AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 54	* *	ARBITRATION OPINION AND DECISION FMCS Case No. 11-51491-3
and	* * *	Grievants: Hooper, Meade, Marble, Phillips, LaGuerre-Rosa, and Wilson
DEPARTMENT OF THE ARMY Fort Benning, GA	* *	James R. Collins, Arbitrator Date of Decision: October 6, 2011

On June 28, June 29, June 30, and July 1, 2011, I held a hearing on the issue set forth below. The Union was represented by Stuart A. Kirsch, and the Employer was represented by Anne M. Norfolk. I received post-hearing briefs from the parties on September 2, 2011 and on September 6, 2011. The record was closed on September 6, 2011.

STATEMENT OF THE ISSUE

As the parties failed to agree on a joint submission of the issue for arbitration, the parties submitted separate submissions, pursuant to Article XXVII of the Agreement, and I have determined that the issue is the following:

> Whether the removal of the grievants—William Hooper, Wavell Meade, Roy Marble, Donny Phillips, Rafael LaGuerre-Rosa, and Henry Wilson—was for just cause and for such cause as to promote the efficiency of the Federal service?
>
> If not, what is the appropriate relief in this case?

Key contract provisions

ARTICLE XXV, DISCIPLINE
Section 1. Primary emphasis will be placed on preventing situations requiring disciplinary actions through effective employee-management relations. Adverse actions are defined as removals, suspensions for more than fourteen (14) days, furlough without pay for thirty (30) days or less and reductions in grade or pay. Disciplinary actions are defined as suspensions of fourteen (14) days or less and letters of reprimand. Disciplinary or adverse action will be taken only for just cause.

ARTICLE XXII, TRAINING
Section 2. The efficiency of operation and conduct of training and development activities for employees are the responsibilities of the Employer.
Section 4. Employees are expected to take full advantage of opportunities presented by the Employer to further their proficiency.

THE FACTS

The grievants in this case—William Hooper, Wavell Meade, Roy Marble, Donny Phillips, Rafael LaGuerre-Rosa, and Henry Wilson—all worked as Security Guards, except for Mr. Hooper who worked as a Police Officer, in the Directorate of Emergency Services at Fort

Benning, Georgia. The record showed that all the grievants had served previously in active military duty for significant periods and had service-related disabilities; and, that all had good work records. The Police Officer and the Security Guard position descriptions both state in the "Conditions of Employment" section that incumbents must maintain current required certifications and skill proficiency with their assigned weapon.

Army Regulation 190-56, "The Army Civilian Police and Security Guard Program," at Section 4-6, states that weapons training, with qualification, will be conducted semiannually; that police and guards are required to qualify semiannually with their assigned weapons; that range requirements established by TRADOC (Training and Doctrine Command) for weapons qualification and familiarization were preferred; that deviations were permitted where such ranges did not exist due to safety or resource constraints; that alternate range configurations approved by recognized government law enforcement agencies could be utilized for qualification/familiarization purposes; and, that the Agency will record training and certification for each individual and this documentation will be readily available for review and inspection. Section 4-6, "Weapons training," was added to AR 190-56 on October 15, 2009, when it was revised. The Training Coordinator, Cris Cox, testified that he was not aware that the 10/15/2009 revision of AR 190-56 had added Section 4-6.

With respect to why the civilian police officers and security guards used TRADOC configured ranges and the Military Police Firearms Qualification Course (MPFQC) format specifically, William Clarke, the Chief of Police, testified that TRADOC is responsible for all training within the U.S. Army; that "we meet the same training requirement for a range as a soldier would;" and, that the MPFQC course had been required for civilian police and security guards since 1987, pursuant to FM 19-10, "Military Police Law and Order Operations."

Chief Clarke testified that the STRAC (Standards and Training Commission) manual is DA PAM 350-38; that the DA PAM 350-38 lays out the total rounds allocated by service or by branch for different weapons qualification; that it says you have fifty rounds for instructional fire, you have fifty rounds for qualification fire, and you don't have anymore; and, that you have to qualify twice a year and each time will get fifty instruction and fifty qualification.

The field training manuals for the civilian police and security guards both state that "DA PAM 350-38 provides weapon training standards, strategies, and resource authorizations" for them. Chapter 8, "Military Police Weapon Systems," of DA PAM 350-38, provides these training standards. Section 8-3, "Training Aids, Devices, Simulators and Simulations (TADSS)," states in part: "A holistic and realistic approach to training that includes live fire and TADSS is needed to fully prepare Soldiers" and "TADSS are an integral part of the training strategies…."

