

**IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy

between

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2859,

and

U.S. DEPARTMENT OF HOMELAND SECURITY,
IMMIGRATION AND CUSTOMS ENFORCEMENT.

RE: Grievance of William Albert Gutierrez

OPINION AND AWARD

of

**LUELLA E. NELSON,
Arbitrator**

May 9, 2007

This Arbitration arises pursuant to Agreement between AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2859 (“Union”), and U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT (“Agency” or “ICE”), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

Hearing was held on March 8 and 9, 2007, in Phoenix, Arizona. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. Both parties filed post-hearing briefs on or about April 17, 2007. Copies of some of the exhibits, the originals of which had been misdirected by the court reporter, were received on May 7, 2007.

APPEARANCES

On behalf of the Union:

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AFGE District 12
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Escondido, CA 92025

On behalf of the Agency:

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STIPULATED ISSUE

Did the Agency have just cause to remove Grievant from his position as an IEA Officer with the Agency and take this action only to promote the efficiency of the Service? If not, what shall be the remedy?

RELEVANT SECTIONS OF THE AGREEMENT

ARTICLE 4 - Management Rights

...

B. **AUTHORITY OF SERVICE OFFICIALS.** Nothing in this Contract shall affect the authority of any Service official:

...

(2) In accordance with applicable laws:

(a) To hire, assign, direct, lay off and retain employees in the Service, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees:

...

ARTICLE 31 - Disciplinary and Adverse Actions

...

B. **ADVERSE ACTION DEFINITION.** Adverse actions covered by the provisions of this Article are removals, suspensions for more than fourteen (14) days, reductions in pay, reductions in grade, and furloughs of thirty (30) days or less.

...

H. **DISCIPLINE/ADVERSE ACTION PROCEDURES**

(1) **Just Cause.** The parties agree that letters of reprimand, suspensions of less than fifteen (15) days, and adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the Service.

....

RELEVANT STATUTORY PROVISIONS

18 USC § 921. Definitions

PART I - CRIMES

(a) As used in this chapter -

(1) The term "person" and the term "whoever" include any individual, corporation, company, association, firm, partnership, society, or joint stock company.

...

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include -

...

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

...

- (33) (A) Except as provided in subparagraph (C), the term "misdemeanor crime of domestic violence" means an offense that -
 - (i) is a misdemeanor under Federal or State law; and
 - (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
- (B) (i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless -
 - (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
 - (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
 - (aa) the case was tried by a jury, or
 - (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
- (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

...
 18 USC § 922. Unlawful acts [the "Lautenberg Amendment"]

PART I - CRIMES

- (g) It shall be unlawful for any person -
 - (9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

FACTS

ICE is one of several entities resulting from a federal reorganization that subsumed multiple agencies, including the former Immigration and Naturalization Service ("INS"), into the newly-created Department of Homeland Security ("DHS"). Employees who were on staff with the INS before the

reorganization are referred to as “legacy INS” employees. Legacy INS employees are covered by the 2000 Agreement between the Union and the INS.

Grievant is a legacy INS employee. Until the events at issue in this case, he had never received discipline; his performance evaluations rated him “excellent.” He was removed from his position as an Immigration Enforcement Agent (“IEA”) effective August 18, 2006.¹ The facts underlying the specifications underlying this personnel action are uncontested; their import is at issue. The specifications were set forth in detail in a May 3 Proposal Letter from Deputy Field Office Director Katrina S. Kane, as follows:

REASON I - ASSAULT

Specification: On or about August 6, 2005, you assaulted Cynthia Gutierrez by striking her on the left cheekbone with your hand causing physical harm. On or about February 10, 2006, you pled guilty to the charge of Assault in Gilbert Municipal Court, Gilbert, Arizona.

REASON II – UNAUTHORIZED USE OF GOVERNMENT CREDIT CARD

Specification 1:

On October 17, 2005, you used your government issued credit card to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 2:

On October 23, 2005, you used your government issued credit card to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 3:

On October 31, 2005, you used your government issued credit card at the Hampton Inn, Mesa, Arizona. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 4:

On November 4, 2005, you used your government issued credit card to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 5:

On November 5, 2005, you used your government issued credit card at Mesa Hooters. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

¹ Except as otherwise indicated, all dates refer to 2006.

Specification 6:

On November 14, 2005, you used your government issued credit card to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 7:

On November 16, 2005, you used your government issued credit card at Buffalo Wild Wings to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 8:

On November 23, 2005, you used your government issued credit card to obtain a cash withdrawal. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 9:

On December 17, 2005, you used your government issued credit card at Uncle Bears Bar & Grill. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

Specification 10:

On December 18, 2005, you used your government issued credit card at Uncle Bears Bar & Grill. You were not under travel orders at the time of this transaction. This use of the government card was without authorization.

On September 29, 2003, you signed the Citibank Government Travel Card Setup Form acknowledging that you read the Citibank Cardholder Account Agreement and agreed to be bound by the terms and conditions as set forth in the Agreement.

