

IN THE MATTER OF THE ARBITRATION BETWEEN;

UNITED GOVERNMENT SECURITY OFFICERS ASSOCIATION, LOCAL 28

AND

G4S REGULATED SECURITY SOLUTIONS

FMCS Case No. 13-51795-3

OPINION AND AWARD OF ARBITRATOR

**Richard A. Beens
Arbitrator
1314 Westwood Hills Rd.
St. Louis Park, MN 55426**

APPEARANCES;

For the Union:

**Robert B. Kapitan, Esq.
General Counsel
UGSOA International
8670 Wolff Court, Ste. 210
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For the Employer:

**Fred Seleman, Esq.
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G4S Secure Solutions (USA) Inc.
1395 Jupiter, FL 33458**

**Date of Award:
October 30, 2013**

JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)¹ between UGSOA Local 28 (“Union”) and G4S Regulated Security Solutions (“Employer”). Britani Kayala (“Grievant”) is a member of the Union and employed by G4S Regulated Security Solutions.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on September 26, 2013 in Rogers, Minnesota. Both parties were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Written closing briefs were submitted by October 28, 2013. The record was then closed and the matter deemed submitted.

ISSUES

Two issues are presented for resolution;

1. *Is this case procedurally arbitrable?*
2. *If the first question is answered in the affirmative, did the Employer have just cause to issue an oral warning to Grievant and, if not, what is the proper remedy?*

FACTUAL BACKGROUND

The Employer is a security company that provides armed, uniformed security officers to various entities. In the present case, they contract with Xcel Energy

¹ Joint Exhibit 1.

Corporation to provide security against terrorism and sabotage at the Monticello Nuclear Plant near Monticello, Minnesota. Grievant was first employed by G4S on January 17, 2011. Although initially filing an unarmed, watchman position, Grievant was promoted to an armed nuclear security position in the fall of 2011. Grievant received an oral warning on October 30, 2012 for an incident occurring the day before. A grievance was filed on her behalf by the Union on November 14, 2012.² The Employer denied the grievance as untimely on November 19, 2012.³ The undersigned arbitrator was notified by email on May 30, 2013 that the parties had selected him to hear the grievance.

Procedural Issues

The Employer raises two procedural issues: 1) was the grievance filed in time? 2) Did the Union comply with procedural requirements of the CBA in processing the grievance? A negative response to either question would make the grievance nonarbitral.

The facts relevant to the first issue are as follows: The parties CBA contains detailed steps and timelines governing the grievance process. Initially at issue in this case is the requirement that a grievance be filed “...not later than ten (10) calendar days (excluding Saturdays, Sundays, and Holidays) after the occurrence of the facts giving rise to the grievance...”⁴ Grievant was disciplined with an oral warning on October 30, 2012 for an incident that occurred the day before.⁵ The Union filed the grievance on November 14, 2012.⁶

The Employer responded five days later denying the grievance on the grounds that

² Joint Exhibit 2.

³ Ibid.

⁴ Joint Exhibit 1, Article 7, section 7.2.2.

⁵ Employer Exhibit 8.

⁶ Joint Exhibit 2.

it was not timely filed and, therefore, procedurally defective.⁷ They argue that Veterans Day is not recognized as a “paid holiday” in the CBA and, therefore, cannot be excluded when counting the 10 day filing limit. Consequently, they argue November 13 was the last day for the Union to file this grievance. Therefore, November 14 was, in fact, the eleventh day and outside the ambit of CBA Article 7, sec. 7.2.2. The Employer’s timeliness objection was immediately raised in their Step 2 response.⁸

On the other hand, the Union contends Veterans Day is a nationally recognized holiday authorized by congress and, as such, must be excluded when determining the grievance filing time limit under the plain language of CBA sec. 7.2.2. They maintain November 14, 2012 was the appropriately the last day to file.