Cris Cox testified that he began working as the Training Coordinator in August 2009 and that he was responsible for managing firearms training and qualifications for the police and guards at Fort Benning.

Mr. Cox testified that he did not conduct the September 2009 weapons qualification at the Porter Range, because he had been on the job for only three weeks and the qualification had been scheduled before he started work; that the Porter Range is at Fort Benning; that pop-up targets with computerized scoring were used at the Porter Range; that he did not know how long the civilian police and guards had been using pop-up targets to qualify; and, that the format was the Combat Pistol Qualification Course (CPQC). Mr. Cox testified, from Mr. Hooper's record before him, that Hooper had qualified on his first try in September 2009; that on the pop-up range you have forty rounds to hit each of the thirty targets; and, that you have to hit seventeen of the targets to qualify. Cox also testified that there was no weak hand requirement at the pop-up range because the CPQC does not require use of the weak hand. Cox testified that no prone or kneeling position was required in September 2009, but that they were required in March 2010; that in September 2009, it was just standing or slightly crouching while firing; and, that the individual stood still, while the targets popped up at different distances, up to thirty-one meters.

The record showed that five of the six grievants qualified for their weapons certification in September 2009; and, that the sixth grievant, Mr. Wilson, was not required to test then and had not been required to test since 2006, when he was detailed to Supply. The grievants' testimony established that the civilian police and guards had been qualifying on the CPQC since 2006.

Mr. Cox testified that, a few weeks before the first familiarization test in March 2010, he had advised Mr. Hoy and Chief Clarke to set up a PMI for all those employees who would be testing and that they had not followed his advice. [TR 453-454] Mr. Hoy testified that Mr. Cox never made such a request and that he had become aware only recently that the grievants had not had a PMI before their first attempts in March 2010. [TR 52] Mr. Cox testified that no training was conducted for the civilian police and guards before they went out to the range to fire for the first time in March 2010; that he did not know why no training had been conducted; and, that it was not his decision.

Cox testified that he was not aware if any of the grievants had qualified on the MPFQC in the past, with the exception of Meade and Phillips who had qualified on the MPQFC when they worked at Vance in 2004. [TR 399]

Cox testified that the only firings that count are the familiarization fire and the qualification fire; that all the instructional fire is done basically by dry fire; that he gives the classes for the basic marksmanship instructions; that they do not authorize them any rounds to actually go out

to the range, stand there and watch an individual shoot, and try to correct them; and, that that has to be done on the familiarization of fifty rounds. Chief Clarke testified that during an instructional fire was the right time to be told the number of hits at each location, so you would know which areas need some work. [TR 129] There was no instructional fire for the grievants in March/April, except for the familiarization fire.

The evidence showed that the Agency gave the grievants five attempts to pass the weapons qualification—two on March 12 or March 15, 2010, two on April 2, 2010, and the final one on April 26, 2010—and, that Mr. Cox conducted an initial PMI (Preliminary Marksman Instruction) for the grievants in late March 2010 and second PMI on April 22nd. Mr. Cox testified that he ran the qualifications in March and April 2010; that he used the Russell County Range because he wanted to avoid the chance of getting bumped off a range at Fort Benning, due to higher-priority needs; and, that he had 120 personnel to qualify in March 2010. The PMI's were conducted in the classroom and covered instruction on safety functions, capabilities, limitations, maintenance, and engaging targets with the assigned firearm. Mr. Cox testified that the PMI's involved "dry fire" only, where the trainee would point his weapon at something in the classroom to engage a target; that there was no live fire connected with the PMI; that the Agency does not authorize them any extra rounds to go out to the range, observe the individual shoot, and offer instruction to improve their performance; and, that their first opportunity to actually fire and receive feedback from him came with their first attempt to qualify, the "familiarization" fire on March 12th or 15th. [TR 406] Under AR 190-15 and DA PAM 350-38, the Agency was required to conduct a PMI for the grievants before they first went to the range to qualify.

The grievants testified that they did not know that they were going to qualify on the MPFQC course until they arrived at the range and Mr. Cox briefed them on what they would be doing. They also testified that there was lightning and heavy rain at the range on March 12th and March 15th, when they fired on their first two attempts to qualify. Mr. LaGuerre testified that he had to fire in the prone position in four inches of water.

Cox testified that at the range, during the March and April qualifications, personnel fired all their tables of fire, starting at the seven-meter line, then moving back to the fifteen-meter line and twenty-five-meter line, and finally moving to the thirty-five-meter line in the prone position, then they would go up there and total the number of hits; and, that he then went to score the total number of hits on the target. He further testified that he did not score each table separately, because "if we tried to do it after every table of fire, we would run out of time."

