

In the Matter Of the Arbitration Between:

American Federation of Government
Employees, National Border Patrol Council,
Local 2595, and Earl Trapp.

Grievants,

OPINION & AWARD

Vs.

Department of Homeland Security,
U.S. Customs and Border Protection, U.S.
Border Patrol, Yuma Sector.

Agency.

FMCS Case No. 12-56290-A (Termination of Earl Trapp)

INTRODUCTION

The Arbitrator, Edward Scholtz, was selected by the parties from a panel of arbitrators provided by FMCS. The arbitration hearing was held in Yuma, Arizona on October 29 and 30 and December 4, 2012. The grievants were represented by Jason Aldrich, Gattey and Baranic, and the Agency, by Lauren Barefoot, Office of Assistant Counsel, U.S. Customs and Border Protection. The matter was submitted by post-hearing briefs.

ISSUE

The issue is controlled by statute. Under 5 U.S.C. Section 7513(a) the Agency must prove that the removal of Earl Trapp was only for such cause as to promote the efficiency of the service.

STATEMENT OF THE CASE AND THE FACTS

The Border Patrol is a Federal Law Enforcement Agency within the United States Department of Homeland Security, U.S. Customs and Border Protection, charged with preventing the entry of terrorists and weapons of terrorism, enforcing federal laws, interdicting smugglers, and protecting the United States from those who attempt to enter the U.S. between the ports of entry.

The Border Patrol mission is “prevent the entry of terrorists and their weapons of terrorism; to enforce the laws that protect America’s homeland by detection, interdiction, and apprehension of those who attempt to illegally enter or smuggle and person or contraband across our Nation’s sovereign borders.”

Earl Trapp entered on duty with the U.S. Border Patrol on March 23, 2009. Trapp was assigned to the Welton Station of the U.S Border Patrol in the Yuma Border Patrol Sector. Trapp worked temporary details in the Tucson Border Patrol Sector when the opportunity presented itself. During February and March 2011, Trapp was assigned to such a temporary detail in the Tucson Sector. During this time frame, Trapp was also scheduled to attend an Army National Guard military drill in Marana, Arizona, from March 4-6, 2011.

Charge I: Time and Attendance Records

On March 4, 2011, at 8:00 in the morning, Trapp appeared at the Yuma County Sheriff’s Office instead of appearing for his military drill so that he could answer questions of investigators regarding their suspicion that he had committed a felony. By appearing in Yuma for the Sheriff’s investigation, Trapp did not appear for his military drill in Marana, which was quite a distance from Yuma. At the

conclusion of the hearing, the investigators requested that Trapp remain in Yuma for the weekend, which Trapp agreed to do.

Following the Sheriff's interview, Trapp called his Station. Trapp testified that he spoke with 2nd line supervisor, Robert Mead, and informed Mead that there was an investigation being conducted by the Yuma County Sheriff's Office, and that he had just answered questions of investigators in Yuma. Mead wrote an email to his superiors documenting the phone call but omitting that Trapp had told him that he was in Yuma. Trapp remained in Yuma through most of the weekend, but returned to Casa Grande, Arizona (his assigned detail station) during the evening of March 6, 2011.

The Agency's schedule for Trapp for the dates from February 27, 2011. to March 12, 2011, and Trapp's computerized record of hours worked ("COSS" records) on each of these days, show Trapp worked on these days as follows:

2/27/11:	Worked from 0000-1000 hours (10 hours total)
2/28/11:	Worked from 0000-1000 hours (10 hours total)
3/1/11:	Worked from 0000-1000 hours (10 hours total)
3/2/11:	Worked from 0000-1000 hours (10 hours total)
3/3/11:	Worked from 0000-1000 hours (10 hours total)
3/4/11:	Military leave (But claimed as a day off in COSS)
3/5/11:	Day Off (But claimed as military leave in COSS)
3/6/11:	Military leave (Claimed as military leave in COSS)
3/7/11:	Day off (Claimed as day off in COSS)
3/8/11:	Worked from 0000-1000 hours (10 hours total)

- 3/9/11: Worked from 0000-1000 hours (10 hours total)
- 3/10/11: Worked from 0000-1000 (10 hours total)
- 3/11/11: Sick Leave
- 3/12/11: Worked from 0000-1000 hours (but probably 12 hours total)

The Time and Attendance Sheet is what an employee completes before entering his hours in the COSS system. Trapp completed his Time and Attendance Sheet for the above dates on March 1, 201, and an email he sent that day indicates that he sent his completed Time and Attendance Sheet from a remote patrol camp (Papago Farms) to the Welton Station at 12:19 p.m. on Sunday, March 13, 2011. Trapp testified that he worked 12 hours that day.