On October 21, 2003, you completed the course requirements for the GSA SmartPay Travel Card. This training instructs the Government employee not to withdraw cash for personal use, or to use the travel charge card for personal expenses at any time. The employee is to use the travel charge card only for authorized official travel expenses. Specifically, it states that cash advances should only be taken and used for expenses that are related to official Government travel, and also points out that your ability to do your job may be affected if you are not able to travel.

On October 21, 2003, you signed the Cardholder Agreement, for the DHS Authorized Travel Charge Card, acknowledging that you understood that your charge card was to be used only for official authorized Government travel expenses; that use of the card for unauthorized expenses or for authorized expenses for others is prohibited; and that, under no circumstances, were you to use the charge card for personal use.

Your signature on the cardholder agreement acknowledges that you understand that failure to comply with the agreement could result in disciplinary action.

In analyzing these specifications, the Proposal Letter commented as follows:

The above-cited misconduct is unacceptable and cannot be tolerated. As a law enforcement officer, you occupy a position of great trust and responsibility requiring you to conduct yourself in a manner that is above reproach at all times. As an employee of a federal law enforcement agency, you are expected to act in accordance with the highest standards of integrity and ethical behavior and as a law enforcement officer you must conform to a higher standard of conduct. You are to ensure compliance with all Federal, State and local laws, as well as agency regulations and operational procedures at all times.

The U.S. Immigration and Customs Enforcement is a law enforcement agency, and we must demand the highest integrity of our employees in order to maintain the public's confidence in the accomplishment of our mission. As an Immigration Enforcement Agent, charged with enforcing the law while in the performance of your duties, both your employer and the public must have complete trust in your judgment and integrity, both on and off duty. The reasons cited above negatively affect our ability to maintain the public trust, and have significantly diminished the degree of trust that the Agency can confidently place in your ability to effectively perform your duties as an Immigration Enforcement Agent.

In proposing this action, I have considered your employment record and the nature of your violations, which in this case is a breach in the public's trust and of the trust we have placed in you. I also considered you have over fifteen (15) years of Federal civilian service and have been employed as a Detention Enforcement Officer with the Phoenix District since January 1, 1989. You were promoted to a full duty Immigration Enforcement Agent, GS-1801-9, on April 4, 2004.

The Union responded to the Proposal Letter in a June 22 letter to then-Field Office Director Phillip Crawford, who has since retired. The letter presented in mitigation of the first Reason the circumstances in which Grievant accepted an offer to enter into a diversion program offered by the county attorney; and contended other agents had completed diversion programs and returned to full duty. The letter presented in mitigation of the second Reason that Grievant had fallen behind in his finances, realized he used poor judgment, and "if he could do all over again he would not have used his government card in the way that he did." The Union's letter further pointed to Grievant's years of service, his performance appraisals and performance awards, as well as his lack of prior discipline.

In an oral reply on June 22, Grievant noted a prior accusation from his ex-wife had led to an Agency investigation in which he was exonerated. He offered an audiotape of a telephone conversation in which his ex-wife offered to drop her charges in exchange for money. He further asserted that, to impugn his ex-wife's testimony, his attorney would have had to call his daughter as a witness; rather than do that, he accepted the

diversion program. With regard to the credit card misuse, he asserted that he did not have the resources, used bad judgment, and had not done it before, and acknowledged he deserved a reprimand for that conduct.

In sustaining the proposal, the Decision Letter commented:

In determining the appropriate penalty, I have carefully considered the reasons for the proposed action and the nature and seriousness of your offense in relation to your duties, position, and responsibilities, in addition to your performance and other work records. The charges against you are very serious, and I cannot dismiss your conduct as you are expected to abide by the rules and regulations and uphold a higher standard of personal conduct expected from a Law Enforcement Officer.

Based upon the record and your explanation of the events, I find no justifiable reason to mitigate the proposal. Your written and oral replies attempt to mitigate the consequences of your actions but do not significantly address the actions themselves. You were advised of your responsibilities as a federal law enforcement officer and the consequences of such behavior.

THE DOMESTIC VIOLENCE REASON

On August 2, 2005, Grievant was arrested on charges that he had struck his wife, from whom he was legally separated at the time, during an argument witnessed by their 13-year-old daughter.² He was transported to the police station, cited, released, and transported back to his home by the arresting officer. He called Supervisory Detention Deportation Officer John Gurule the next day to report what had happened.