The grievants' qualification records showed that the grievants failed to qualify on all five attempts in March/April 2010; that all but one had shown significant improvement over time;

and, that four were within two or three hits of qualifying on their final try. The grievants were not informed that their fifth attempt would be their last chance to qualify until after they had fired.

By memoranda dated April 27, 2010, to Personnel, the grievants' supervisors requested their removal "from civil service for failing to meet a condition of employment for weapons qualification."

By letter dated June 14, 2010, to each grievant, their supervisors advised them "that it is proposed to affect your removal from your position" for "loss of firearms certification."

By six separate letters dated June 14, 2010, the Agency notified each of the grievants of their proposed removal for loss of firearms certification. Lieutenant Anthony Montgomery, Guard Supervisor, signed the letters to the five security guards, and Lieutenant Kevin Sparks, Traffic Supervisor, signed the letter to Mr. Hooper. The letters informed the grievants that they had a right to reply and that: "Your oral and/or written reply should be made to Chief [of Police] Kevin Clarke."

By memorandum dated June 21, 2010, to the Union, with a copy to Personnel, Chief Clarke extended the time "for each employee to prepare their response" an additional fourteen days, until July 15 for five grievants and to July 21 for Mr. Wilson, in response to the Union's request. [UX-23] By another memorandum to the Union that day, with a copy to Personnel, Chief Clarke granted the Union's request for forty hours of official time for each of the grievants to prepare their responses and for forty hours of official time for their Union representative, Ozai Scott, to assist the grievants in preparing their responses. [UX 24] Chief Clarke stated on both memoranda that he was the "Point of Contact." Mr. Hoy testified that he was unaware at the time that he made his decision that the Agency had granted the grievants official time to prepare a response and that he was only aware that Mr. Scott, the Union representative, had requested forty hours of official time to help prepare the grievants' response.

Although he was originally designated to be the deciding official, Chief Clarke testified that he did not serve as the deciding official because he was away at Fort Leonard for three weeks in July 2010, running a school; and, that he did not receive any written replies because he was not there. [TR 51] Mr. Hoy testified that Chief Clarke was TDY at Fort Leonard for a senior leaders course for at least two weeks; that he did not wait for him to return from TDY because Chief Clarke had reviewed the matter with him before he left and Mr. Hoy felt qualified to make the decision himself; and, that he could not recall whether Chief Clarke told him that all the grievants had requested official time to prepare written replies to the proposed removal. [TR 768-771] Mr. Scott testified that he met with the six grievants at the Union hall every day at 7:30 am to assist them with preparing written replies; that they finished on Friday, July 9th, and

addressed the letters to Chief Clarke, because he was the deciding official at that time; that the oral reply meeting with Chief Clarke was scheduled for the following week; and, that Chief Clarke called him before the scheduled oral reply meeting and told him that he would be away but to go ahead with the scheduled oral reply meeting, with Mr. Hoy.

Each grievant testified that he had prepared a written response to the proposed removal, during their week of official time. All their written responses were undated and addressed to Chief Clarke. Scott testified that he hand-delivered these written replies to Mr. Hoy and Ms. Creek at their offices on July 14th, the day before the scheduled oral reply meeting. Mr. Hoy initially testified that he could not recall receiving any written replies; later, Hoy testified on rebuttal that he could not have received any written replies from Scott on July 14th because he was very busy all week with a function and was seldom in his office. Creek testified on rebuttal that she knows that Scott did not give her any written replies on July 14, because she files such documents carefully as a matter of custom.

Mr. Scott testified that, at the start of the oral reply meeting on the July 15th oral reply meeting, he handed a separate written response on behalf of all the grievants to Mr. Hoy; and, that Mr. Hoy apologized for not having had a chance to read the grievants' written responses; and, that he said that he was only there to take notes for Chief Clarke, the deciding official. Mr. Hoy initially testified on cross-examination that he had received the Mr. Scott's July 15th written response; when asked if his earlier testimony that he had not received anything in writing from the Union before the oral reply meeting was false, Mr. Hoy then testified that he could not recall when he had received the document; and, on voir dire by the Agency's counsel, Mr. Hoy testified at first that "I do not remember receiving that letter" and then: "I can't say, yes, I remember on this date this letter was presented to me." Much later in his testimony, after the Union's counsel had resumed his cross-examination following lunch, Mr. Hoy testified that he never received Mr. Scott's July 15th written reply.

