

**OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN**

Ohio Department of Youth Services, Ohio River Valley Juvenile Correctional Facility

-AND-

Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Ohio River Valley Juvenile Correctional Facility

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CASE-SPECIFIC DATA

Grievance No.

35-20-(04-12-20)-0069-01-14

Hearing(s) Held

August 8, 2005

Post-hearing Briefs Received

August 24, 2005

Case Decided

October 3, 2005

Subject

Possession of Deadly Weapon on State Property

The Award

**Grievance Sustained in Part and Denied in Part
Reinstatement Without Backpay**

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

This is a disciplinary dispute between the Ohio River Valley Youth Center, a Branch of the Ohio Department of Youth Services (“DYS” or “Agency”), and OCSEA, AFSCME Local 11 (“Union”),¹ which represents Mr. William J. Gaspers (“Grievant”). The Agency removed the Grievant effective December 12, 2004 for violating DYS Policy 103.7, which encompasses General Work Rule 4.17, Unauthorized possession of a weapon.² Specifically the Grievant was fired for possessing the weapon on state property. When he was removed, the Grievant was the Training Officer for the Agency and had approximately fifteen discipline-free years of satisfactory to exemplary service.

During part of the Grievant’s tenure the Agency was plagued with public allegations of nepotism,³ and private allegations of the same from union officials in power at that time. In January 1996, the Agency promulgated guidelines that addressed nepotism.⁴ The nepotistic issues impacted the Grievant’s terms and conditions of employment because for part of his tenure with the Agency, his wife, Ms. Aldine Gaspers, was its Superintendent. An example of the aforementioned impact was that the Grievant was obliged to follow special reporting procedures designed to circumvent the Superintendent.⁵ Furthermore, a different agency processed the instant dispute, thereby obviating Superintendent Gaspers’ involvement.

The Grievant’s problems started after he took a .25 caliber Butler Derringer (“Weapon” or “Pistol”) into a hotel room. The foundation for the Grievant’s problems was laid on a camping trip with his wife, some friends, and their children in early October 2004. At the beginning of the camping trip the weapon was loaded, but during the trip, the Grievant removed the ammunition because children were present. Although he does not have a license to carry a concealed weapon, the Grievant customarily carried the pistol in a small

¹ Hereinafter collectively referenced as the “Parties.”

² Joint Exhibit 3-4.

³ Union Exhibit 1.

⁴ Management Exhibit 7.

⁵ Union Exhibit 2.

camera case, which he kept tucked away in a travel bag that he used for short trips. Also, the Grievant took a drawstring laundry bag in which he placed any soiled clothing from the camping trip.

Although the arbitral record does not reveal the exact date that the Grievant returned from the camping trip, he left his dirty laundry in the laundry bag. On October 26, the Grievant took his travel bag, which contained the weapon, and obtained a state vehicle from the Ohio River Valley Juvenile Correctional Facility. He drove the car from that Facility to the Agency's Training Center in Delaware, Ohio where he remained until the afternoon. He then drove the state vehicle to the Delaware Hotel ("Hotel"). The Agency and the Hotel had recently entered an agreement whereby the Agency's employees would use the Hotel to house its employees during training sessions. The Grievant had reserved a room for the night because he was scheduled to conduct more sessions at the Training Center on October 27, 2004.

Upon entering the Hotel, the Grievant walked past a large sign that explicitly prohibited firearms, deadly weapons, or dangerous ordnance "anywhere on the premises."⁶ The Grievant checked into room 107 and carried his baggage, including the travel bag, to his room. He then ate dinner in the Hotel's restaurant, socialized with some coworkers, watched a World Series game, and played some pool. After that, the Grievant returned to his room and had a lengthy telephone conversation with his wife. Finally, he began unpacking in preparation for bed, opened the travel bag, and saw the camera case, which he knew contained the pistol. Without notifying the Hotel management that he had a weapon on the premises, the Grievant placed the camera case in the night stand by his bed and retired for the evening.