The Employer’s second argument against arbitrability was not raised until the day of the arbitration hearing and is based on their allegation that the Union failed to comply with CBA provisions 7.2.3 and 7.4. The former would require the Union to contact Employer’s V.P. of labor relations to discuss possible resolution of the grievance within thirty (30) days after a Step 2 denial for the purpose of encouraging settlement discussions. Section 7.4 contains procedures for notifying the Employer of the Union’s intent to proceed to arbitration plus for either jointly agreeing to a specific arbitrator or obtaining and selecting from a FMCS list.

⁷ Joint Exhibit 2.

⁸ Joint Exhibit 2.

Just Cause Issue

The facts relevant to the underlying merits of the grievance are as follows: the federal Nuclear Regulatory Commission heavily regulates Security work at nuclear facilities (“NRC”). In addition, both the plant owner, Xcel Energy, and the employer, G4S, promulgate extensive, detailed rules governing conduct of the armed security employees. Security force members (“SFM”) are trained to be constantly vigilant for potential saboteurs, both outside and inside the Xcel nuclear facility. Consequently, they can never be separated from their weapons while on duty. To this end, Xcel policies require that rifles can only be handled in two ways:

1) *“Rifles SHALL be slung vertically in front of the body with the muzzle pointed down. SFMs SHALL ensure they maintain positive control of the rifle at all times (i.e. keep one hand on the rifle). The rifle SHALL NOT be slung behind the back as the officer cannot maintain control of the weapon.”*⁹ (Emphasis in original.)

2) *“While at a stationary post equipped with a weapons rack, SFMs may place their rifle in the rack, a retention device (i.e. lanyard, tether, etc.) should be used to ensure the officer can not be separated from their weapon...”*¹⁰

In furtherance of all NRC, Xcel, and G4S policy compliance, *“Employees are expected to report suspected violations of laws, or regulation, or corporate policies, including the Code of Conduct.”*¹¹ This expectation is also communicated to the employees through a variety of additional policy publications, including Plant Access Training,¹² the Xcel Conduct of Security Operations regulations,¹³ G4S Ethics Code.¹⁴ All of these publications are either a part of SFM training or available to them on the

⁹ Employer Exhibit 7, Conduct of Security Operations, Section 4.10.6.

¹⁰ Ibid., Section 4.10.7.

¹¹ Employer Exhibit 4.

¹² Employer Exhibit 3.

¹³ Employer Exhibit 5.

¹⁴ Employer Exhibit 2.

Employer's intranet.

The specific incident giving rise to this grievance occurred on the evening of October 29, 2012. Grievant was on duty and located in BRE-4 at approximately 2100 hours. BRE is an acronym for "bullet resistant enclosure." These are relatively small (6' x 6') metal guardhouses that have gun ports and contain a couple chairs and video monitors. One or two security guards occupy a BRE at any given time. One of their duties is to observe video monitors displaying pictures from various cameras that automatically scan the area outside the perimeter of the nuclear plant. In addition, the security personnel must periodically perform a manual scan of that same area. The purpose of the latter is to disrupt and foil any intruder who might be attempting to time and evade the automatic scans.

At approximately 2120 hours on October 29, 2012, Grievant was monitoring security camera screens and about to do a manual scan in BRE-4 when Officer Aleckson entered the enclosure. Since he customarily worked with a different command group, Aleckson asked Grievant whether the commanders of her group preferred rifles to be controlled by "lanyard or sling."¹⁵ Grievant responded, "sling" and went back to her primary duty, conducting a manual scan of the plant perimeter. Despite Grievant's direction, Aleckson hung his untethered rifle on a gun port handle while placing a cell phone call to his son on the East Coast.¹⁶ A short time later Grievant became aware of Aleckson's rule violation and pointed to the gun while he was still on his phone call. She

¹⁵ Armed Nuclear Security Officers at the Monticello facility are divided into five groups. Normally a given group covers a given shift. However, officers may occasionally be temporarily assigned to another group to cover for ill, absent, or vacationing members.