The evidence showed that Mr. Hoy met with the grievants and their Union representative, Ozai Scott, on July 15, 2010, to discuss their replies to the proposed removal letters. The only management representative present at the meeting was Mr. Hoy. Mr. Hoy testified that he did not invite another management representative to the meeting as either a note-taker or observer; that he never provided to the Union any notes from the meeting or any summary of the oral reply; and, that he took notes at the meeting, but that he later destroyed them. He offered no explanation for not retaining the notes, testifying that no one had instructed him to take notes and that "I took the notes so that I would have a record if there was anything significant that I know I needed to address." [TR 815-821] Mr. Hoy testified that the meeting lasted about one

hour; that only Mr. Scott, Mr. Phillips, and Mr. Hooper said anything to him during the meeting; that the only issued raised was how their targets were scored; that they did not express any concern with the way the range was run; and, that they did not dispute the scores they had received. He further testified that no grievant indicated that he needed an accommodation for a handicap. Mr. Hoy acknowledged that there was some discussion about a different protocol—different protocol, targets, percentage required, stances—but no discussion in detail; and, testified that he could not recall whether anyone had asserted that there had been a failure to bargain over these changes. Mr. Hoy testified that he could not recall saying at the oral reply meeting that he was not there to make the decision or that he was only there to take notes and give them to Chief Clarke.

Sheryl Creek, HR Specialist in CPAC (Civilian Personnel Advisory Center), testified that she did not receive any written replies and did not attend the July 15th oral reply presentation. She further testified that Mr. Hoy at some later time discussed with her what had transpired during the oral presentation, but not in detail. Ms. Creek testified further that she knew what defenses and what issues they were raising as part of the oral replies from the documents Hoy had sent her.

By memorandum, dated July 21, 2010, to the attention of Sheryl Creek, HR Specialist in CPAC (Civilian Personnel Advisory Center), William Hoy, Deputy Director of Emergency Services, advised that he had met with the grievants and their Union representative, Ozai Scott, on July 15, 2010, at 1330 hours, "to hear responses to the proposed removal actions for their failure to meet the minimum standards of the Military Police Firearms Qualification Course (MPFQC)." Mr. Hoy testified that he prepared the memo after his July 15th meeting with the grievants and that it accurately reflects the content of the meeting. [TR 753] He testified further that he did not provide a copy of the memorandum to the Union or any of the grievants prior to the arbitration hearing. Ms. Creek testified that the memo was "Deputy Director Hoy's decision that was prepared and given to me so that I could prepare the proper decision letter for him;" and, that her purpose in reviewing Hoy's draft was to make sure that he was addressing whether the removal promoted the efficiency of the service and the Douglas factors. [TR 293-294] Mr. Hoy testified that, in addition to considering the fact that the grievants had failed to qualify on the range, he also considered one of the Douglas factors—the effect of the event upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties—after a phone conversation with Ms. Creek. Mr. Hoy also testified that he wanted to make sure in his decision that he

treated all six grievants equally, since they had not brought up anything out of the ordinary. [TR 755] Mr. Hoy testified that he attempted with CPAC to find other positions within DES.

In preparing the removal letter, Ms. Creek testified that she reviewed the Table of Penalities [UX-8] and relied on #14B, "Violation of administrative rules or regulations where safety to persons or property is endangered," which provides for "written reprimand to removal for a first offense."

By six separate letters dated August 3, 2010, the Agency notified each of the grievants that "the proposed removal action was fully supported by the preponderance of the evidence" and "that you will be removed from the Federal Service effective August 6, 2010." The letters were signed by William Hoy, the Deputy Director of Emergency Services. Mr. Hoy testified that the text was virtually identical in all of the letters. Chief Clarke testified that he was still away at Fort Leonard when the removal letter was issued and was never asked to review the removal letter; and, that he has never reviewed the removal letter. [TR 68]

Ms. Creek testified that this was the first time that a civilian police officer or security guard had been discharged for failing to pass their firearms certification after their probationary period. [TR 273]

In making his removal decision, Mr. Hoy testified that he never looked at AR 190-56, Section 4-6 which deals with weapons training; that he was unaware that there were terrible weather conditions at the range on March 12 and March 15, 2010; and, that he "didn't know about the conduct of the ranges." [TR 887] Mr. Hoy acknowledged at the hearing that it would have helped the grievants in improving their firing performance to know what stances and other areas that they were weak in; that this feedback had been available in previous years; and, that this feedback was not provided to them in 2010. [TR 891-894] He further testified that he never checked the grievants' targets; and, that he was unaware that Cox had changed the score of two other employees who had challenged their scores, with the result that they had passed, and then had refused to consider the challenges of Mr. LaGuerre and possibly other grievants. [TR 887-894]