Trapp testified that he was stressed out when he completed the Time and Attendance Sheet and that he was also fatigued having just worked 12 hours that day. Trapp testified that there were obvious inaccuracies. He should have not claimed military leave. Trapp also testified that he completely mislabeled the Administratively Uncontrollable Overtime work by entering "2's" in the AUO Excludable row, when those "2's" should have been in the AUO row immediately above the Excludable row. Trapp's Time and Attendance record show that he claimed military leave on Friday, March 4, and Sunday, March 6, while his COSS records show military leave was claimed on Saturday, March 5, and Sunday, March 6.

Chief Martin admitted that Trapp incorrectly entered his overtime (AUO) hours, and that the Time and Attendance Sheet submitted by Trapp did not request overtime for the overtime hours Trapp had worked.

Trapp testified that he believed that Charge I and its specifications should be sustained.

Charge II: Facebook Charge

Trapp had a Facebook account that included the time period from May 2010 to March 2011. Trapp testified that his Facebook postings have always been set to “private” and never to “public.” An agency witness, Ms. Ashley Butler, testified that she saw Trapp’s Facebook postings but her testimony lacked specifics and was not supported by any documentation. I find that Trapp’s Facebook account settings were set to “private.” Trapp testified that he never received a “friend request” from Michael Bodes, a Supervisory Agent at the Welton Station.

Michael Bodes has been assigned to the Welton Station for his entire career of seven years. Bodes testified that he had heard from Agent Alvarez that Trapp was posting inappropriate comments on his Facebook account. Alvarez had no recollection of telling Bodes that information but did recall another Agent, Jason Negus, complaining about Trapp’s Facebook posts.

Bodes testified that he decided to create the Facebook account of “Layla Shine.” Bodes then sent a “friend request” to Trapp. Trapp testified that he accepted a “friend request” from someone named “Layla Shine” with a picture of a female tagged to the request. Trapp believed that “Layla Shine” was someone that he had met in the past when he was single.

Supervisory Agent Bodes testified that when Trapp accepted the “friend request” he looked at Trapp’s Facebook postings and copied them to a word

document. The Facebook postings obtained by Bodes were relied upon by the Agency to support its charge of “Poor Judgment” in Charge II. Before acquiring Trapp’s Facebook posts, Bodes did not investigate to determine if his method of acquiring Trapp’s Facebook pages was legal or otherwise appropriate. Bodes did not use any law enforcement authority to access Trapp’s Facebook account and it was not a criminal investigation. Bodes testified that he was unaware of a requirement that he honestly and accurately identify himself to Facebook. Chief Martin admitted that none of Trapp’s Facebook posts contained information that violated the Agency’s Policy regarding “Improper Web Postings of Sensitive Information.”

The Border Patrol Handbook Chapter 7 applies to “Reporting of Incidents.” The Agency referenced Chapter 7 on February 9, 2011 to answer a question regarding reporting of off-duty incidents. An arbitration decision shows that the Arbitrator did not order the Border Patrol Handbook rescinded and the Agency withdrew a challenge to that Arbitration Award. Bodes admitted that he had read Chapter 7. The Agency introduced no evidence to show that the Border Patrol Handbook had been rescinded. Therefore, the Border Patrol Handbook was the active policy of the Agency during the relevant time period.

