

72 FLRA No. 35

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO SECTOR
LAREDO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2455
NATIONAL BORDER PATROL COUNCIL
(Union)

0-AR-5436

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DECISION

April 14, 2021

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Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester dissenting)

I. Statement of the Case

On October 15, 2018, Arbitrator Bruce Ponder issued an award finding that the Agency violated its own policy when it temporarily revoked an agent's law enforcement status and assigned her to administrative duty after learning that during a confrontation with another agent, she had allegedly pointed her taser and her service-issued firearm at the other agent. The question before us is whether the Arbitrator's award is contrary to Agency policy. Because the Arbitrator's findings are inconsistent with the plain language of the Agency's Use of Force Policy (UFP),¹ the answer is yes.

II. Background and Arbitrator's Award

The grievant, Border Patrol Agent Claritza Perez, is assigned to Laredo South Border Patrol Station. On February 13, 2016, while in the processing area of the Laredo South Station, Supervisory Border Patrol Agent Kent Galindo overheard other agents discussing an incident where Perez allegedly pointed a taser and her Agency-issued firearm at Border Patrol Agent Charles

Mellado. Galindo reported the matter to Watch Commander Charles Clough and after discussing the matter, Galindo and Clough individually informed Mellado and Perez that they needed to provide statements about the situation. Mellado submitted his statement on February 21, 2016, and Perez provided her statement on February 22, 2016.

On February 23, 2016, based upon an oral briefing provided by Assistant Chief Patrol Agent (ACP) Albert Torres, ACP for the Laredo Sector, the Chief Patrol Agent (CPA) for the sector, Mario Martinez, issued written notification to Perez that her law enforcement status was temporarily suspended; that she was required to relinquish her badge, credentials, and agency issued firearm; and would be assigned administrative duties pending completion of a full investigation. As a result of the temporary revocation of her law enforcement status, Perez lost the ability to work mandatory and voluntary overtime, to earn premium or differential pay, to participate in details and training, and to transfer duty stations.

The situation was investigated by the Agency's Office of Professional Responsibility which issued a report on June 14, 2016. The Agency restored Perez's law enforcement status on August 10, 2016.

After her law enforcement status was restored, the Union filed a grievance asserting that the Agency subjected Perez to an unjustified and unwarranted personnel action by revoking her law enforcement status and assigning her to administrative duty for an extended period. The grievance was denied at all three steps of the grievance process and the Union submitted the matter to arbitration.

At arbitration, CPA Martinez testified that the only information he relied upon in making the decision to impose the temporary revocation was an oral summary by ACP Torres of the statements provided by Mellado, Perez, and another agent who corroborated Mellado's version of the incident. The oral briefing provided by ACP Torres included that Perez had denied pointing her firearm at Mellado and that the situation occurred ten months prior to it being reported. The Arbitrator found that additional witnesses had submitted statements, and that ACP Torres did not include those statements in his presentation to CPA Martinez.

The UFP requires temporary revocations to be based on reliable evidence. At arbitration, CPA Martinez explained why he found the information orally relayed to him reliable, testifying that it was because the situation was reported and corroborated by other Border Patrol agents.

¹ Exceptions, Ex. 2, Use of Force Policy (UFP).

As CPA Martinez relied on Torres's oral summaries of three witness statements, instead of reviewing all of the written witness statements, the Arbitrator concluded that CPA Martinez acted without reliable facts in his possession at the time of the temporary revocation.

As a result, the Arbitrator determined that the Agency violated the UFP and the limitations of the management rights clause of the parties' agreement. As a remedy, he directed the Agency to pay the grievant backpay and reserved consideration of a motion for attorney fees.

On November 15, 2018, the Agency filed exceptions to the Arbitrator's award, and on December 20, 2018, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusion: The award is contrary to Agency Policy.

The Agency argues that the award is contrary to the UFP.² In resolving grievances, arbitrators are empowered to interpret and apply agency rules and regulations,³ such as the UFP. However, they are not free to impose requirements not presented by the plain wording of those rules and regulations.⁴

When evaluating exceptions asserting that an arbitrator's award is contrary to a governing agency rule or regulation, the Authority considers the matter de novo and determines whether the award is inconsistent with the plain wording of, or is otherwise impermissible under, the rule or regulation.⁵ The Agency contends that the Arbitrator misapplied the UFP by placing burdens upon the Agency not present in the policy.⁶ We agree.

Section II, Chapter 1 paragraph (F)(2) of the UFP makes it clear that when certain situations occur, the only requirement necessary to temporarily revoke either firearm carry authorization or law enforcement status is *reliable* evidence that such a situation has taken place.⁷ Further, it is important to recognize that the policy in question applies only when a CBP agent's authority to

carry an agency issued firearm or otherwise engage in law enforcement activities is being revoked on a temporary basis and does not apply to permanent revocations, which require *substantiated* evidence.⁸ The sole question for a temporary revocation under the policy is whether the evidence used to make the revocation decision was reliable at the time the decision was being made.