With respect to what potential mitigating Douglas factors he considered, Mr. Hoy testified that he examined the Douglas factors and that "it was obvious that their inability to not be able to qualify, based upon, you know, the number of times they were given to qualify, was reason for removal." [TR 919]

Mr. Hoy testified that he received a data request from the Union, including the firearm qualification records of the grievants for as long as they had been employed. [TR 758] With the exception of a single record, all the records prior to 2008 had been purged by the Agency. Mr.

Hoy testified that the regulation says that firearms qualification records will be kept on file until the guard or police offer leaves the Agency and that "we completely messed that up." [TR 905]

By letter dated August 18, 2010, to CPAC, the Union grieved the removal of the six grievants.

By Memorandum of Agreement dated August 30, 2010, the DES and the Union reached agreement in negotiations over the 10/15/2009 changes in AR 190-56. Ms. Creek and Chief Clarke signed off on the MOA for the Agency. Ms. Creek testified that negotiations leading to the MOA had begun some time after April 26, 2010, when the grievants had their fifth and final fire. The MOA provided for preliminary marksmanship instruction involving the use of firearm simulators. Chief Clarke testified that they did not own a simulator before the grievants' removal but, based on the negotiations of the MOA, he had agreed to go get one. [TR84] Cox testified that since August 2010 they have been allowed to use the 209th MP Detachment's simulator for weapons training; that it is a great machine; and, that you can program it for the whole MPFQC. [TR 716] The MOA also provided for the firing of practice rounds which the Agency had not made available to the grievants, due to STRAC limitations on rounds.

By letter dated November 9, 2010, Col. Thomas MacDonald, the Garrison Commander, responded to the Union at the fourth step of the Grievance Procedure, sustaining the removals and denying the grievance.

The evidence showed that Henry Wilson had worked in Logistics Supply since 2006, under the supervision of Carleton Pearson; that he continued in the Security Guard series; that he had not carried a weapon since that time; and, that he was not required to weapon qualify during that time, until March 2010. [TR 914-915] Mr. Cox testified that during the first qualification or the PMI, or whatever, he told Mr. Wilson that he might want to get his eyes checked; that, based on the way he was holding the weapon, he was firing low; that he asked if he could see the front sight; that Wilson responded that it was a little blurry; and, that he responded that he might want to go get his eyes checked, that it might be his whole problem. [TR 665-666]

LaGuerre testified that he had served as a security guard since 2004; that his primary responsibilities as a gate guard were to perform access-on-post guard duties and to assist on emergencies of any civilian citizens and military personnel; that he had never failed to qualify for weapon certification before 2010; that he had received a letter of commendation as in "expert," for shooting 30 hits out of 30 in 2007; that they were always allowed to shoot ten rounds for practice before shooting the forty rounds that counted; that he had shot at pop-up targets and had never fired the MPFQC prior to March 2010. He further testified that he had lost two fingers,

and broken two others, on his right hand from a hand-grenade explosion, while in the service; that his dominant hand had always been his left hand; and, that he had never been required to qualify with his weak hand, prior to March 2010. According to LaGuerre's testimony, the weather was extremely bad with heavy rain and lightning on March 12th, when he did his first firing; there was about four inches of water on the ground; it was the first time that he had been asked to qualify on the Russell County Range; previously, when firing at pop-up targets, they had forty rounds to hit a minimum of sixteen to qualify; and, he first learned of the different requirements at the Russell County Range when they were being briefed by Lt. Cox at the range about how the firing was to be conducted. LaGuerre testified that this was when he learned that they would receive fifty rounds and have to hit a minimum of thirty-five targets to qualify and that he would have to shoot with his weak hand at one of the tables; that he told Cox and Rousseau that he had never before been required to do any qualification with his weak hand; that Cox had responded that he needed to make an effort to shoot with his weak hand or he would not be given credit for the qualification; that he was never given any feedback about whether he was hitting anything with his weak hand; and, that no Preliminary Marksmanship Instruction was conducted before the March 12th qualification. [TR 997-1034] LaGuerre further testified that he attended a classroom PMI conducted by Cox after the March 12th "familiarization;" that it lasted no longer than two hours; that the PMI included "dry fire" only, where they picked out a spot in the classroom and practiced aiming and pulling the trigger; that no simulators were used; and, that they practiced only from a standing or crouched position and were not told to practice while prone or kneeling or with support. [TR 1006-1008] LaGuerre testified that he then went for another qualifying fire on April 2nd, as requested; that there were two fires; that Cox walked around in between people and appeared to be giving pointers; and, that Cox approached him when he was shooting with his weak hand, gave him instructions on how to hold the pistol and pull the trigger without his fingertips, and finally told him to use his pinky; that he attended a second classroom PMI on April 22nd which lasted about forty-five minutes; and, that the same slide show was used. [TR 1009-1010] Laguerre testified he went to qualify again on April 26th; that nobody told him before that qualification that it would be his last opportunity to qualify; that two guards who did not qualify at first had disputed their count and were qualified in the end by Cox; that he had asked Cox if he could check for more hits beyond the thirty-two Cox had scored him and Cox had responded, no more. [TR 1015, 1021]