The Appendix to Chapter 7 of the Border Patrol Handbook classifies types of allegations. Only Class 4 allegations may be investigated by Border Patrol managers. And the Appendix 7-4 describes Class 4 allegations as low-level misconduct, such as attendance-related issues, poor or careless work performance, conducting personal business on company time, and other low-level offenses. The other Classes are all described by much more serious conduct, and must be investigated by either the

Office of the Inspector General, or, the CPB Office of Internal Affairs. Trapp's alleged Facebook misconduct was investigated as if it were a Class 4 offense, and Chief Martin regarded the Facebook Charge as much less serious than the Time and Attendance Charge.

Procedural Background

Trapp was served the Proposal for Removal on July 8, 2011. The Union provided Chief Martin several documents including Facebook's Statement of Rights and Responsibilities. This document demonstrates that Facebook requires its users to promise that the user is providing his/her real name, not provide false personal information and will not violate law in using Facebook.

On March 1, 2012, Trapp received Chief Martin's decision sustaining both Charges and all Specifications, and imposing the penalty of removal. Trapp's removal was effected on March 2, 2012. The Union timely invoked arbitration on March 21, 2012.

OPINION & AWARD

Under 5 U.S.C. Section 7513(a), the Agency must prove that the removal of Earl Trapp was only for such cause as to promote the efficiency of the service. The Agency is required to prove its case by the preponderance of the evidence standard. The Agency must also prove that the penalty selected was within the bounds of reasonableness. **(Douglas v. Veterans Administration 5 MSPR 280, 302, 306 (April 10, 1981).)**

Charge I: Submission of Inaccurate Time and Attendance Records

Trapp admitted the misconduct alleged in Charge I. The Douglas factors discussion will be discussed in order except that Factor #6 will be discussed last.

Factor #1: Nature and Seriousness of the Offense....

Chief Martin claimed that the falsification was intentional but the Proposal did not, in fact, charge intentional falsification. Patrol Agent in Charge, Justin Bristow testified that it is common for agents to make mistakes on their Time and Attendance records and that supervisors allow employees to amend their Time and Attendance records when supervisors discover inaccuracies. The evidence shows that Trapp was under stress at the time and was fatigued when he completed the Time and Attendance records, having just worked a twelve-hour shift.

Factor #2: Employees job level and type of employment....

Border Patrol Agents are law enforcement officers who are held to a high standard. (But see discussion of comparable disciplinary cases involving Border Patrol Agents regarding Factor #6.)

Factor #3: The employee's past disciplinary record.

Trapp had no prior discipline.

Factor #4: The employees past work record....

There was nothing significant regarding Trapp's work record.

Factor # 5: Effect of the offense on the employee to perform at a satisfactory level and its effect on supervisor's confidence....

The evidence shows that this is a common offense with employees routinely being given the opportunity to correct errors before disciplinary action is considered.

Factor #7: Consistency of the penalty with any applicable agency Table of Offense and Penalties.

Chief Martin admitted that he never looked at the Table in issuing his decision for removal.

Factor #8: Notoriety of Offense.

Chief Martin claimed that the matter received notoriety because the Army National Guard was involved. However, the Army National Guard had nothing to do with Trapp's Border Patrol Time and Attendance Records.

Factor #9: The clarity with which the employee was on notice of any rules that were violated... or had been warned about such conduct.

Trapp submitted "inaccurate records" which is common. This was a single incident.

Factor #10: Potential for Employee's rehabilitation.

Trapp did not commit similar misconduct either before or after the incident. Other Agents who have committed similar misconduct have not been removed from service.

Factor #11: Mitigating circumstances surrounding the offense.

The investigation by the Sheriff acted as a stressor for Trapp. Trapp was also fatigued when he completed the records having just worked a twelve-hour shift commencing at midnight. Trapp also made an error to his detriment by claiming his overtime hours in the "AUO Excludable" row that would not have provided him overtime for the hours worked.

Factor #12: The adequacy and effectiveness of alternative sanctions to deter such conduct.

The Agency has not terminated other Agents who have made similar errors.

Factor #6: Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Union Exhibit O provides the orbit of relevant comparison regarding the penalty imposed on Trapp. The first case proposed a ten-day suspension for three charges 1) Submitting inaccurate Time and Attendance Records 2) Failure to follow Leave Procedures and 3) Alleged that employee lied to his supervisor.