The next morning, the Grievant awoke and had coffee at the Hotel's concession stand. Shortly thereafter he learned that a coworker was vomiting and seriously ill. The coworker offered to use a state vehicle to drive himself home, which was a fifteen minute drive from the Hotel. However, the Grievant insisted on driving the worker home, rather than risk his driving a state vehicle in his condition. Before driving the worker home, however, the Grievant checked out of the Hotel and took all of his belongings with him, except

⁶ Management Exhibit 4; Joint Exhibit 4-17.

for the travel case in the night stand, which he apparently forgot during his haste to assist the ill coworker. The Grievant telephoned his supervisor to notify her about the ill employee and to advise her that he would be late for the morning training sessions. He never mentioned the weapon that he kept in his room the night before.

On October 29, 2004, the Grievant's oversights with respect to the weapon began to mushroom. On that day the next guest to occupy room 107 after the Grievant, found the weapon in the night stand drawer and gave it to the Hotel's management, who notified the Agency, since the Grievant was the last person to use the room.¹⁷ On or about November 2, 2004, the Agency launched an administrative investigation with Mr. Donald L. Whipple as the Investigator.¹⁸ Based largely, if not entirely, on that investigation, the Agency elected to discipline the Grievant for violation of Rule 4.17, which prohibits the possession of firearms on state property. Although the Grievant was not charged under a criminal statute, apparently as an aggravative consideration, the Agency included a criminal statute in the arbitral materials. That statute prohibits one from "knowingly" conveying or attempting to convey deadly weapons ammunition therefore, or ordnance onto the premises of a detention center.¹⁹

In a letter dated November 22, 2004, the Agency notified the Grievant that his pre-disciplinary hearing was scheduled for November 29, 2004.¹⁰ The hearing was actually held on December 1, 2004.¹¹ On that day the hearing officer found *just cause to discipline* the Grievant but found *no proof that he knowingly* transported the weapon on state property.¹² In a letter dated December 8, 2004, the Agency notified the Grievant that he would be removed effective December 14, 2004.¹³ On or about December 24, 2004, the

¹⁷ Union Exhibit 6.

¹⁸ Joint Exhibit 4-3.

¹⁹ Management Exhibit 2.

¹⁰ Joint Exhibit 3-1.

¹¹ Joint Exhibit 3-3.

¹² *Id.*

¹³ Management Exhibit 3-4.

Union responded with Grievance No. 32-20-(04-12-20)-0069-01-14.¹⁴ At the Step 3 hearing, on or about January 12, 2005, the Agency denied the Grievance,¹⁵ and the Union requested a Step 4 meeting. Finally, in a letter dated May 23, 2005, the Union announced its intent to submit the instant dispute to arbitration.¹⁶

Subsequently, the Parties appointed the Undersigned to hear the dispute and scheduled an arbitral hearing to be held on August 8, 2005 at the OCSEA home office in Westerville, Ohio. The Undersigned heard the matter as scheduled. At the beginning of the hearing, the Parties offered factual stipulations, joint exhibits, and a submission agreement. There were no procedural challenges or objections to the Undersigned's jurisdiction. The Agency and the Union were represented by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and documentary evidence in support of their cases. All witnesses were duly sworn and fully available for direct and cross-examination. Each document introduced into the arbitral record was available for relevant objections. At the end of the hearing, the Parties opted to submit written closing arguments in lieu of oral arguments and agreed to e-mail the briefs to the Undersigned on or about August 23, 2005. The Undersigned received the last Brief-related correspondence on August 24, 2005 and on that date officially closed the record in this dispute.

II. Relevant Contractual and Regulatory Provisions

A. Regulatory Provisions

General Work Rules, Policy Number 103.17¹⁷

Rule 4.17 Unauthorized Possession of a Weapon

Rule 4.17 explicitly prohibits "possession of an unauthorized weapon or a facsimile thereof while on state property, in a state vehicle or conducting state business."¹⁸ Rule 4.17 is a level 4 violation.¹⁹

Infraction Discipline Grid

Where the Grievant had no prior discipline and commits a major (level 4) infraction, available penalties

¹⁴ Joint Exhibit 2-1.

¹⁵ Joint Exhibit 2-9.

¹⁶ Joint Exhibit 2-1.

¹⁷ Joint Exhibit 5-1.

¹⁸ Joint Exhibit 5-7.