LaGuerre testified that he prepared a written reply addressed to Chief Clarke and gave it to Ozai Scott, the Union representative; [UX 40; Tr 1017] that he attended the oral reply meeting; that, when Hoy arrived, he said that he did not have a chance to go through their

letters, that in any case he was only there to take notes for Chief Clarke in his absence, that he would brief Chief Clarke on what was said at the meeting, and that it was for Chief Clarke to make any decision. [TR 1018]

POSITION OF THE PARTIES

The Agency

The Agency contends that the grievants were required to qualify on their weapons as a condition of employment; that this was an essential job requirement; that the Agency gave them five opportunities to qualify and they failed each; that the issuing official considered at least six Douglas factors in deciding the appropriate action; and, that removal was the only option available.

The Agency argues that the way the weapon qualification was conducted in 2010 did not constitute a change in working conditions; and, even assuming that it was a change in working conditions, that is not a defense to the removal actions. The Agency further contends that the mere the use of the CPQC in the past was not a condition of employment established by past practice, because the MPFQC was required by regulation and nor responsible management officials knew or knowingly acquiesced in the practice.

With respect to the Union's contention that the Agency's failure to bargain the change from the CPQC to the MPFQC, the Agency argues that this contention is not a valid defense to a removal action.

The Agency also argues that the "republications" of AR 190-56 in 2009 did not constitute a change with regard to weapons qualification from the 2006 version; and, that the fact that the parties negotiated and reached an MOA in August 2010 does not validate the Union's claim.

The Agency takes the position that the training provided the grievants was adequate since all but six of the 120 employees had qualified.

The Agency contends that it did not commit harmful procedural error with regard to the failure to consider the grievants' written replies to their proposed removal.

The Agency further contends that there was no evidence of discrimination; no denial of veterans' preference in the removal of the grievants; and, no requirement for penalties and remedial actions to be consistent with those at other installations or even with other cases in the same activity.

The Union

The Union takes the position that the Agency did not satisfy its burden of proof and did not follow its protocols and processes, regulations, and the parties' collective bargaining agreement;

that the Agency did not provide sufficient opportunities to qualify, when most grievants were improving with each attempt; and, that the Agency did not inform the grievants that 4/26/2010 test would be their last opportunity to qualify.

The Union contends that the issuing official should have done an individual evaluation of each grievant with respect to the Douglas factors and whether there were other suitable job opportunities at Fort Benning.

The Union argues that, even if all the allegations are sustained, that the penalty was excessive and inappropriate, under the circumstances. The Union contends that there is applicable precedent for employees failing physical agility/ fitness for duty tests.

DISCUSSION

It is undisputed that qualifying for weapon certification under the MPFQC required a score of at least thirty-five hits out of fifty rounds fired; that none of the six grievants attained this score in any of their five attempts in March and April 2010; and, that their failure to qualify at that time was the sole stated reason for the grievants' removal. Hence, their removal was due to their inability to meet a standard of handgun proficiency during this window of time rather than any willful misconduct. The central issue before me is whether their failure to meet this standard at this time was just cause for their removal. Although the requirement that they qualify for their weapon certification was certainly reasonable, for the following reasons I conclude that the Agency did not have just cause to remove the grievants in August 2010.

The Agency failed to provide the grievants adequate training and a fair opportunity to qualify.

Article XXV, "Discipline," Section 1, provides that discipline "will be taken only for just cause;" and, that "[p]rimary emphasis will be placed on preventing situations requiring disciplinary actions through effective employee-management relations." In addition, Article XXII, "Training," provides that, while employees are expected to take full advantage of opportunities presented by the Agency to further their proficiency, it is the Agency's responsibility to offer the opportunities and conduct the appropriate training. In this case, the Agency failed to take reasonable action to prepare and assist the grievants in qualifying for weapons certification.