¹⁶ October 29, 2012 was the day Hurricane Sandy struck the eastern seaboard where Aleckson's son lived.

then returned to the manual scan. A very short time later, Lieutenant Ihlenfeldt, one of the duty group's commanding officers entered BRE-4 unannounced. He observed Aleckson leaning back in a chair and talking on his cell phone. Upon seeing Lt. Ihlenfeldt, Aleckson grabbed his rifle from the gun port handle and placed it on his lap. In a subsequent discussion with the officer, Aleckson acknowledged knowing his weapon should either be slung or tethered.¹⁷ Lt. Ihlenfeldt require him and Grievant to fill out Security Incident Reports.¹⁸ Grievant was never questioned by Ihlenfeldt about her involvement in the incident.

On the following day, October 30, 2012, Grievant was disciplined in the form of an Oral Warning.¹⁹ As a basis for the discipline, the Employer indicated, "*SFM B. Kayala failed to coach or otherwise check her co-officer to ensure compliance with policy.*"²⁰

As previously indicated, the Union filed the present grievance on November 14, 2012.

APPLICABLE CONTRACT AND POLICY PROVISIONS²¹

ARTICLE 2

MANAGEMENT RIGHTS

This Agreement shall not be construed to infringe or impair any of the normal management rights of the Employer which are not inconsistent with the provisions of this Agreement. Included among management rights is the authority to administer and/or manage the Employer's business, including by not limited to the direction of the working force; the right to hire, discipline, suspend or discharge employees for just cause.... To

¹⁷ Employer Exhibit 6.

¹⁸ Union Exhibits 1 and 2.

¹⁹ Employer Exhibit 8. Aleckson also received an Oral Warning, but did not file a grievance.

²⁰ Ibid.

²¹ Only CBA or policy provisions directly relevant to this grievance have been included.

require employees to observe Employer as well as Client and NRC rules and regulations, to establish and enforce rules and regulations....

ARTICLE 7²²

GRIEVANCE AND ARBITRATION PROCEDURE

7.2.2 STEP 2 - If the matter is not resolved in Step 1, the grievance shall, not later than ten (10) day calendar days ((excluding Saturdays, Sundays, and Holidays) after the occurrence of the facts giving rise to the grievance, be reduced to writing setting forth the facts in detail, and specifying the Article and Section/Paragraph allegedly violated, and signed by the aggrieved employee and the Union Committeeman, and shall be submitted to the Site Manager or his designee.

7.2.3 STEP 3 - If the grievance is still unsettled, the International Union representative or his designee will contact the Employer's Corporate V.P. Labor Relations or his designee and shall schedule a time for the International Union representative or his designee and the Employer's V.P. Labor Relations or his designee within thirty (30) calendar days to review and discuss the grievance. The Employer's V.P./ Labor Relations or his designee shall have fifteen (15) calendar days after that discussion to respond to the International Union representative or his designee.

7.3 Grievances which have been processed in accordance with the requirements of the above paragraphs and which remain unsettled shall be processed to arbitration in accordance with the following procedures and limitations.

7.4 The Union International representative, or his designee within ten (10) calendar days (excluding Saturdays, Sundays and Holidays) after the rejection of the grievance by the Employer's Corporate V.P. Labor Relations, or his designee, will, in writing notify the Employer's V.P. Labor Relations or his designee of the Union's intent to invoke arbitration. The Employer and the Union will jointly attempt to agree upon the selection of a neutral arbitrator, to hear the case. Should the parties fail to agree upon the selection of an arbitrator, the Union will request the Federal Mediation and Conciliation Service to supply a list of seven (7) arbitrators to hear the case. A copy of this request will be sent to the Employer. This request will be made within ten (10) calendar days (excluding Saturdays, Sundays and Holidays) after failure of the parties to agree upon an arbitrator. Within thirty (30) days of receipt of the list, an Arbitrator will be selected from the list, by the parties alternately striking from the list until one name remains, and this individual will be the arbitrator to hear the case.

²² Joint Exhibit 1, p. 7.