¹⁹ Joint Exhibit 5-7.

range from a six-day suspension to termination.¹²⁰

(Policy 101.15, at 2-3)

Depicts types of misconduct classified as “critical incidents,” which include:

- g. All felony law violations by DYS employees, volunteers or interns as evidenced by arrest, indictment, information (official charging document) or law-enforcement complaint.
- j. *Display/usage* of deadly weapons/firearms by employees, volunteers, interns, visitors or juveniles while on DYS premises or contract sites. (Management Exhibit 1, at 3).

Ohio Revised Code, Section 2901.22 (B)

“A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”²¹

Ohio Revised Code, Section 2921.36

(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the Department of Mental Health or the Department of Mental Retardation and Developmental Disabilities, any of the following items:

* * * *

(1) Any deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance. . .²²

Ohio Revised Code, Section 2921.36 Definitions

As used in sections 2923.11 to 2923.24 of the Revised Code:

(A) "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

(B)(1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.²³

B. Contractual Provisions

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. . . .

24.02- Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be

¹²⁰ Joint Exhibit 5-9.

¹²¹ Agency Post-Hearing Brief, at 1.

¹²² Management Exhibit 2.

¹²³ Management Exhibit 2, at 3.

commensurate with the offense. . . .

24.05- Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

III. The Issue

Did the Department of Youth Services remove the Grievant for just cause? If not, what shall be the remedy?

IV. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. Rule 4.17 does not require intent, since it does not specify a requirement for any particular mental state on the part of any employee.
2. The Grievant *knowingly* and *intentionally* transported a weapon onto state property. His own statements substantiate this position. Also, "Knowingly" is defined by statute in the arbitral record.¹²⁴

The following conduct and circumstances establish intent:

- The Grievant used the same travel bag he customarily carries on trips.
- The Grievant owned numerous firearms and customarily carried the pistol in a "small camera case travel bag" on trips.
- The Grievant failed to notify the Hotel's staff at the time he unpacked the gun because of the late hour and because the violation was complete.
- The Grievant failed to apprise his supervisor of the pistol when he told her about the sick colleague.
- Nor did the Grievant attempt to recover the weapon from the Hotel *before* another guest discovered it two days later. This shows that upon returning home he does not customarily unpack his travel bag. He never missed the gun because he never unpacks items (including the gun) that he routinely carries in the bag.
- The Grievant's failure to remove the gun suggests that he often travels with the gun and had no intention of doing otherwise when he traveled on state business, onto state property, and in a state vehicle.
- The Grievant testified that historically he only carried the gun on a few trips, a statement which directly contradicts his statements to Investigator Whipple (GE 4-11 and 4-12). Moreover, the Grievant actually testified that he takes the gun when he goes on camping trips, and the record shows that he is an avid autumn camper.
- The Grievant's placing the pistol in the night stand drawer is consistent with one who carries a gun for personal protection, and who intends to control the weapon for personal security.

Together the foregoing observations show that the Grievant had actual knowledge that he possessed the gun, and actual knowledge supports an inference of intent.

3. The weapon was loaded. At the arbitration hearing, the Grievant testified that he unloaded the gun during a camping trip, an assertion he omitted on November 12 during the interview with Mr. Whipple. Even when Mr. Whipple said the weapon was loaded, the Grievant did not challenge that point.
4. The Grievant voluntarily waived his right to union representation, a fact that Joint Exhibit 4-10 clearly

¹²⁴ Ohio Revised State Code, Section 2901.22 (B).

establishes.

5. Nepotism did not affect the measure of the Grievant's discipline. The Agency never modified the measure of the Grievant's discipline because his wife was then Superintendent of the ORVJCF. Instead, the Agency carefully weighed the mitigating and aggravating circumstances relevant to the penalty decision in this case.
6. The Agency did not subject the Grievant to disparate treatment. Nor has the Agency historically imposed lighter discipline upon employees caught with weapons on state property, i.e., those similarly situated to the Grievant.