To begin with, the new training coordinator, Mr. Cox decided that the qualification standards for the March 2010 qualification would shift from the long-standing Combat Pistol Qualification Course (CPQC) to the MPFQC. Because the MPFQC was the preferred standard under AR 190-56 and Mr. Cox understandably wanted to conduct his first qualification as training coordinator in this preferred manner, this was a reasonable decision. However, as he was already on board when the last qualification was held in September 2010, he knew at that

time that the qualification had been conducted on the CPQC, using pop-up targets, since he had signed off on their qualification records. Moreover, he knew, or should have known by asking his assistant, Mr. Rousseau, or any of the police or guards, that the qualification had been held on the CPQC for many years. Finally, he knew, or should have known through his expertise or simple inquiry, that there were numerous and significant differences between the CPQC and the MPFQC. These differences included the MPFQC requirements of firing some rounds with the weak hand; firing from different positions, including prone and kneeling; moving around from table to table, at different distances; and, scoring a higher percentage of hits to qualify. Knowing all this, Mr. Cox should have foreseen that many of the employees would struggle to qualify under the unfamiliar protocols of the MPFQC, without training and practice in preparation for the March 2010 qualification; and, he was obligated under Article XXV and Article XXII, to notify the employees that they would be qualifying on the MPFQC, rather than the CPQC, well in advance of the March 2010 qualification, and to prepare them for the MPFQC, so that they could qualify and avoid any disciplinary consequences for failing to qualify.

There was a conflict in the testimony offered on the issue of notice. I credit the testimony of the six grievants that they did not learn that they would be qualifying under MPFQC until the day of their first qualification attempt in March 2010. The testimony of Mr. Cox that employees knew in February 2010 that they would be testing on the MPFQC at the Russell County Sheriff's Range in March 2010, is not credible, since it appears that he was relying on their supervisors to inform the employees and neither of the supervisors testified; all the employees denied getting any advance notice that the MPFQC would be used or that the qualification would be conducted off base; and, Mr. Cox offered no documentary evidence to support his testimony and could not recall any details about how he had notified employees.

In addition, there is no evidence that the Agency made any attempt to offer the grievants any PMI training prior to the March 2010 qualification. Mr. Cox's testimony that he notified Chief Clarke and Mr. Hoy that training should be provided the employees in advance of the qualification is not credible, since Chief Clarke and Mr. Hoy both denied that Mr. Cox had made any such request for training. Hence, I conclude that Agency violated Article XXV, Section 1, by not notifying employees that they would be qualifying on the MPFQC and not giving them any chance to prepare, in advance of the March 2010; and, violated Article XXII, Section 2, and AR 190-56, 4-6a, by not offering any weapons training or other assistance in preparing for the MPFQC, in advance of the March 2010 qualification.

As all the grievants had years of experience with qualifying for their weapon certification while serving in the military and had qualified every time required as civilian DA employees, they

had every expectation of qualifying again in March 2010, before they arrived at the range for their first and second attempts to qualify. However, they faced several disadvantages in attempting to qualify that they had not experienced previously. The first, as discussed above, was dealing with entirely new protocols on which they were briefed only minutes before they fired, in their first attempt to qualify. It had been over four years since any of the grievants had fired on the MPQFC, and two of the grievants had never before fired on the MPQFC. After qualifying on the CPQC for the past several years, it was unreasonable to expect that the grievants could immediately adjust to the changes from pop-up to stationary targets; from standing in place to moving from table to table; from firing all rounds with the dominant hand to firing some rounds with the weak hand; and, from firing rounds in either a standing or crouched position to firing in prone and kneeling position. Some of these new protocols affected some grievants more than others, due to their service-related disabilities. Another disadvantage was that, unlike the CPQC, they received no feedback from their firings to learn their weaknesses. Contrary to Chief Clarke's testimony that the familiarization fire was the time when individuals could fire, check their score for each table, identify their weak areas, and receive instruction on how to improve, the grievants received only a total score without any breakdown to identify weaknesses. In addition, on both March 12th and on March 15th, the grievants fired their familiarization and qualification rounds during lightning and heavy rainfall. Although Mr. Cox decided to proceed in this weather because police officers and guards could be called on to fire their weapon in bad weather as well, it is doubtful that they would be held to such high standards of accuracy in such weather. Also, when firing from the prone position, as required by the MPQFC, they were firing while in several inches of water. Under these circumstances, the Agency failed to provide the grievants a fair and reasonable opportunity to qualify on March 12th and March 15th, when the grievants made their first attempts, in violation of the widely-accepted general notions of fairness that are part of the "just cause" standard. If removal is to follow after a certain number of failures to pass a qualification test, then it is essential that the employee have a fair, unencumbered opportunity to pass the test on each attempt. In this case, the first two of the five attempts allowed by the Agency were not conducted in a fair manner.