The situations identified in the UFP as justifying temporary revocation of the authority to carry firearms include "[e]vidence of unlawful violent behavior, or behavior that indicates that the individual may be a danger to themselves or others;" "[e]vidence of serious breaches of [Agency] integrity or security policies;" "[e]vidence of a credible threat to use a fire arm in an unlawful manner;" or "[i]f [a Responsible Official] determines that the revocation is in the best interest of [the Agency] and/or the officer/agent."⁹ In this case, CPA Martinez was orally advised by a subordinate manager that two agents had provided written statements affirming that they witnessed a third agent point a firearm at one of them.

CPA Martinez chose to rely on the three witness statements summarized for him by his subordinate. The Arbitrator found it insufficient for CPA Martinez to rely on the summaries of witness statements. The facts here do not establish that the temporary revocation was not based on reliable evidence. The three statements considered by CPA Martinez, standing alone, provide sufficient reliable evidence to conclude that *at least* one of the situations described in the UFP had occurred, therefore justifying the temporary revocation.¹⁰

In this case, CPA Martinez determined that an allegation made by one agent and corroborated by another agent was reliable enough to merit the temporary revocation of a third agent's firearm carry and law enforcement status, even though the situation occurred months earlier and was denied by the third agent. Absent evidence that the CPA had legitimate reason to question the veracity or motive of the agents making the accusation when the temporary revocation was imposed, there is no basis to reach the legal conclusion that CPA Martinez "acted without reliable facts in his possession" in violation of the policy.¹¹ While CPA Martinez potentially could have been provided with additional information, the record

² Exceptions at 5-9.

³ *U.S. Dep't of VA, Med. Ctr., Dayton, Ohio*, 68 FLRA 360, 361-62 (2015) (VA) (Member Pizzella dissenting) (citation omitted).

⁴ *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 521, 522-23 (2018) (then-Member DuBester dissenting) (arbitrator improperly found violation of agency's policy by imposing obligations not present in the policy).

⁵ VA, 68 FLRA at 362.

⁶ Exceptions at 5-9.

⁷ Award at 17 (quoting UFP) ("Temporary revocations will be based on reliable evidence.").

⁸ UFP at 11.

⁹ Award at 18 (quoting UFP).

¹⁰ While the Union and the Arbitrator point to other information that existed at the time the decision was made which could have aided the decision maker in assessing reliability, the only relevant question in assessing policy compliance is whether the information used by the decision maker was reliable when the decision was made.

¹¹ Award at 31.

does not establish that his decision was unsupported by reliable evidence.¹² In essence, the Arbitrator wrongly determined that the UFP requires a decision maker to root their decision on something akin to probable cause¹³ before imposing a temporary revocation. Further, the Arbitrator's reasoning suggested that even if CPA Martinez made his decision based on reliable evidence presented to him, his failure to seek out and review any additional witness statements invalidated the propriety of his decision. Such an interpretation of the policy is contrary to the plain language of the UFP.¹⁴ Thus, the Arbitrator's conclusion that the Agency violated the UFP when it temporarily revoked an agent's law enforcement status and assigned her to administrative duty is contrary to the Agency policy.¹⁵

Furthermore, imposing what appears to be a different and higher standard than the UFP requires to assess the reliability of the evidence renders the distinction between temporary and permanent revocations virtually meaningless. The purpose of a temporary revocation provision within the policy is to provide the flexibility of immediacy with respect to implementation. That is why the policy permits a supervisor to temporarily revoke the authorization to carry a firearm but not the revocation of law enforcement credentials¹⁶ and why a temporary revocation only requires reliable evidence, whereas a permanent revocation must be supported by substantiated evidence.¹⁷ In contrast, a permanent revocation is generally the result of full and complete inquiry into the situation or incident. Simply stated, the requirements and procedures for a permanent revocation are more daunting than for a temporary revocation.

The UFP requires that a temporary revocation be based only on reliable evidence. By imposing a requirement that the deciding official review all submitted statements before taking any action, the award is inconsistent with, and contrary to, the plain wording of the policy. Consequently, we set aside the award and find it unnecessary to resolve the Agency's remaining exception.¹⁸

IV. Decision

We set aside the award.

¹² The dissent fails to acknowledge that there was evidence, i.e., two witness statements, that the grievant pointed a firearm at her co-worker. Further, examining the two additional statements, as done by the dissent, shows one witness did not see the grievant point a weapon at an agent while the other agent confirmed that the grievant was pointing the gun as a joke. Indeed, based on these additional statements, not two but three people saw the grievant pointing the gun – thereby lending additional support for temporary revocation.

¹³ See Award at 27-28 (basing his interpretation of the “reliable evidence” standard as “something equal to or less than probable cause, perhaps something approximating reasonable suspicion”).

¹⁴ While having a complete investigatory picture is best, the evidence in the instant case was sufficient to warrant temporary revocation while a complete investigation was conducted.