B. Summary of the Union's Arguments

1. There was insufficient evidence to impute either intent or knowledge to the Grievant in the instant case. The Agency never established either subjective or objective knowledge by the Grievant, regarding the weapon in his camera case. Thus, the Grievant has never been shown to have knowingly intended to place the weapon in the state vehicle or to carry it into state property.
2. The Grievant's removal was at least partly caused by his wife's position as Superintendent of the Agency. Because of its concerns about nepotism, the Agency processed the Grievant's case differently from other cases. But for Ms. Gasper's relationship with the Grievant, his employer would have investigated the matter, held the pre-deprivation hearing, as well as considered and appropriately weighed mitigating factors.
3. The Grievant was a victim of disparate treatment.
 - Although Rule 4.17 prohibits both weapons and/or firearms on state property, the record shows that the Agency still employs some employees who violated Rule 4.17.
 - Just cause requires like treatment under like circumstances. Rules must be consistently enforced and resulting disciplinary measures, consistently applied. The Agency bears the burden of proving the existence of a reasonable basis for disparate treatment.
4. From the outset, the Agency clearly intended to remove the Grievant, irrespective of relevant, weighty mitigating circumstances. Specifically, the Agency either flatly ignored or unduly discounted that: (1) The Grievant's act was unintentional; (2) The Grievant was a fifteen-year employee; (3) The Grievant served fifteen discipline-free years; and (4) During his fifteen-year tenure, the Grievant maintained a satisfactory to exemplary performance record.
5. The Agency's sensitivity to public and private charges of nepotism unduly influenced its decision to remove the Grievant.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this dispute involves discipline, the Agency has the burden of proof or persuasion regarding its charges against the Grievant. To establish those charges, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that the Grievant engaged in the alleged misconduct. Doubts regarding the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish purported misconduct in the first instance, it cannot prevail, *irrespective* of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of

persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

B. Impact of Rule 4.17

Rule 4.17 prohibits “possession of an unauthorized weapon while on state property, in a state vehicle or conducting state business.” The Rule does not reference intent or any other state of mind. The Union does not contend that the Grievant did not violate Rule 4.17 by bringing a pistol into the state vehicle and onto state property at the Ohio River Valley facility. Indeed, evidence in the arbitral record establishes that the Grievant had neither authorization from the Agency to bring the weapon onto state property nor authorization from the State of Ohio to carry a concealed weapon. The pistol was therefore “unauthorized” under Rule 4.17. Furthermore, the Grievant admitted transporting the weapon onto the state’s premises and into the state’s vehicle that he drove from Ohio River Valley to Delaware, Ohio. Then he admits parking the states’ vehicle on the Training Center’s property. Finally, the Grievant was “conducting state business” while the weapon was in his possession. It is, therefore, not difficult to find that the Grievant violated Rule 4.17 by transporting the weapon onto state property and possessing the weapon while conducting state business.

C. The Grievant’s State of Mind

Ohio Revised Code, Section 2921.36(A) provides in relevant part: “No person shall *knowingly* convey . . . onto the grounds of a detention facility . . . any of the following items: (1) *Any deadly weapon* or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or *ammunition* for use in such a deadly weapon. . . .” Finally, Ohio Revised Code, Section 2901.22 (B) states in relevant part: “A person acts *knowingly*, regardless of his purpose, when he is *aware that his conduct will probably cause a certain result* A person has *knowledge* of circumstances when he is aware that such circumstances probably exist.”²⁵

The issue here is whether the Grievant “*knowingly*” carried the weapon onto state property. The Agency

²⁵ Agency Post-Hearing Brief, at 1.

correctly argues that if the Grievant “knowingly” did that, then he manifestly intended to do so.¹²⁶ Because it is often virtually impossible to ascertain a person’s subjective state of mind—what a person actually knew—the bottom line issue here is an objective one: Whether the Grievant *knew* or, with ordinary diligence, *should have known* he was taking a weapon onto state property. The Agency offers several arguments that the Grievant possessed the requisite knowledge. In contrast, the Union broadly contends that the Agency flatly failed to establish that the Grievant had culpable knowledge.