Moreover, although the performance of most of the grievants improved over time, the Agency never provided them an opportunity to identify the specific areas in which they needed to improve, so that they could make adjustments. The PMI's in late March and late April, were not designed to address effectively how the grievants could become more proficient at firing, since the PMI mostly covered areas unrelated to the grievants' failure to qualify; and, the PMI's were conducted in a classroom, addressed many topics unrelated to firing proficiency, and

involved dry fire only and no range practice. As a result, the grievants continued to have no opportunity to identify their specific areas of weakness and to improve in these areas through live practice.

The Agency failed to conduct a reasonable investigation before deciding to remove the grievants.

It is generally-accepted by arbitrators that “just cause” requires the employer to conduct a reasonable investigation of what happened, before terminating an employee. When Mr. Hoy issued his decision to remove the grievants on August 2, 2010, there were many important facts of which he was not aware and, as a result, could not possibly have considered in making his decision. He did not know that the police and guards had qualified on the CPQC and pop-up targets, rather than the MPFQC course, for years before the March 2010 qualification. He was unaware that the grievants were not notified in advance that they would be qualifying on the MPFQC. Nor was he aware that the Agency had not provided any weapons training to the police and guards in advance of the March 2010 qualification, as required by DA regulations. He also did not know that no tenured civilian police officer or security guard had been removed previously for failure to maintain weapons qualification. He was also not aware that Wilson had not been required to weapons qualify since 2006 and that Wilson had had obvious vision problems, when he fired the qualification in April 2010. These were all important, relevant facts that Mr. Hoy could have discovered simply by speaking with Mr. Cox, the two supervisors who had proposed the removals, Chief Clarke, and Ms. Creek. In making his decision, he could rely only on the limited knowledge of events that he had, and this is reflected in his 8/3/2010 removal letter, where Mr. Hoy stated that all the grievants were notified on February 11, 2010, that they would be qualifying on the MPQFC and that all training was conducted in accordance with Agency standards, when neither “determination” was true. Moreover, this failure to investigate what happened resulted in inadequate consideration of the Douglas factors in determining the appropriate penalty to impose for failing to maintain weapon certification. Although he asserted in his removal letter that he had “considered the potential Douglas factors in relation to this issue,” he cited only one at the hearing--#5, the effect of the offense on his ability to perform satisfactorily and upon supervisors’ confidence in his ability to perform assigned duties. However, Mr. Coy failed to address at least two other relevant Douglas factors--#6, the consistency of the penalty with those imposed upon other employees for the same or similar offenses, and #10, the potential for the employee’s rehabilitation. Mr. Coy made no apparent effort to inquire if any other employee had been discharged previously for failing to weapon qualify or whether any employee had been allowed more than five attempts to qualify

previously. Anyone giving reasonable consideration of the potential for rehabilitation of the grievants would conclude that all six grievants had a good chance of weapon qualifying on the MPFQC with some additional training, if that person knew all the facts in this case. Moreover, Mr. Coy knew, or should have known, about the negotiations concerning the implementation of the revised AR 190-56, which had begun in the spring of 2009 and concluded with the 8/30/2010 MOA, since Ms. Creek and Chief Clarke had negotiated for the Agency. The contours of that MOA must have been known; and, the need for better weapon qualification training, including firearms simulators and the firing of practice rounds, must have been recognized, by August 3rd.

Therefore, I conclude that the removal of the grievants—William Hooper, Wavell Meade, Roy Marble, Donny Phillips, Rafael LaGuerre-Rosa, and Henry Wilson—was not for just cause and was not for such cause as to promote the efficiency of the Federal service. Accordingly, the grievance is sustained, and the grievants shall be reinstated with full seniority and other rights and be made whole for earnings lost form the date of their removal.

I will retain jurisdiction for the sole purpose of entertaining an application for attorney fees, submitted by the Union within thirty days followin the issuance of this Award.

DECISION

The grievance is sustained. The grievants shall be reinstated with full seniority and other rights and be made whole for earnings lost from the date of their removal.

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James R. Collins