On February 10, 2006, Grievant signed a Plea Agreement under which he accepted a guilty plea to a domestic violence charge in return for diversion into the “deferred judgment” program. Under the Plea Agreement, he received a 180-day suspended sentence with no jail time and with three years’ probation. He was fined \$500 and ordered to have no contact with his wife. He was also required to complete counseling as recommended; for a domestic violence charge, this included a 52-week domestic violence program. The Plea Agreement provided that there would be no automatic termination of probation. It included an

² The arresting officer’s report noted slight swelling on the left cheekbone where Grievant’s wife claimed he had struck her with a closed fist. It reported an interview of Grievant’s daughter, who reportedly saw him reach in and strike her mother but did not know whether it was with an open or closed hand. It reported Grievant initially said he had gently touched his wife’s cheekbone with his hand; it further reported that, at the police station, he said he tried to stop her from closing the window, and his hand slipped and lightly hit her on the side of the face.

acknowledgment that federal law prohibited him from possessing a firearm while the conviction remained in effect. It also provided that, if he violated any of the terms and conditions, the Court could revoke his probation and sentence him to the maximum term allowed by law. It was accompanied by a notice that:

1. If you successfully complete the terms and conditions of diversion, the court will discharge you and dismiss the proceedings against you.
2. If you fail to successfully complete the terms and conditions of diversion, the court may enter an adjudication of guilt and proceed as provided by law.

Grievant testified he decided to enter into this arrangement rather than go through trial to save his daughter from having to testify.

Grievant paid his fine on February 10. He received a “Certificate of Completion” on October 11 for a “26 week Men’s Domestic Violence Intervention Program” and a Progress Report reflecting he had successfully completed treatment in a timely manner. On December 13, his attorney filed a Motion for Early Termination of Probation and Dismissal of Case on his behalf. The Motion noted Grievant had no violations; had completed all classes; had paid all fines and fees; and had successfully completed the terms of the probation. It further stated he “is an employee of ICE and is capable of being reinstated to his position once he is released from probation.” It noted that the probation officer would either not oppose the Motion or would take no position. Grievant testified his attorney filed a second Motion to expedite consideration in February 2007. The court had not ruled on either Motion at the time of the arbitration hearing.

Gurule testified he talked to Grievant about the pending domestic violence charge several times over the months between his arrest and the Plea Agreement. He recalled advising Grievant repeatedly not to plead guilty – including on the day he signed the Plea Agreement, when he called from the courthouse – and recalled specifically discussing the import of the Lautenberg Amendment (18 U.S.C. §922(g)(9)).

Agency labor relations personnel Jim Losasso and Michael Spargo exchanged e-mails regarding Grievant’s Plea Agreement prior to the Proposal Letter. Initially, Losasso asked whether Grievant’s Plea Agreement was equivalent to being convicted of a misdemeanor crime of domestic violence. Spargo responded that a conviction was not needed to propose removal. He expressed doubt that a guilty plea under

the deferred judgment program was either a finding of guilt or a conviction; however, he suggested the Agency use the “act of striking his separated spouse to propose his removal” and “wait to include any Lautenberg issue as a factor in the decision.” Losasso followed up, again asking whether he should not proceed on a Lautenberg theory, but instead should do a proposal based on the arrest for assault. Spargo responded “the Lautenberg aspect should not be included because under AZ law we do not have a conviction;” but reiterated the Agency could rely on the fact that Grievant did not contest the charge.

Crawford did not testify. Kane testified that, as she was preparing the Proposal Letter, the Lautenberg Amendment was raised, and it was explained to her that removal was warranted by both the assault and the guilty plea. It was her understanding that the *Douglas* factors³ were not a consideration because the incident “had surpassed the threshold beyond looking at mitigating factors.” She therefore did not consider the *Douglas* factors. She testified an employee on probation in these circumstances could not work for the Agency because he could not do the job for which he was hired without the ability to carry a firearm. She believes a person with this type of conviction should not be a law enforcement officer. In this regard, she initially testified it was not her understanding that Grievant had not been convicted of assault; she knew he had pled guilty under the deferred judgment program. However, in later testimony, she testified that the e-mail exchange described above, which she saw at the time of the Proposal, made her aware there had been no conviction and that she should not reference the Lautenberg Amendment in her Proposal.

THE UNAUTHORIZED CREDIT CARD USE REASON

No dispute exists that Grievant used the government-issued credit card as alleged in the specifications, for charges ranging from \$80 to \$500. Grievant testified he had paid off the unauthorized credit card charges by the time the Agency contacted him about them. That credit card was removed on December 28, 2005, but he received a replacement card after the first of the year in 2006.

³ The *Douglas* factors refer to potential aggravating and mitigating circumstances articulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), discussed in detail below.

Grievant's immediate supervisor prepared a worksheet on this misconduct. He noted Grievant's excellent performance appraisals in the past three years and his 15 years' service. Although he noted Grievant's position involved public contact, he also noted that this incident had not subjected the Agency to adverse publicity or impacted the Agency's reputation, in that it was not known outside Grievant's immediate chain of command. He noted that, because the government credit card was taken away, Grievant was unable to conduct official government travel. He found the incident had affected management's confidence in Grievant in that he abused his credit card and was unable to fully perform his duties. He found good potential for rehabilitation after counseling. He noted Grievant had been placed on administrative duties due to the pending domestic violence charges, and found no other mitigating circumstances. He recommended a five-day suspension for this offense.