As set forth below, preponderant evidence in the arbitral record as a whole shows that the Grievant either knew or should have known that the pistol was in his camera case on October 26, 2004. First, during his interview with Mr. Whipple, the Grievant said: “I just keep it; I’ve had it for a number of years. I take it with me if I travel somewhere *out of state* or whatever for *personal protection*.” Then he said:

And to be honest about it I probably didn’t even pay attention. I mean it [the pistol] *stays* in my travel bag; I have a small travel bag that is just for like overnight and *usually* it’s [the pistol] in there with the shaving kit and other stuff buried at the bottom. I usually throw some clothes in there, take it and go never pay attention to it.¹²⁷

This language suggests that the pistol was as common to the Grievant’s travel bag as was his shaving kit, both of which lay at the bottom of that bag, and both of which the Grievant either knew or should have known were in the bag.¹²⁸ Further support of this conclusion is found in the Grievant’s statement: “I take it with me if I travel somewhere out-of-state or whatever for *personal protection*.” Here the Union focuses on the fact that the Grievant explicitly mentions *out-of-state* travel and not *in-state* travel. The Union’s focus on out-of-state travel implicitly, and as set forth below, unduly, discounts “*personal protection*.” On the other hand, one is hardly surprised that the Agency ignores the absence of *in-state* travel, while stressing “*personal protection*.”

For the following reasons, the Agency’s interpretation is more persuasive. The Grievant admits taking

¹²⁶ In any event, the statutory language is “knowingly” rather than intentionally.

¹²⁷ Joint Exhibit 4-12.

¹²⁸ If the Grievant knew his shaving kit was in the bag, he certainly should have known his weapon also was there.

the weapon on *out-of-state* trips specifically for “*personal protection*.” In other words, the need for personal protection is the only reasonable motive for traveling out of state with the weapon. However, it requires little reflection to conclude that the need for *personal protection* exists probably with equal urgency both within and without Ohio’s borders. Any reasonable person who feels the need for personal protection outside of Ohio will likely grapple with that same need inside of Ohio. Thus, the Grievant’s need for “personal protection,” explains the weapon’s place at the bottom of his travel bag with his shaving kit. Also, his tendency to pay no attention to whether the weapon is in the travel bag combines with the foregoing rationale to strongly suggest that the weapon is not taken only on out-of-state trips. Instead, it probably travels both in state and out of state, as the Grievant said, “buried” at the bottom of his travel bag with his “shaving kit and other stuff.”²⁹

Other sections of the arbitral record also support this conclusion. First, there is the Grievant’s account of how the weapon somehow returned to his travel bag even after he removed it during the October 2004 camping trip. He testified that during that camping trip, he removed the camera case from the travel bag, unloaded the weapon, placed it in one compartment of the camera case, placed the ammunition in a separate section of the case, and stored the case itself in one of his camper’s vestibules. When asked how the camera case found its way back into his travel bag on October 26, 2004, the Grievant testified that while cleaning the camper after the last autumn trip, a family member must have discovered the camera case in the vestibule and placed the case in the Grievant’s travel bag. The revealing question is why would the family member know to place the camera case in the travel bag rather than somewhere else? One logical explanation—especially in light of the foregoing quotations—is that the family member knew the Grievant usually kept the camera case in the travel bag.

Second, why would the Grievant retain possession of the weapon once he discovered it in the Hotel room on October 26, 2004? Perhaps the painful but proper course of action would have been to surrender the

²⁹ Joint Exhibit 4-12.

weapon either to Hotel management or to the Agency's management, at least until he could return in his own vehicle and collect the weapon. Since there is no indication that the Grievant even considered either course of action,¹³⁰ one can reasonably deduce that but for the coworker's illness on the morning of October 27, the Grievant would have *remembered* the weapon in the night stand drawer and necessarily confronted two choices:¹³¹ (1) leave the weapon in the room, hardly a likely outcome, or (2) consciously and deliberately place the weapon back in the state vehicle, drive the vehicle onto the Training Center's parking facilities, and conduct training sessions.