The remaining cases in Union Exhibit O show that four different employees of both the Yuma and El Centro Border Patrol Stations were proposed penalties ranging from five to fourteen calendar day suspensions for the act of claiming overtime pay when no overtime was worked.

After reviewing the Agency disciplinary practice in comparable cases, it is clear that removal was not justified for a single incident of errors in completing Time and Attendance Records, especially since Trapp had never received any prior discipline and other Agents have been allowed to correct their errors without penalty when supervisors caught the errors. The Agency has not applied its rules and penalties even-handedly. Therefore, the penalty of removal is reduced to a ten calendar-day suspension.

Charge II: Facebook Charge. The Electronic Stored Communications Act (ESCA) 18 U.S.C.A. Section 2707

In *Crispin v. Christian Audigier, Inc.* 717 F. Supp. 2d 965 (CD Calif. 2010),

the District Court found that Facebook postings and communications are protected by the Electronic Stored Communications Act. If the user sets the Facebook wall postings privacy settings to “private” the user is entitled to the protection of the ESCA. Judge Morrow’s rulings in **Crispin** relied upon the Ninth Circuit’s decision in **Konop v. Hawaiian Airlines, Inc., 302 F. 3d 868 (2002)**.

The ESCA and the **Crispin** and **Konop** cases were described to Chief Martin during the oral reply but Chief Martin chose to proceed with the Trapp removal.

Border Patrol Agent Trapp had a Facebook account with the privacy settings set to “private.” Supervisory Border Patrol Agent Michael Bodes accessed Trapp’s Facebook account by violating Facebook’s requirements by creating a false account and acquired Trapp’s wall postings after friend requesting Trapp under the false name, “Layla Shine.” Bodes conduct violated the ESCA,

The defenses the Agency might rely upon appear in 18 U.S.C Sec. 2707.

Paragraph (e). This provision reads as follows:

(e) Defense—A good faith reliance on—

- (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under Section 2703(f) of this title);
- (2) a request of an investigative or law enforcement officer under Section 2518(7) of this title; or
- (3) a good faith determination that Section 2511(3) of this title permitted the conduct complained of.

Supervisory Border Patrol Agent Bodes testified that he did not conduct a criminal investigation of Trapp so he could not have obtained a warrant to search and seize Trapp’s Facebook account. Therefore, the first defense is unavailable to

the Agency. The second defense requires a good faith determination by a law enforcement officer that a person's life or safety is jeopardized or national security is at risk or organized crime activities are occurring. Defense #2 does not apply since none of these facts were alleged by the Agency. The third defense is also inapplicable because the Agency is not the stored communication provider in this matter.

In summary, the courts have ruled that Facebook is an "Electronic Communication Provider," and as such, Facebook users who have their privacy settings set to "private" have an expectation of privacy. "Trickery cannot be used by law enforcement officials to obtain consent to view and potentially acquire evidence where an individual has an expectation of privacy." **Crispin**. Bodes was acting in a work-capacity when he obtained Trapp's Facebook posts but he did not follow Agency policies as set forth in Chapter 7 of the Border Patrol Handbook.

Supervisory Border Patrol Agent Michael Bodes illegally obtained Trapp's Facebook postings in violation for the ESCA. The appropriate remedy in this arbitration proceeding is to suppress Trapp's Facebook wall postings. Therefore, Charge II and its Specifications, which are based upon the illegally obtained Facebook postings, and all the evidence pertaining thereto, are excluded.

AWARD

The Union's grievance is sustained; the Agency did not prove cause for the removal of Earl Trapp. Charge I and both of its Specifications is sustained. Charge II and its Specifications are not sustained since the Agency violated the ESCA in acquiring and relying upon illegally obtained evidence. The removal penalty is

reduced to a ten calendar-day suspension, which would have commenced being served on March 2, 2012. Trapp is entitled to back pay for all lost from the date the ten calendar-day suspension would have concluded. Trapp is also entitled to seniority and all other benefits to which he would have been entitled had he been suspended for ten calendar days. The Arbitrator retains jurisdiction regarding the implementation of this Award for 60 calendar days from the date of this Award.

DATED: July 11, 2013.

Edward Scholtz, Arbitrator