7.9 any grievance shall be considered null and void if not filed and processed by the Union, or the employee represented by the Union, in strict accordance with the time limitations and procedures set forth above. There shall be no recognition of a continuing grievance so as to frustrate the intent of strict adherence on this time limitations. Failure of the Employer to act within the time frame required entitle the grievant to the next step. In any particular case, any time limit specification may be extended by mutual agreement between the Employer and the Union in writing.

ARTICLE 13²³

HOLIDAYS

13.2 The following holidays shall be designated as paid holidays.

*New Year's Day
Good Friday
Memorial Day
Independence Day
Labor Day*

*Thanksgiving Day
Day After Thanksgiving Day
Christmas Eve
Christmas Day*

ARTICLE 22²⁴

GENERAL

22.4 The Union recognizes that it is the responsibility of security employees to familiarize themselves with the job duties, rules and regulations established by the Employer and the client, and to perform the job duties as required and to obey the Employer and client rules and regulations and to faithfully report all violations thereof. The Union agrees that security employees shall discharge all duties assigned to them impartially and without regard to and Union or non-Union affiliation of any personnel at or assigned to the Monticello Site, and that failure to do so constitutes sufficient cause for discipline, up to and including discharge.

XCEL ENERGY POLICIES

3.2 Corporate Compliance and Business Conduct

²³ Joint Exhibit 1, p. 15.

²⁴ Joint Exhibit 1, p. 27.

Reporting Suspected Violations²⁵

Employees are expected to report suspected violations of laws or regulations, or corporate policies, including the Code of Conduct...

Conduct of Security Operations²⁶

4.1.7 All security personnel have the responsibility to stop and immediately notify supervision when instructions or conditions are not fully understood or expected outcomes are not achieved. All security personnel are expected to maintain a questioning attitude at all times.

Plant Access Individual Responsibilities²⁷

As in any industrial organization, several general rules must be followed when working in the plant.

-
- *Problems in the plant must be REPORTED using the problem-reporting programs such as action requests (ARS). Report problems to your supervisor if you do not have computer access.*
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The G4S Ethics Code²⁸

-
- *Carefully following company rules and procedures.*
-
- *Reporting any wrongdoing.*
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OPINION

1. Is this case procedurally arbitrable?

A general presumption exists that favors arbitration over dismissal of grievances

²⁵ Employer Exhibit 4.

²⁶ Employer Exhibit 5.

²⁷ Employer Exhibit 3.

²⁸ Employer Exhibit 2.

on technical grounds.²⁹ A party raising the object of procedural arbitrability bears the burden of proof and must overcome the presumption that grievances are arbitrable.³⁰

The first issue involves a contract interpretation in which the arbitrator is called upon to determine the meaning of some portion of the collective bargaining agreement between the parties. The arbitrator may refer to sources other than the collective bargaining agreement for enlightenment as to the meaning of various provisions of the contract. The essential role of the arbitrator, however, is to interpret the language of the collective bargaining agreement with a view to determining what the parties intended when they bargained for the disputed provisions of the agreement.

The “*facts giving rise to the grievance*” occurred on October 30, 2012, the day Grievant received an oral warning.³¹ She had ten (10) days “(*excluding Saturdays, Sundays and Holidays*)” thereafter to file her grievance. Management asserts November 13 was her final day to file under CBA Section 7.2.2. The Union points out that Veterans Day, a recognized federal holiday, fell on Monday, November 12, 2012.³² As a consequence, they argue November 14 was the last day for filing the grievance. Finally, the Employer points out that Veterans Day is not a paid holiday as set out in CBA Section 13.2. Therefore, they contend it cannot be excluded when counting the ten day filing limit.

The labor contract in this case gives no guidance. The parties’ CBA does not

²⁹ Elkouri & Elkouri, *How Arbitration Works*, (Seventh Edition, 2012), Ch. 5.4 B. See Also, Rodeway Inn, 102 LA 1003, 1013 (Goldberg, 1994).

³⁰ DeKalb Comm. Unit School Dist., 120 LA 1095 (Simon, 2004) and Bloom Township High School District, 119 LA 321 (Bierberg, 2003).