Finally, the Grievant's credibility suffered from inconsistencies between his testimony and his statements during the interview with Mr. Whipple. In addition, his testimony suffers from internal inconsistencies. With respect to his testimony and interview statements, the Grievant testified that during the last fifteen years he carried the pistol on trips two or three times. In contrast, during his interview with Mr. Whipple, the Grievant said he carried the weapon for "personal protection" and "*usually its in there [travel bag] with the shaving kit and other stuff buried at the bottom.*"¹³² The statement about carrying the weapon on trips two or three times is facially inconsistent with the latter assertion, which reasonably and strongly suggest that the Grievant has carried the weapon more than two or three times during the last fifteen years. Furthermore, during his interview with Mr. Whipple, the Grievant could not recall whether the weapon was in the Hotel room or at home. Yet, how could one so easily forget having found a pistol in one's travel bag in a hotel room, unless possession of such a weapon on trips was relatively common? Indeed, the Grievant testified that he exclaimed "Oh God" when he discovered the weapon. That reaction seems wholly inconsistent with the Grievant's total inability to recall whether the weapon was in the Hotel room or in his home. This total

¹³⁰ During direct testimony, the Grievant suggested that the damage was done once the weapon was in the Hotel room. The two foregoing alternatives indicate that the Grievant's conclusion was not necessarily true.

¹³¹ That the Grievant did not even mention let alone elect one of these alternatives to placing the weapon in his night stand suggests that he was probably more comfortable concealing the weapon, rather than openly admitting that he had mistakenly and innocently brought the weapon onto state property. The result of such a decision would hardly have been worse than that in the instant case.

¹³² Joint Exhibit 4-12 (emphasis added).

loss of memory occurred within three days, between October 26, 2004, when the Grievant noticed the weapon in his travel bag, and October 29, 2004, when the guest discovered the weapon in the night stand. It is incredible that one who has traveled with a weapon only two-three times over the last fifteen years would so easily forget finding a weapon in one's baggage. For all of the foregoing reasons, the Arbitrator holds that *more likely than not* the Grievant "knowingly" conveyed the weapon onto state property on October 26, 2004.

D. Impact of Nepotism

The issue here is whether the Agency's admitted concerns about nepotism ultimately deprived the Grievant of *outcome-determinative* procedural rights. For example, the Union maintains that but for her position as Superintendent of the Agency, the Grievant's wife, Ms. Aldine Gaspers, would have had a greater decision-making role in the instant dispute, and, consequently, mitigating circumstances would have received full weight and consideration. The Agency contends that Ms. Gaspers' position as Superintendent did not adversely affect the outcome in this case. In fact, Ms. Krueger testified that because Ms. Gaspers was Superintendent, the Agency's disciplinary decision was even tougher. Assuming the truth of this assertion, Ms. Krueger essentially establishes that Ms. Gaspers' presence *did indeed* have *some*, though not necessarily an adverse, effect on the Agency's decision making in this dispute. Still, evidence in the record on this point does not prove that Ms. Gaspers' presence as Superintendent somehow *caused* the Agency's penalty decision to be unreasonable, arbitrary, capricious, or an abuse of discretion. This is not to formally find or hold that such defects do not taint the Agency's decision in this case. That assessment is made below in the penalty section of this opinion.

E. Disparate Treatment

The Union argues that the Grievant was a victim of remedial disparate treatment because he received a harsher penalty than other employees who engaged in the same or similar conduct but whom the Agency currently employs. This is an affirmative defense for which the Union has the burden of persuasion or proof.

The Agency contends that, with one exception, it has removed every employee caught with a weapon or firearm on state property. That one exception involved an employee who concealed a knife in the finger of his glove and brought the knife on the Agency's property. However, evidence in the instant dispute does not establish whether the employee was participating in an official security challenge to determine if gate-keeping employees were sufficiently alert. In all other cases cited by the Union, the Agency fired employees caught with weapons or firearms on state property. Apparently employees who were so removed but still work for the Agency were subsequently reinstated pursuant to other decision-making mechanisms such as settlements or arbitral decisions. Finally, one or more administrators were demoted rather than removed for assaulting fellow employees. The difficulty for the Union here is that on their face the assaults were not the same as or similar to bringing a deadly weapon onto state property. The latter conduct, if not severely penalized or deterred, could result in far more deadly assaults. For these reasons, the Arbitrator finds no proof that the Grievant was a victim of disparate treatment in this case.