OTHER EMPLOYEES CHARGED WITH DOMESTIC VIOLENCE

Scott Gibson, a legacy INS law enforcement officer working for Customs and Border Patrol ("CBP"), was arrested on domestic violence charges in July 2002. He entered the Arizona deferred judgment program, under which he was required to attend anger management classes for three months but was not placed on probation. It was his understanding that, if he did not complete the classes, conviction would be imposed. After three months, the charges were dismissed. While he was in the deferred judgment program, he was assigned to administrative duties.

Maria Bermudez, a legacy INS law enforcement officer working for CBP, was arrested on domestic violence charges in March 2005. She entered the Arizona deferred judgment program, under which she was required to attend group classes; she understood that if anything further arose within the next year, conviction would be imposed. She was assigned administrative duties for approximately a year and a half, until the end of 2006.

Arthur Edwards, who is now a Supervisory Detention and Deportation Officer for the Agency, was arrested on domestic violence charges in June 1999. He testified he entered a "not guilty/no response" plea and entered the Arizona deferred judgment program, under which he was required to attend counseling and

was placed on probation. He received an administrative reprimand and was placed on non-law enforcement duties until he had completed the program and the charges were dismissed. He was promoted to supervisor at some point after this series of events.

IEA Joseph Ramirez was arrested on charges of domestic violence in 1999 or 2000. He was released from custody the next day, and his wife dropped the charges about three months later. During that time, he was on administrative leave. The District Director allowed him to return to work, but required him to attend anger management classes, and assigned him only administrative duties until he completed those classes.

Martin testified it was his understanding that Supervisory IEA Arthur Wilson was arrested on domestic violence charges at some time prior to his promotion. Wilson declined to testify or allow the release of his personnel file.

Martin testified an employee named Jerry Inwood was arrested on a charge of domestic violence. Inwood contested the charge and sought a jury trial; the district attorney declined to prosecute and dismissed the case. Inwood was put on administrative duty while the case was pending; once the case had been dismissed, he returned to full law enforcement duties.

Agency personnel records reflect that a Recreation Specialist in Florida was charged with Conduct Unbecoming and proposed for a 14-day suspension, after being arrested in September 2005 on domestic violence charges. The criminal case was closed after a motion of “nolle prosequi.” The Proposal Letter found a nexus between the off-duty conduct and the employee’s position as an employee of a law enforcement agency. It found the employee had violated Standards of Conduct by failing to use good judgment, and damaged the Agency’s confidence in the employee’s ability to perform the duties of a Recreation Specialist. The Decision Letter noted the employee’s 15-year service and performance at least at “fully successful” for the prior three years as mitigating factors. As an aggravating factor, it noted the employee had been suspended for four days in 2005 for misuse of a government credit card. It stated the *Douglas* factors had been considered. It reduced the proposed penalty to a five-day suspension.

OTHER EMPLOYEES CHARGED WITH MISUSE OF A CREDIT CARD

Agency records reflect that a “Cook Supervisory” in Florida received a Proposal Letter in April 2006, proposing a 10-day suspension for misuse of a government travel credit card. The specification noted five instances of unauthorized charges or cash advances over the course of five months, totaling more than \$3,800. The Proposal Letter noted the employee’s years of federal service and performance rating at “acceptable” for the past three years, as well as the lack of prior discipline. The Decision Letter noted the lack of a reply to the proposed action, and ordered the 10-day suspension.

Agency records reflect that an IEA in Florida received a Proposal Letter in June 2006, proposing a five-day suspension for misuse of a government travel credit card. The specification noted three instances of unauthorized charges totaling \$4,422.82. The Decision is not in evidence.

OTHER EVIDENCE FROM THE AGENCY

The Interim ICE Firearms Policy became effective July 7, 2004. That policy called for ICE officers to have credentials from DHS to carry firearms, and made those credentials subject to denial, suspension or revocation for, *inter alia*, evidence of the commission of an act of domestic violence or of inappropriate violent behavior. In the event of such a restriction or revocation of the authority to carry a firearm, the policy provided that officers would not perform assignments requiring that they be armed. It further provided that “Permanent denial or revocation of firearms credentials may be grounds for reduction in grade, reassignment or removal, as determined appropriate by ICE.” The policy described the Lautenberg Amendment and its effect on law enforcement officers, including the inability to carry a firearm or ammunition if convicted. It required ICE officers arrested for domestic violence to report the arrest. Pending disposition of the case, it provided “ICE officers are not permitted to possess or carry firearms or ammunition and are subject to suspension from ICE LEO duties.” It called for supervisors to ensure that firearms and ammunition were turned over for storage pending final disposition of the incident.

