over that many, he testified, "officer presence."³⁰ There are not sufficient handcuffs or devices to detain them to actually secure that many aliens. The Grievant described the equipment he had to secure the aliens, "Gun, the pepper spray, and -- we're actually only required to carry one of those, pepper spray or the baton, and one set of handcuffs and the radio."³¹ There is no other equipment that the agent carries to secure aliens.

²⁷ Transcript page 143

²⁸ Transcript page 143

²⁹ Transcript page 144

³⁰ Transcript page 104

³¹ Transcript page 161

POSITION OF THE PARTIES

EMPLOYER

The Employer argued that the charge against the Grievant should be sustained. The Grievant was charged with negligence. It is the primary duty of the agent to secure the aliens that he detains. Having failed to keep control over the detained aliens is a breach of the agent's responsibility. The Employer is not required to allege negligence or any *men rea* but simply to describe the conduct of the employee in "sufficient detail to allow the employee to make an informed reply." The Union's attempt to describe the Grievant's conduct as getaways not deserving punishment has no merit. Trying to equate the Grievant's situation with an agent who has detained 30 or 60 illegal aliens has no merit. The Union's witnesses' testimony that the situation involving the Grievant was not an escape is absurd.

The Employer stated that the two-day suspension was reasonable. While failing to secure an alien is not listed in the table of penalties, it is a violation of one of the Grievant's primary duties. Deputy Chief Villareal imposed the two-day suspension after reviewing the "Douglas" factor. In the process, he factored in the Grievant's prior discipline. The Employer reviewed the prior discipline the Grievant received noting that in August 2007, he was suspended for one-day for not assisting port inspectors in apprehending a "port runner." He had a three-day suspension for being AWOL, a reprimand a year before in 2006 for a lost badge, another AWOL in 2002 which resulted in a one-day suspension, and a reprimand in 2001. The Grievant's disciplinary history is not in dispute. The Employer then reviewed the records of other agents receiving discipline for escapes, and distinguished them from the Grievant's circumstance showing that their discipline was not disparate.

The Employer noted that the choice of penalty is “left to the sound discretion of the Agency.” The MSPD can mitigate a penalty only if it finds the penalty is “clearly excessive, disproportionate to the sustained charges or arbitrary, capricious or unreasonable.” There is a nexus between the Grievant failing to secure the aliens and the efficiency of the United States Custom and Border Protection. The Grievant’s failure to secure the aliens goes against the core of his duties and the Agency’s mission. The evidence in the record clearly establishes that the charge against the Grievant should be sustained. For these reasons, the Employer asked, that the grievance be denied.

UNION

The Union noted that the Employer has the burden of proof to establish cause for the Grievant’s discipline. The Employer has failed to articulate and prove the Grievant’s misconduct. In response to the Union’s request for clarification when the Employer stated that there were no regulations, policies, or procedures that it alleged the Grievant violated. The only document provided to the Union in response to its request for any and all regulations, policies, and/or procedures is a copy of the pertinent section of the Officer’s Handbook relating to the escape of an alien.

The Union argued that the Grievant’s actions were consistent with established practices, procedures and training. The Employer’s alleged “standard procedure” of physically securing individual suspects when they are transported is more an exception than a rule during daily operations. The Grievant’s actions were consistent with the Agent’s policy that he “take every reasonable precaution to prevent” the escape of the aliens. After the two suspects fled, the Grievant reasonably made sure that he secured the remaining suspects in his custody and

instructed Agent Powers to do the same thing. The Employer's alleged "standard procedure" for performing field transfer for multiple suspects on a "one by one" basis and physically securing each suspect creates a safety risk to the agents under the Employer's current manpower and operational restrictions. Preventing the escape of aliens could be addressed more effectively by making changes to the Employer's policy and procedures.

The Union asserted that the Employer failed to conduct a proper investigation. The Union asserted that the Grievant's two-day suspension does not promote the efficiency of the service. The deciding official failed to meaningfully consider all Douglas factors when rendering the decision to suspend the Grievant requiring this Arbitrator to substitute his independent judgment for what discipline would be appropriate. The deciding official did not give due consideration to the Grievant's oral reply. The deciding official did not properly evaluate the seriousness of the offense. The deciding official improperly evaluated the Grievant's prior discipline. Deputy Chief Villareal stated he considered the Grievant's previous discipline of a one-day suspension for AWOL on December 28, 2002. This incident occurred more than 2 years prior to October 22, 2007. As such, the offense cannot be considered. The deciding official failed to consider Douglas factor concerning other mitigating circumstances, including unusual tensions and harassment.

The Arbitrator must substitute his independent judgment in place of the Employer's decision to suspend the Grievant. The only disciplinary action that should have been considered by the deciding official was the official reprimand on July 6, 2006 for failing to safeguard government property. The Employer provided eleven cases where agents were alleged to have been involved in the same or similar misconduct as the Grievant. Of those eleven, ten resulted in

letters of reprimand. The Union stated that the Employer did not establish just cause to impose a two-day suspension. The escape was not the result of any misconduct by the agent, but instead was the result of a systematic problem created by the Employer's own manner of conducting operations. The Union asked that the Grievant's discipline be rescinded and that he be given back pay for all pay and benefits lost as a result of the suspension.

DISCUSSION

The most notable thing about the present dispute is the amount of time and energy the parties have spent putting on a case involving a two-day suspension, which occurred three years prior to the arbitration hearing. There is no doubt, based on the evidence presented, that it is a primary responsibility for Border Patrol Agents to apprehend illegal aliens and, once having done so, to maintain control over them until they are appropriately incarcerated. There is no doubt that the Border Patrol Agents are under significant pressure to apprehend as many aliens as possible and that the number of aliens at times may make it difficult for agents to control their illegal entries and keep them in custody. However, it hardly needs to be stated that once an illegal alien has been detained, the Employer reasonably expects the agent to keep that illegal alien in detention. If an agent is overwhelmed by the number of illegal immigrants being detained at one time that would provide one particular situation. However, that is not the set of facts which are before this Arbitrator. The agent detained a number of illegal aliens and had them contained within his vehicle. In the process of letting them out of his vehicle, he lost control of two of the aliens who escaped.