¹⁵ The idea that a supervisor, let alone a CPA, could not, on a temporary basis, immediately revoke the authority to carry an Agency-issued firearm after two agents report that another had pointed a deadly weapon at one of them borders upon lunacy. Under the UFP, the ability of a supervisor is limited to the temporary revocation of firearm carry authorization, they may not revoke credentials/law enforcement status or revoke firearm carry authorization on a permanent basis. UFP at 11.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Exceptions at 8 (arguing that the award fails to draw its essence from the parties' collective-bargaining agreement).

Chairman DuBester, dissenting:

I disagree with the majority's conclusion that the Arbitrator's award is contrary to the Agency's Use of Force Policy (force policy). In explaining the basis for my disagreement, however, a few points bear mentioning at the outset.

First, I fully appreciate the important purpose behind the force policy's provision allowing the Agency to temporarily revoke an agent's authority to carry an Agency-issued firearm, and the practical realities encountered by the Agency in implementing this provision. And I fully agree that, consistent with the force policy's language, the evidentiary threshold imposed on the Agency to execute this authority is not onerous. Nor should it be.

But words have meaning. And, this particular provision requires temporary revocations to be "based on reliable evidence."¹ In my view, the Arbitrator correctly concluded that the Agency failed to honor this self-imposed standard in rendering its decision.

In reaching its contrary conclusion, the majority has left out some significant facts. As the majority notes, the decision at issue was rendered by Chief Patrol Agent (Chief) Mario Martinez based solely upon an oral summary of the evidence provided by Assistant Chief Patrol Agent (Assistant Chief) Albert Torres. This summary referenced a statement from Border Patrol Agent (Agent) Charles Mellado, the grievant, and another agent who corroborated Agent Mellado's version of the incident. As also noted by the majority, Chief Martinez testified that based upon this briefing, he believed the evidence was reliable at the time he made his decision.

But the record shows that this oral summary did not provide Chief Martinez with the full evidentiary picture even at this early stage of the investigatory process. Specifically, the Arbitrator found that "the record contain[ed] no evidence that [Assistant] Chief Torres reviewed any of the written statements or talked with any of the supervisors . . . before his conversation with Chief Martinez."²

And more importantly, the Arbitrator found that, "[h]ad [Assistant Chief Torres] done so, he would have discovered that Agent Mellado's claim that [the] grievant pointed her taser at him was directly contradicted by [another agent's] statement," which indicated that "[r]ather than the threatening gesture described by [Agent]

Mellado," the grievant "point[ed] her firearm in [Agent] Mellado's 'direction' in the manner of a 'bad joke.'"³ And Chief Torres also "would have seen the statement of [an additional agent], named by [Agent] Mellado as a witness, which stated he had never seen [the] grievant point her weapon at an agent,"⁴ as well as statements that Agent Mellado "had made the same allegations against [the] grievant on December 7, 2015 to the Federal Protective Service and the Border Patrol AIG," but that he "declined to make a statement at that time."⁵

The majority barely acknowledges these flaws in the Agency's procedure, conceding only that Chief Martinez "potentially could have been provided with additional information."⁶ And in the majority's view, the Agency's omission of any conflicting evidence from its decision-making process was immaterial because the evidence of which Chief Martinez was made aware supported his decision.

But the majority's rationale ignores that Chief Martinez was *not* made aware of evidence already contained in the record that contradicted the very evidence upon which he relied to make his decision. And for that reason, I believe the Arbitrator correctly concluded that the Agency failed to meet the force policy's "reliable evidence" standard in rendering its decision.

I certainly do not agree with the majority's assertion that the Arbitrator erred because he "wrongly determined that the [force policy] requires a decision maker to root their decision on something akin to probable cause."⁷ The Arbitrator did no such thing. Rather, endeavoring to apply the term "reliable evidence" as used – but not defined – in the force policy, the Arbitrator simply noted that the term is "perhaps" analogous to "something approximating reasonable suspicion" that "requires an objective factual basis that leads a reasonable mind to suspect that the actionable activity or omission occurred."⁸ At no point in his decision did the Arbitrator conclude that the Agency was required to meet a "probable cause" standard to exercise its temporary-suspension authority under the force policy.

Nor do I agree with the majority that the Arbitrator erred because he based his decision upon Chief Martinez's "failure to seek out and review any additional witness statements."⁹ As explained, this was not the basis upon which the Arbitrator reached his conclusion. Rather, he found that the Agency's decision did not comport with the force policy's standard because it was based upon an

¹ Award at 17 (quoting the force policy).

² *Id.* at 29.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 30.

⁶ Majority at 4.

⁷ *Id.*

⁸ Award at 27.

⁹ Majority at 4.

incomplete, and inaccurate, summary of the statements that had already been provided to the investigatory official.

In sum, I wholeheartedly agree that the Agency can, and should, exercise its authority to temporarily revoke an agent's authority to carry an Agency-issued firearm based upon reliable evidence of unlawful or violent behavior. But in taking such actions, the Agency should be required to abide by the plain language of its own policy.

Accordingly, I dissent.