³¹ Employer Exhibit 8.

³² November 11 is the legally authorized federal public holiday. However, when any federal public holiday falls on a weekend the following Monday is treated as a holiday for pay and leave purposes. See www.usa.gov/citizens/holidays.shtml.

define “holidays” in either Section 7.2.2. or Article 13. Nor does Section 7.2.2 restrict the meaning of “holidays” in any way. Article 13 Section 13.2 only contains a specific list of “paid holidays.” These include some nationally authorized holidays like Memorial Day and Independence Day.³³ The list also includes Good Friday the day after Thanksgiving, and Christmas Eve, none of which are holidays authorized by Congress or presidential executive order.³⁴ More important, there is nothing in the CBA indicating Article 13, Section 13.2 limits the wording of Article 7, Section 7.2.2. There is nothing in the CBA that leads me to believe Section 13.2 was intended to define “holidays” for all purposes in the contract.

Under these facts, it makes more sense to regard the generic term “holidays,” as used in Section 7.2.2, as a generic reference to nationally recognized holidays and the manner in which they are treated when falling on weekends. That, combined with a universal arbitral reluctance to deny a grievance base on vague procedural grounds,³⁵ leads me to find this grievance procedurally arbitrable on this point. In other words, I would not count the Monday upon which Veterans Day was celebrated in calculating the ten (10) day limit on filing a grievance. I find the grievance was validly filed within the time limit set out Section 7.2.2 of the CBA.

Finally, does the Union’s failure to precisely follow the CBA procedures warrant dismissal of the grievance when the issue is first raised at the arbitration hearing?

There is a clear split among arbitrators on this issue. Some hold that following a

³³ See www.usa.gov/citizens/holidays.shtml for a list of national holidays that have been created by either Executive Order or an act of Congress.

³⁴ Ibid.

³⁵ Elkouri & Elkouri, *How Arbitration Works*, Seventh Edition (2012), Chapter 5.5 C.

CBA grievance procedure to the letter is jurisdictional and allow the issue to be raised at any point in the process.³⁶ I would agree if the Employer could show significant prejudice shortly before or at the arbitration hearing. However, absent such a showing, I would side with those who believe failure to object prior to the hearing constitutes a waiver, particularly in this case.³⁷ I do that for a number of reasons. Since I was notified of my selection as arbitrator on May 30, 2013, the Employer has been aware of the Union's intent to proceed to hearing for almost six months. Despite this time lag, they did not raise the procedural non-compliance argument until the morning of the arbitration. Waiver of a procedural argument is often found where a company processes a grievance fully, including the selection of an arbitrator, and then argues for the first time at the arbitration that the grievance is nonarbitral.³⁸ The Employer had ample time to discuss possible resolution of the grievance -- as is the apparent intent of CBA sec. 7.2.3. Further, there is not a scintilla of evidence that the non-compliance prejudiced the Employer's case.

More importantly, it appears the parties, who been dealing with each other for over ten (10) years, have been inconsistent in demanding strict compliance with CBA Sections 7.2.3 and 7.4. Where parties have been informal in past handling of grievances, clear notice should be given if a party intends to insist on strict compliance in the future.³⁹ Again, had the Employer wished to find a mutually acceptable arbitrator without reliance

³⁶ Monroe Mfg., 107 LA 877, (Stephens, 1996); G4S (Wackenhut Corp.). FMCS Case No. 10-57225-3, (Scoville, 2012).

³⁷ Ardco, Inc., 108 LA 326, (Wolff, 1997). See also: Elkouri & Elkouri, *How Arbitration Works*, (Seventh Edition, 2012), Ch. 5.4 B.

³⁸ Elkouri & Elkouri, *How Arbitration Works*, (Fifth Edition, 1997, p. 224. Union Eye Care Ctr., 100 LA 703, (Shunker, 1993); Liquid Transporter, 99 LA 217, (Whitney, 1992).