The Agency issued a new policy on the Lautenberg Amendment on September 8, 2006, superseding a number of policies, including the Interim ICE Firearms Policy that was in effect at the time of Grievant’s

removal.⁴ The newer policy requires ICE officers who are arrested or convicted of a felony or misdemeanor crime of domestic violence must report the event to both the immediate supervisor and the Agency's Office of Professional Responsibility ("OPR"), and surrender any Government-issued firearms or ammunition. Pending disposition of the case, it prohibits such officers from possessing or carrying firearms or ammunition, and makes them "subject to termination from ICE law enforcement officer positions." It calls for termination of officers "convicted of a crime of domestic violence." If the matter is "legally resolved without a conviction" as defined in the policy, the officer's firearms and ammunition are returned.

The Agency has a Standard Schedule of Disciplinary Offenses and Penalties. That schedule calls for discipline ranging from an official reprimand to removal for the first offense, for most of the offenses listed, including those involved here.

POSITION OF THE AGENCY

Management has the authority to take a multitude of personnel actions. An employee may be disciplined for just and sufficient cause and only for such reasons as will promote the efficiency of the Service. The Agency had just cause and only for reasons to promote the efficiency of the service to remove Grievant for assaulting his ex-wife and for his unauthorized use of a government credit card.

The MSPB has found removal was reasonable for a Special Agent who physically assaulted his girlfriend and misused the government vehicle. The assault was found to strike at the core of both the employee's position and the agency's law enforcement mission. It is inconsistent with the fundamental expectation to exercise law enforcement authority in a reasonable manner, and constitutes a serious violation of rules prohibiting employees from engaging in criminal and immoral conduct.

Grievant struck his ex-wife in the face, in front of their 13-year-old daughter. Striking your ex-wife or any woman is unacceptable; it is even more egregious when committed in front of a minor child and by a law enforcement officer. Grievant pleaded guilty to assault (domestic violence) by the plain terms of the

⁴ Evidence regarding this policy was received for the limited purpose of addressing any issues relating to remedy in this matter.

Plea Agreement. His conduct violated the standards of conduct for a law enforcement officer and is inconsistent with the fundamental expectation to uphold the law and exercise good judgment.

The Agency has the right to expect and hold its officers to a higher standard of conduct. A law enforcement officer occupies a position of great trust and responsibility, and must conform to a higher standard of conduct than non-law enforcement employees. The incident report stated that Grievant struck his ex-wife on the cheek with a closed fist. Striking a woman and conviction of assault raises serious concerns about his judgment, self control, and ability to perform his job. It reflects negatively on his judgment and affects his reputation, integrity, credibility, reliability, and effectiveness as a law enforcement officer. His conduct also affects management's trust and confidence in his ability to do his job.

The Agency had just cause to remove Grievant based on his unauthorized use of his government credit card. Removal has been found to be a reasonable penalty for this conduct in other federal cases. Grievant used his government credit card on 10 occasions from October to December 2005 for personal use and without authorization. This is a serious offense, compounded by the fact that it was intentional and repeated. He knew the card was to be used only for official purposes and that personal use was prohibited. Personal use is a violation of the credit card program, cardholder agreement, and card. He signed an acknowledgment that the card would be used only for authorized travel expenses and would not be used for personal use. He was on notice that personal use was misuse. He admitted to his supervisor that he knew it was wrong. This was not a sole event of indiscretion based on a tough financial situation; he repeatedly used the card for personal purposes. The only reason he stopped was because his ex-wife reported it to the Agency.

Grievant has provided excuses that do not correspond with the record. He began his credit card misuse in October 2005, and was still employed until August 2006. His personal reasons do not excuse his behavior, nor were the reasons valid. His conduct demonstrates untrustworthiness and unreliability; raises serious doubts as to his honesty and integrity; and raises serious doubts of his ability and willing to comply with Agency rules, regulations, and policies.

Grievant is no longer able to perform his law enforcement duties. A law enforcement officer must be able to carry a gun, use a government credit card to perform travel and overseas escorts, and testify at trials. Grievant's assault and guilty plea prohibits him from carrying a gun and performing his job. He was aware his behavior and its consequences would negatively impact his job before entering into the plea agreement. Gurule informed him of the consequences of entering a guilty plea for domestic violence – that he would lose his firearms and possibly his job. His plea agreement included a statement that he was not permitted to possess a firearm while the conviction remained in effect. Grievant has two years' probation remaining. During this period, he cannot possess a firearm.

The Lautenberg Amendment prohibits anyone convicted of domestic violence from, *inter alia*, possessing a firearm. There is no exception for law enforcement officers. Agency policy states that anyone convicted of domestic violence may not possess a firearm, citing the Lautenberg Amendment. It further permits suspension or revocation of credentials for evidence of commission of an act of domestic violence. The arrest report and plea agreement here showed evidence of the commission of an act of domestic violence. Officers without authority to carry a firearm cannot perform assignments for which they must be armed. Grievant's firearm was revoked; he cannot possess a firearm for the remaining two years of probation. He is no longer able to meet a necessary condition of employment and perform one of his essential duties.

