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In the Matter of the Arbitration Between: ) )  
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NATIONAL BORDER PATROL ) )  
COUNCIL, AMERICAN FEDERATION OF ) )  
GOVERNMENT EMPLOYEES (AFGE), ) )  
LOCAL 2595, ) ) OPINION AND AWARD  
                  Union ) )  
          and ) )  
) )  
DEPARTMENT OF HOMELAND SECURITY, ) )  
U.S. CUSTOMS AND BORDER PROTECTION. ) )  
                  Agency ) )  
) )  
(Luis Bustamante, Grievant) ) )

**I. INTRODUCTION**

This matter arose due to a dispute between the American Federation of Government Employees, National Border Patrol Council, Local 2595 (the “Union”) and the Department of Homeland Security, U.S. Customs and Border Protection, U.S. Border Patrol (the “Agency”).

Luis Bustamante (“Grievant”) is a U.S. Border Patrol Agent assigned to the 1159 Checkpoint (the “Checkpoint”) in the desert east of the Wellton Border Patrol Station. Grievant uses a canine to detect smugglers of aliens and contraband.

On July 7, 2009, Grievant was working with his canine in the early morning hours. Supervisory Border Patrol Agent (“SBPA”) Nicholas Long (“SBPA Long” or “Long”) ordered Grievant to reverse the direction of his vehicle and remain at the Checkpoint. The

Agency alleged that Grievant did not comply with the instruction and suspended Grievant for two days. The suspension was later reduced to one day.

After engaging in the requisite dispute resolution procedures, the Union requested arbitration pursuant to Article 34 of the Collective Bargaining Agreement (“CBA”). (Agency Exhibit-AX-5). The parties selected Karen G. Andres (“Arbitrator”), and the matter was set for hearing on June 28 and 29, 2011 at the Yuma Border Patrol Station in Yuma, Arizona.

The hearing was held on June 28, 2011 and was concluded in one day. With the submission of closing briefs on August 8, 2011, the record was closed.

## **II. ISSUES**

The issues are as follows:

1. Did the agency have appropriate cause to discipline Grievant?
2. Assuming such cause existed, was Grievant’s one-day suspension just and sufficient, and was it given only for such reasons as will promote the efficiency of the Agency?

## **III. HEARING EXHIBITS**

### **A. Agency Exhibits**

1. Notice of proposed two-day suspension, dated August 10, 2009;
2. Notice of one-day suspension, dated December 28, 2009, and effective January 6, 2010;
3. Materials relied on in issuance of the proposed suspension:
  - (a) Memorandum from then Special Operations Supervisor Wayne Preston to then Chief Patrol Agent Paul Beeson, dated July 23, 2009;

- (b) Memorandum from SPBA Nicholas Long to then Patrol Agent in Charge (“PAIC”) Carla Provost, dated July 16, 2009;
  - (c) Memorandum from grievant to then PAIC Carla Provost, dated July 8, 2006;
  - (d) Memorandum from Border Patrol Agent (“BPA”) Steven Washington to then PAIC Carla Provost, dated July 8, 2009;
  - (e) Memorandum from BPA John Hunter to then PAIC Carla Provost, dated July 8, 2009;
  - (f) Memorandum from BPA Juan Lopez to then PAIC Carla Provost, dated July 7, 2009; and
  - (g) Duty Assignment Sheet for Grievant from July 5 to July 18, 2009;
4. The Union’s invocation to arbitration, dated January 29, 2010;
  5. The Parties’ Collective Bargaining Agreement (CBA)
    - Article 32: Disciplinary and Adverse Action*
    - Article 34: Arbitration;*
  6. The Agency’s Standards of Conduct: *Sections 6.7.2 & 6.7.6;*
  7. The Agency’s Recommended Tables of Offenses and Penalties: *Section E.1;*
  8. Transcript of Grievant’s Oral Reply to Proposed Two-Day Suspension, conducted December 11, 2009;
  9. Position Description for GS-1896-11 Border Patrol Agent; and
  10. Photographs of Border Patrol Highway Checkpoint 11-59.

**B. Union Exhibits**

1. Table of Contents for Arizona Revised Statutes Title 28 (Transportation);
2. Ariz. Rev. Stat. § 28-621 (Applicability to vehicles on highways; exceptions)
3. Ariz. Rev. Stat. § 28-624 (Authorized emergency vehicles);
4. Ariz. Rev. Stat. § 28-729 (Driving on roadways landed for traffic);

5. Ariz. Rev. Stat. § 28-731 (Driving on divided highways);
6. Redacted agency discipline dated October 26, 2004.

#### **IV. POSTIONS OF THE PARTIES**

##### **A. AGENCY**

Grievant intentionally disregarded his supervisor's orders. Grievant's contention that he was operating his vehicle in the safest manner is belied by the physical layout of the Checkpoint, the observations of fellow agents and Grievant's own statements.

The resulting one-day suspension promoted the efficiency and safety of Grievant and his fellow agents.

##### **B. UNION**

SBPA Long did not instruct Grievant where to turn around his vehicle. Grievant determined he could not change lanes safely after immediately leaving the Checkpoint.

The driver should have discretion to determine the safe operation of the government vehicle. It is unconscionable for the Agency to discipline an employee for driving a vehicle in the manner the employee thought most safe and prudent.

#### **V. FINDINGS OF FACT**

The Agency] is the United States government body which is responsible for patrolling and policing the nation's borders. "The Border Patrol enforces the laws that protect America's homeland by the detection, interdiction, and apprehension of those who

attempt to illegally enter or smuggle any person or contraband across our Nation's sovereign borders." (AX9. Border Patrol Agent-BPA-job description).