³⁹ Elkouri & Elkouri, *How Arbitration Works*, (Fifth Edition, 1997), p. 223

on a FMCS list, they could have broached the subject when first aware of the Union's intent to arbitrate. Once again, there is no showing of prejudice to the Employer. If anything, the Union is prejudiced by having to make last minute, unprepared arguments on matters they were led to believe were not at issue. Workplace harmony and due process are best secured when all sides are aware of all issues at the earliest possible moment. Springing "gotcha" claims at the last possible moment do nothing but foster distrust and suspicion, neither of which are positive factors in the workplace.

Under the facts before me and for the reasons set out above, I find the Employer has not met its burden in proving the grievance is procedurally nonarbitrary.

2. Did the Employer have just cause to discipline Grievant and, if not, what is the proper remedy?

It is well established in labor arbitration that, where an employer's right to discipline an employee is limited by the requirement that any such action be for just or just cause, the employer has the burden of proof. Although there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

A just or sufficient cause consists of a number of substantive and procedural elements. A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee, express or implied of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered without a predetermined

conclusion? Finally, did the Grievants violate the work rule in question?

Guarding a nuclear facility is extremely serious business in this age of political extremism and instability. Heightened vigilance against threats to security, external or internal, are eminently reasonable. Hence, the Employer's rules⁴⁰ requiring employee awareness and reporting of co-worker violations are reasonable in this context. However, none of the written rules cited by the Employer as applicable deal with a duty to "coach" or "actively engage" coworkers when aware of a problem, the alleged deficiency in Grievant's conduct. Report them? -- Yes. Coach them? -- No.

Did the Grievant have prior notice of the rules in question? Grievant's testimony indicated familiarity, through either reading or training, of all the Employer's rules except Exhibit 4, the Xcel Corporate Compliance and Business Conduct policy. Her actions in telling Aleckson to "sling" his weapon and later gesturing when she saw him out of compliance clearly demonstrates an understanding of the policies and, in my view, constitutes "coaching" and "actively engaging."

Was the incident thoroughly investigated before the imposition of disciplinary action? The short answer is "No." While she was told to write a "short and sweet" incident report, Grievant was never given a face-to-face opportunity to explain her conduct to her supervisors. While I realize an oral warning is the lowest level of disciplinary action, it is a black mark against the employee and can be weighed against her in future disciplinary actions.⁴¹ Industrial due process requires that any discipline, including oral warnings, be based on a meaningful, more-than-perfunctory factual

⁴⁰ Employer Exhibits 1, 2, 3, 4, 5, and 7.

⁴¹ Employer Exhibit 9.

investigation.⁴² It is clear that Grievant had no idea she might be disciplined when asked to write an incident report. Ihlenfeldt's incident report⁴³ and his subsequent corrective action notice⁴⁴ give no indication that he was aware of Grievant's attempts to correct Aleckson's conduct. At the very least, a supervisor should have given her the opportunity to explain her conduct in the give and take of a face-to-face talk. Had that happened, this entire discipline/arbitration process may well have been avoided.

Finally, did Grievant violate the work rules in question? Clearly not. No one rebutted Grievant's very credible testimony regarding the incident. Neither Aleckson nor Ihlenfeldt were called as witnesses. Grievant indicated that she was conducting a manual video scan of the plant perimeter during the ten minutes between Aleckson entering BRE-4 and Lt. Ihlenfeldt's appearance. She briefly interrupted that critical task to advise Aleckson to "sling" his weapon and again to gesture to him when he failed to comply. In the interim, her attention was focused, as it should have been, on the far more critical task of a manual video scan. In my view, she very appropriately balanced performance of her primary duties and coaching a non-compliant co-worker. Under these facts, I find Grievant did not violate the Employer's policies or procedures.

⁴² *The Common Law of the Workplace*, National Academy of Arbitrators, Second Edition (2005), §6.14.

⁴³ Employer Exhibit 6.

⁴⁴ Employer Exhibit 8.

AWARD

The grievance is SUSTAINED. The Employer is directed to remove the documented oral warning from her personnel file.

Dated: _____

Richard A. Beens, Arbitrator