F. Whether the Weapon Was Loaded

Here the issue is whether the Pistol was loaded when the guest discovered it in room 107. The Union argues that the Agency adduced no evidence or facts to support the proposition that the weapon was loaded. Conversely, the Agency asserts that it relied on allegations of the Hotel's management that the weapon was loaded.

Preponderant evidence in the record does not establish that the pistol was loaded when the guest found it in the room. At best the Hotel management's contrary assertions are mere hearsay and lack any independent corroborative evidence in the arbitral record. To corroborate that hearsay, the Agency might have produced the manager(s) who made the assertion, thereby affording the Union a fair opportunity to cross-examine the Hotel management regarding those assertions. As matters stand that was not done, and the record lacks preponderant evidence to support the claim that the weapon was loaded when it was discovered in the room.

VI. The Penalty Decision

The Agency has established that the Grievant violated Rule 4.17; therefore, some measure of discipline is warranted. Assessment of the proper quantum of discipline requires evaluation of mitigative and aggravative factors to determine whether removal is unreasonable, arbitrary, or capricious under the circumstances of this case.

A. Aggravative Factors

The major aggravative factor in this case is that the Grievant violated Rule 4.17 by bringing a deadly weapon onto state property. As pointed out earlier, this is a level four violation and is very serious.¹³³ The second aggravative factor in this case is that the Grievant either knew or should have known that the weapon was in his travel bag. Given the difficulty of ever proving actual subjective knowledge, this imputed objective knowledge is effectively equivalent to “knowingly” bringing the weapon onto state property. The Grievant’s denials of culpable knowledge will not be heard where, as here, he habitually placed the deadly weapon in his travel bag.¹³⁴ Another aggravating factor is that the Grievant apparently was the only Training Officer for the agency. As such he should have exercised special care to comply with *all* of the Agency’s rules, irrespective of their levels.

B. Mitigative Factors

The mitigative factors in this dispute include the Grievant’s fifteen years of otherwise satisfactory and sometimes exemplary service. In addition, during that fifteen-year tenure, the Grievant was never disciplined for anything, until the conduct leading to the instant dispute. Thus, but for the instant infraction, the Grievant maintained an exemplary disciplinary record.

¹³³ The Agency did not formally charge the Grievant of committing (nor did he commit) a “critical incident” as defined in Policy No. 101.15, since the Grievant neither displayed nor used the weapon anywhere.

¹³⁴ Similarly, that the Grievant might not have seen the Hotel’s sign, prohibiting weapons on its premises is no excuse, given that he admits having visited the Hotel between thirty and forty times.

C. Propriety of Removal

In light of this balance of mitigative and aggravative factors, termination of the Grievant was unreasonable, arbitrary, and *not for just cause*. Preponderant evidence establishes that he should have known (objective knowledge) that the weapon was in his travel bag on October 26, 2004. However, it is not established that he consciously brought the weapon onto the Agency's property.

Accordingly, the removal shall be reduced to time-served suspension. The Agency shall *reinstate* the Grievant without *backpay*, forthwith. In other words, from the date of the Grievant's effective removal to the date of his reinstatement pursuant to this award, he is not entitled to any *regular or overtime wages* to which he otherwise would have been entitled but for his removal. Nothing in this Opinion and Award is intended to have (or shall be interpreted as having) any effect *whatsoever* on any other benefits to which the Grievant otherwise would have been entitled, but for his removal in this case. Finally, the Grievant's seniority shall remain unaffected and undiminished by either his removal or this Opinion and Award.

Finally, given the nature of the Grievant's misconduct, he shall be reinstated pursuant to a *last chance agreement* in which he promises not to violate Rule 4.17 or any similar Rule involving the conveyance of any kind of weapons, firearms, ammunition, or dangerous ordnance onto any state property. The agreement shall last for *two (2) years* from the date the Agency reinstates the Grievant pursuant to this opinion and award. An established or proven violation of the last chance agreement within the life of the agreement shall, *without more*, constitute *just cause* for the Grievant's removal under Article 24.01 of the Parties Collective-Bargaining Agreement.

VII. The Award

For all the reasons set forth in this opinion and award, the Grievance is hereby **sustained in part and denied in part.**



Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.