The Union equates the events surrounding the Grievant's situation with the alien getaways. It is the Arbitrator's understanding that a getaway is a circumstance where the alien

was not fully in the control of the agent and gets away before he is in custody. The illegal aliens in the present case were in custody and were secured within the Grievant's vehicle. The Grievant opened the door of his vehicle, and stood around in a manner that permitted two of the illegal aliens who had been secured to get out and run away. That, in the Arbitrator's opinion, is an escape which resulted from the Grievant's negligence. The Grievant had a duty of care to the Employer to maintain control over the illegal aliens he had placed into his vehicle, and he failed to do so.

No one has accused the Grievant of deliberately allowing two illegal aliens to escape. If the Grievant had done this, in all likelihood he would have violated federal law and, clearly, he would have been discharged. This is not a case of deliberate, knowing action on the part of the Grievant to allow two aliens to escape. This is a case where the Grievant was sloppy in his handling of illegal aliens and, as a result, two of them got away. The Grievant has been an agent long enough to know how to properly transfer illegal aliens and on this particular occasion, he simply ignored his prior training and experience. The Grievant's attempt to blame the transport officer who was a new hire at the time is misplaced for any number of reasons. First, Mr. Powers, the Transport Agent, described what he was doing at the time the two illegal aliens escaped, which would have prevented him from maintaining control over them. He was doing a search on an illegal alien he was about to put into his vehicle. His back was to the Grievant's vehicle and to the escaping illegal aliens. The Grievant knew this, or should have known this. For the Grievant to believe that he could simply stand around doing nothing and let the Transport Agent to everything does not make any sense, nor does it show much concern for the safety of the transporting officer.

The real issue in the present case is not whether the Grievant was negligent in failing to maintain control over two illegal aliens. The answer to that question is a resounding yes. The Grievant was negligent and, as a result, he lost control of two aliens who escaped. The real issue in the present case is the appropriate level of discipline for engaging in that conduct. The Employer presented prior examples of discipline imposed on Border Patrol Agents who have allowed illegal aliens to escape after they have been placed in custody. In all except one case, the level of discipline imposed by the Employer has been an official reprimand. In the case of disparate treatment, the burden is on the Employer to establish why the Grievant was treated differently from the other ten employees who received official reprimands. In its effort to do so, the Employer points to the Grievant's prior discipline. However, there are a number of the examples provided by the Employer where the agent had prior discipline as well. The Arbitrator is somewhat at a loss to distinguish between the Grievant and Senior Border Patrol Agent referenced in Agency Exhibit #11G. This individual received a written reprimand, but at the time he received it, he had another reprimand for failure to exercise proper caution while operating a government vehicle, and a one-day suspension for carelessness in operating a government vehicle. The Grievant's prior discipline related to attendance in the form of AWOL. Negligently operating a vehicle is not a volitional act any more than negligently failing to retain control over illegal aliens who are in custody.

Based on the evidence presented with respect to the Employer's treatment of other agents who have engaged in the same or similar conduct to the Grievant, it is the Arbitrator's conclusion that the level of discipline selected by the Employer is arbitrary and capricious. Other employees received an official reprimand for conduct similar to the Grievant's even

though the employee had prior discipline in his file. The explanation provided by Deputy Chief Villareal that somehow the Grievant showed no remorse, which made his misconduct worse is not supported by the evidence. The argument that Deputy Chief Villareal refers to is the argument put forth by the Union complaining that the Employer's policy with respect to transfers needs to be changed so that aliens do not escape. The fact that the Grievant and the Union disagree with the existing policy does not show a cavalier disregard or unwillingness to accept responsibility. Instead, it shows a policy difference. In the Arbitrator's opinion that is not a distinguishing characteristic that carries any weight.

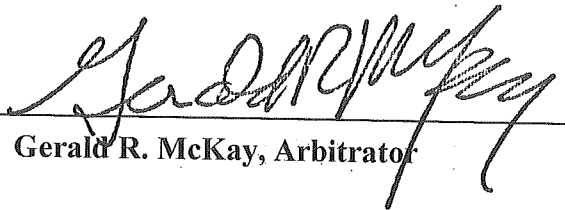
In summary, the Grievant's conduct in the transfer of two illegal aliens who escaped was negligent. Had the Grievant exercised due care in a manner that he is expected to exercise it, those two aliens would not have escaped in that circumstance. When other illegal aliens have escaped from other officers, the Employer's overwhelming practice is to issue official reprimands for that conduct. The Employer's attempt to distinguish the Grievant's circumstance from all of the other employees who have been disciplined has no merit. The distinction the Employer attempts to make is a distinction without a difference. As a result, it is the Arbitrator's opinion that the Employer did not have good cause to impose a two-day suspension. The Employer did have good cause to impose an official reprimand. The Grievant's two-day suspension is reduced to an official reprimand and the Employer is directed to reimburse the Grievant for lost wages and benefits as a result of the improper suspension.

AWARD

The two-day suspension of the Grievant was not for just and sufficient cause, and only for reasons as will promote the sufficiency of the Service. The Grievant's two-day suspension is changed to an official reprimand. The Employer is directed to reimburse the Grievant for lost wages and benefits as a result of the improper two-day suspension.

IT IS SO ORDERED.

Date: May 25, 2010



Gerald R. McKay, Arbitrator