In two years, Grievant may be able to carry a firearm and perform this part of his job, if his conviction is dismissed. The expungement/setting aside of a conviction is not automatic. The federal prohibition lasts forever unless the conviction is set aside. The prosecutor has sole discretion whether to divert prosecution, and may require a guilty plea before entry into the program. Therefore, even if Grievant avoids violent behavior for the remainder of his probation, he will be unable to carry a firearm unless and until a prosecutor sets aside his conviction. There is no guarantee the conviction will be set aside; his ability to perform the essential duties of his job is unforeseeable.

Nothing in the record shows that the court accepted Grievant's motion for early termination of probation, or that it will entertain and rule on his motion. Expungement is not automatic. Despite the motion,

there is no guarantee he will fulfill the requirements of probation or be able to carry a firearm and perform his job in two years. There is no way of knowing whether he will ever be capable of performing the essential duties of his job.

As a law enforcement officer, Grievant may be called to testify in court. His guilty plea would affect his testimony in court. His conviction would negatively affect the Agency's mission and reputation, and would hinder Grievant from performing additional essential duties.

Grievant's position requires that he be able to travel. Having a government credit card is essential to the job. His card was taken away due to misuse. His chances of getting a credit card in the future are significantly limited, so he was no longer able to perform another essential function: overseas escorts. There is a direct relationship between his misconduct and his duties.

Removal is a reasonable penalty for Grievant's conduct based on the seriousness of the misconduct, his position, and the effect of his misconduct on the Agency's mission. Grievant's removal was reasonable based on his assault of his ex-wife in front of his daughter, guilty plea for assault (domestic violence), and misuse of a government credit card.

Grievant is not similarly situated to other employees who committed the same or similar offense. Bermudez, Gibson, and Inwood were Customs and Border Patrol employees. CBP has a separately negotiated contract. These employees are members of the DHS, with a separate table of offenses. They are under different supervision.

The charges and circumstances surrounding the cases of Ramirez, Wilson, and the Recreation Specialist are not similar to Grievant's. Ramirez' charges were dropped without a conviction or probation. The Recreation Specialist was not in a law enforcement position; he was suspended for "conduct unbecoming;" he was not convicted; his criminal case was closed by a motion of "nolle prosequi;" he also had a different supervisor. The Union failed to provide evidence concerning Wilson's case.

Although there were some similarities between Edwards' case and Grievant's, the Union failed to show they were similarly situated. Edwards was erroneously placed on administrative duties during his

probation. There are significant differences in their cases. The case against Edwards was dismissed; there was no plea agreement; he did not plead guilty to the offense. Edwards and Grievant hold different positions and have different supervisors. Edwards was not also charged with misuse of a government credit card.

Grievant is not similarly situated to other employees concerning misuse of a government credit card. The Cook Supervisor was not a law enforcement officer, misused his card 5 times, had a different supervisor, and was charged only with one specification of misuse. The IEA misused his card three times, had a different supervisor, and was charged with only one specification of misuse. Grievant was charged with two specifications (for assault and misuse), and misused his card 10 times.

Removal was consistent with the table of penalties. Removal is reasonable for either of the offenses for a first time offense.

The proposing official considered options short of removal, but decided it was not feasible to retain Grievant given the nature and seriousness of his conduct of assault, guilty plea to domestic violence, effect on his ability to carry a firearm and perform his job, and his position. Further, misuse of the credit card raised questions about his integrity, judgment, and ability to follow policies, rules and regulations. She considered appropriate factors.

Consistency of penalty with those imposed on other employees for the same or similar offense is only one factor to be considered. Where the punishment is appropriate to the seriousness of the offense, an allegation of disparate penalties is no basis for reversal of an initial decision or mitigation of the penalty determination. Here, removal was appropriate based on the seriousness of the offense. Grievant's removal did not exceed the bounds of reasonableness.

Grievant provided inaccurate or misleading statements to the arresting officer, and to the court regarding his employment. This calls into question his reliability, truthfulness, trustworthiness and ethical conduct. He was not removed for making false or misleading statements when he was arrested and in court. The arresting officer noted Grievant had changed his story about the contact with his ex-wife. Grievant knew he was not an employee of ICE; he was removed effective August 18, 2006. Yet his motion for early

termination stated “Defendant is an employee of ICE.” This statement was provided under penalty of perjury; it was also inaccurate and incorrect. Grievant knowingly continues to provide false written statements to the court regarding his current employment status. These statements call into question his ability to perform his job duties and responsibilities. He may be called to testify in immigration cases. Law enforcement officers must adhere to a higher standard of conduct. His continuous and repeated conduct makes it impossible to trust that he will perform any of the essential duties and responsibilities of his position effectively.

POSITION OF THE UNION

At the time of his removal, Grievant was a legacy INS agent working for ICE; therefore this adverse action and arbitration are governed by the 2000 Agreement between AFGE and the INS. The Agency bears the burden of proof. To sustain the action, the Agency must prove that the removal was done only for appropriate cause as provided in MSPB law, and that the removal was just and sufficient and only for reasons as will promote the efficiency of the service. The Agency failed to meet this burden for both charges.