The Yuma Border Patrol Sector patrols 118 miles of the international border between Mexico and the States of California and Arizona. It is divided into three stations which include Grievant's station in Wellton, Arizona.

Grievant began employment with the U.S. Border Patrol on December 8, 2003. He is a canine officer or handler. He works with a canine to seek out hidden aliens and contraband.

Grievant drives a mid-size sport utility vehicle with tinted windows and a kennel for the dog in the back. The driver's visibility is limited, particularly at night.

The Checkpoint is hazardous. People often drive too fast or recklessly. Some drivers do not turn on their lights at night. Some drivers are intoxicated. Drivers have been known to fall asleep at the wheel. Some people neglect to stop at the Checkpoint. Agents should assume that people will not obey the rules.

Grievant takes many precautions when driving and has never had an accident. It's up to the agent to determine how best to operate his vehicle to ensure safety. Careless operation of government-owned vehicles is a serious offense.

On July 7, 2009, Grievant and his canine were working at 0400 hours. Grievant informed SBPA Long that he intended to check the Sentinel rest area for any illegal activities ("make a cut"<sup>1</sup>). Grievant was in the habit of doing this, and other supervisors permitted it.

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<sup>1</sup> A "cut" means that the agent drives along the side of a road or a trail and looks for signs of foot traffic or any other abnormal activity.

Long told Grievant that he was needed at the Checkpoint. He should make a u-turn, get out his canine and start working there. Grievant indicated his assent either verbally or by nodding.

According to Long, instead of immediately turning around and resuming his duties, Grievant left the Checkpoint and returned five minutes later. “(Grievant) could have turned left onto the median or turned right to use the Spot Road exit, but he chose to aggravate the situation by being insubordinate, and returning on his own terms.” (AX3b).

Other witnesses were of the opinion that Grievant could have turned around sooner than he did.

When Grievant returned, he parked his vehicle along the frontage road behind another canine handler’s vehicle. Long could not see the vehicle. (AX3b).

According to Grievant, he drove eastbound about one quarter mile to a location where he was able to turn around safely. He returned to the Checkpoint and went through his regular routine. He placed his lunch box in a refrigerator and went to the rest room prior to resuming work at the Checkpoint. (AX3c).

Agent Steven Washington estimated that Grievant returned to the Checkpoint five to ten minutes later after he went to turn around. (AX3d). The Checkpoint was not busy at the time of the incident in question.

Long stated in his testimony that Grievant told him that the incident of July 7 was a “joke”. (Tr114). Long presented himself at hearing as an extremely serious young man.

## VI. OPINION

Having carefully reviewed and weighed the testimony and evidence presented at the hearing, and after considering each argument raised by the parties in their briefs, I reach the following conclusions:

“(A) 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...shall be just and sufficient and only for reasons as will promote the efficiency of the Service.” [ CBA, Article 32, sec. M). Case law concurs.

Long did not have a problem with Grievant turning around his vehicle. The problem was with Grievant driving too far to make the turn in Long’s opinion, and Long’s apparent feeling that Grievant was mocking him.

It goes without saying that a good arbitrator or judge is neutral and fair. However, it is inevitable that every arbitrator or judge brings his or her background, experiences and philosophies to the bench or conference table. Those personal factors embellish or contribute to the efforts of the trier of fact to make the most reasoned and even-handed decision. I served as a civilian member of a panel of three on tribunals termed “Board of Rights” for the Los Angeles Police Department. I began in this capacity at the beginning of a change in the composition of the Board in 1992. Previously, only high-ranking sworn personnel served in the hearing office capacity. After the Rodney King incident, the LAPD Commission added a civilian member to Board composition.

I had the opportunity to talk at length with my colleagues on the Board. I also availed myself of the opportunity to talk with the rank and file in the streets.

Following allegations of cronyism, the police chief at the time bent over backward to make the Department accountable. However, as often happens in life, he swung the pendulum very far in the other direction. Officers were called upon to be super-human. They were punished for tiny offenses. They were required to report each other's malfeasance or face punishment. (I am not exaggerating when I say that an officer could be punished if he failed to report that he had observed that his partner had jaywalked.) As a direct result, morale suffered.

Of course, it is important to follow orders in a police department or any other law enforcement agency such as the Border Patrol. I will venture to opine that it best serves the interests of the Agency and its employees if agents are also given some latitude to make decisions - if they are encouraged to think for themselves. I learned many years ago that an employer who delegates tasks rather than micromanages gets the best work effort and product from a basically good employee.

Grievant turned around and remained at the Checkpoint as instructed. Long did not instruct Grievant to make the u-turn at a specific point. If Grievant took a couple of extra minutes beyond Long's expectation, this is minor and inconsequential. The difference in the time does not rise to the definition of failure to follow supervisory orders. Punishing an employee for such a minor event does not "promote the efficiency of the agency" within the meaning of the CBA. Instead, it is more likely to create a hostile working environment for both supervisors and agents.

The Arbitrator cannot know with certainty if Grievant intended to undermine Long's authority by taking longer than necessary to turn around, or if Grievant truly thought that he was turning around at the earliest point that was safe. The evidence does

not show that Grievant was purposely taking longer than necessary to mock Long's authority. Since the burden of proof is on the Agency to show insubordination, it is determined that Grievant followed orders and was not guilty of insubordination.

#### VII. AWARD

The grievance of BPA Luis Bustamante is granted and the 1-day suspension imposed against him is overturned. The Agency shall pay to him all back pay and benefits lost as a result of the suspension from duty.

The Arbitrator will retain jurisdiction in the event of a dispute regarding back pay and benefits or attorney fees.



KAREN G. ANDRES

DATED: AUGUST 29, 2011