To avoid putting his family through a trial, Grievant agreed to enter into a plea agreement under the deferred judgment program. He was required to plead guilty to assault to enter into the deferred judgment program. Despite this plea, the deferred judgment program diverted Grievant from prosecution with the understanding he would meet certain terms and conditions. If he met them, the court would discharge him and dismiss the proceedings. He has completed all the terms of the program, and his attorney has filed a motion for early release from his probation.

The Lautenberg Amendment does not apply to Grievant. Kane thought it should apply because of the assault and guilty plea, and that it was a threshold that warranted no need to consider other factors. Because the deciding official did not testify or document the factors considered, Kane’s testimony as the proposing official provides the best explanation of the reasons for the removal.

Under state law, Grievant has not been convicted; since he has completed the terms of the program other than probation time, all indications are that he will never be convicted of domestic violence or assault

in connection with the August 6, 2005, incident. The language of the Lautenberg Amendment is clear: a conviction is the determining factor. A conviction has not occurred unless there has been a trial by jury or the person waived a jury trial. Grievant's plea agreement and guilty plea was not a waiver of jury trial; it was only a guilty plea in accordance with the terms of the Arizona deferred judgment program, with the understanding that there would be no conviction or criminal record if the terms and conditions of the program were met. Under the statute, a person is not deemed to have been convicted if the conviction has been expunged. Under state law, Grievant has not been convicted and would not be unless he failed to completed the terms of the deferred judgment program. Since no conviction occurred, there will be no need to have anything expunged or set aside.

The internal e-mail correspondence, and lack of a mention of "conviction" or Lautenberg prior to the arbitration hearing, demonstrate that the Agency was aware there was no conviction and agreed that Lautenberg did not apply. At hearing, Union counsel erroneously referred to a different statute, 5 U.S.C.S. §7371, which applies only to law enforcement officers convicted of felonies. Grievant has not been convicted of any crime, and was not accused of committing a felony, so that statute does not apply.

ICE policy did not and does not require Grievant's removal. The ICE policy that became effective September 8, 2006, is irrelevant, because the decision to remove Grievant was made on August 6, 2006, before the policy came into effect. Nevertheless, the September 2006 policy does not vary from federal law. Its purpose is to provide notice to employees and supervisors about the Lautenberg Amendment, ensure that employees who fall under Lautenberg are removed from service, and ensure that no employees are hired who would fall under Lautenberg. It still states only that law enforcement officers convicted of domestic violence will be terminated from a law enforcement position. Since Grievant has not been convicted of domestic violence, the new policy does not affect his eligibility for employment as a law enforcement officer.

Gurule believed Grievant would not be "without a conviction" until the end of his probation. That is untrue and demonstrates a lack of understanding of the deferred judgment program. Under that program, the individual is diverted from prosecution and will not have a conviction entered unless he fails to complete

the terms and conditions of the program. Grievant was removed based on a lack of understanding of the plea agreement and state law. The Agency has not terminated other employees who entered into the same deferred judgment program.

The Interim ICE Firearms Policy that was in effect at the time of the removal decision *may* warrant denial, suspension or revocation of credentials to carry a firearm for “evidence of the commission of an act of violence.” It does not require revocation of firearm privileges or address termination. It permits reduction in grade, reassignment, or removal in the event of permanent denial or revocation of firearms credentials. There is no evidence Grievant was or would be subject to permanent revocation of his firearms credentials. Furthermore, this policy was never referenced as a reason for the removal decision. It simply gives notice of possible actions, and does not serve as a “threshold.” Other ICE employees who were arrested for domestic violence went through the deferred judgment program, were placed on administrative duties until the situation was resolved, then returned to full law enforcement duty. Grievant is capable of the same.

Agency policy requires reporting allegations of misconduct to the DHS OIG or Joint Intake Center or OPR. Grievant reported his arrest to his supervisor at the earliest possible time. The Agency has never claimed he did not properly follow reporting requirements. No evidence exists that Grievant received or saw this policy. No evidence exists that OPR investigated the matter.

Grievant was treated disparately. Several other DHS law enforcement officers have been arrested on suspicion of domestic violence, entered the deferred judgment program, were placed on administrative duties while on that program, completed the terms of that program, then returned to full law enforcement duty. Some received no discipline; some received only a reprimand. At least two such officers were promoted after such an arrest. All legacy INS employees fall under the 2000 Agreement. The same disciplinary standards apply to all legacy INS employees, regardless of which agency they currently work for within DHS. CBP has added a stricter table of penalties than the INS table of penalties that is used by ICE.

Unlike some of the similarly situated employees, Grievant did not spend any time in jail. There is no evidence he did anything more severe than these individuals. He has never been convicted of a crime.

He has completed the terms of his deferred judgment program and expects to be released early from his probation. As a victim of disparate treatment, he should be reinstated and made whole. The Agency should reinstate him and place him on administrative duties until the legal proceedings against him are dismissed.

After his divorce and arrest, Grievant had emotional and financial difficulties. He temporarily needed money to support himself and his daughters. He admits to using his government credit card for meals and cash advances. He has always admitted to his mistake and recognized there was no legitimate excuse for his actions, even though he always intended to pay off the card as soon as he was able. He had already paid off the balance before the Agency contacted him about this issue. He immediately admitted his guilt and recognized it was wrong to use the card in that fashion. The Agency took away that card, but apparently did not cancel his right to a government credit card, as he received a replacement card.

Grievant's first line supervisor recommended a 5-day suspension for the credit card issue. He believed it would not be an issue again; that the incident was not known outside the immediate chain of command; that it had no impact on the Agency's reputation; and that Grievant's potential for rehabilitation was good.

Other employees were suspended for larger unauthorized credit card charges; in one instance, there was an OPR investigation and it was unclear whether the employee had paid off those charges before being investigated. Here, there was no OPR investigation, and Grievant paid off the charges before being contacted. He was the victim of disparate treatment.

The Agency failed to prove that the deciding official considered the *Douglas* factors prior to making the decision to remove Grievant. There is a distinction between deciding whether any action should be taken and deciding on the appropriate penalty. To support taking action, there must be a nexus between the misconduct and the efficiency of the service. To determine the penalty, the agency must consider all relevant factors, both mitigating and aggravating.

Crawford retired before the hearing. Although the Agency had three months' notice of the hearing, it was unable to get him to testify in person or by phone about his decision. The Union and Grievant were

unable to question him about the reasons behind his decision, the documents and evidence he relied on, and what, if any, aggravating and mitigating factors he considered. The failure to produce testimony or documentation resulted in the Agency's failure to prove its case.

We do not know what Mr. Crawford's understanding was of Grievant's arrest and plea agreement in association with the deferred judgment program; whether Crawford understood that a deferred judgment is not a conviction, or how that understanding affected his decision; what he believed about the application of the Lautenberg Amendment to the situation, nor whether that was part of his consideration; whether he considered Grievant's clean disciplinary record, length of service, and excellent performance reviews, or how those may or may not have impacted his decision; whether he considered the consistency of penalty with those imposed on other employees for the same or similar offenses; whether he considered any mitigating factors; or whether he considered any alternative sanctions. We do not know if Crawford shared Kane's belief that this was threshold issue and therefore did not warrant consideration of the *Douglas* factors.

No evidence suggests the Agency considered the *Douglas* factors. An arbitrator may rescind a penalty if the *Douglas* factors were ignored or improperly used; an arbitrator can mitigate a penalty even when he sustains the charges. The failure to consider even a single significant mitigating circumstance is sufficient to overturn a penalty. In this case, the only Agency testimony was Kane's testimony that the *Douglas* factors were not considered.

The Arbitrator should find the Agency committed an unjustified personnel action and sustain the grievance in its entirety. The Arbitrator should order the Agency to reinstate Grievant and eliminate all references to his removal action from his personnel file. Pursuant to the Back Pay Act, the Arbitrator should grant back pay with interest, including annual leave, sick leave, and retirement benefits, and all other appropriate relief. If the Arbitrator mitigates removal to a lesser sanction, all the above relief except the pay corresponding to the lesser sanction should be provided. The Arbitrator should retain jurisdiction for purposes of resolving any question of attorney fees to which the Union and Grievant may be entitled.

OPINION

PRELIMINARY MATTERS

The Agency bears the burden of proving, by a preponderance of the evidence,⁵ that its removal decision was warranted. In this regard, the Agency must establish three things:

- (A) the misconduct complained of occurred as charged;
- (B) the proven misconduct impairs the efficiency of the service; and
- (C) removal is the appropriate penalty for the proven misconduct and is not arbitrary, capricious, or an abuse of discretion.

In determining whether the Agency has met this burden, the Arbitrator must adhere to the legal standards established by the Merit Systems Protection Board (“MSPB”). A critical tool in this analysis is the MSPB decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). If misconduct is proven, the “*Douglas* factors” provide an organized method of analyzing the level of appropriate discipline, by delineating eleven possible aggravating and mitigating factors:

1. the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional or technical and inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2. the employee’s job level and type of employment including managerial or fiduciary role, contacts with the public, and prominence of the position;
3. the employee’s past disciplinary record;
4. the employee’s past work record; including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon the Employer’s confidence in the employee’s ability to perform assigned duties;
6. consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. the notoriety of the offense or its impact upon the reputation of the Employer;

⁵ The "preponderance of the evidence" standard is a common standard of proof. The shorthand explanation of that term is that the Agency must show its version of events was more likely than not.

8. the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
9. potential for the employee's rehabilitation;
10. mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
11. the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

On its face, the Proposal Letter does not weigh the *Douglas* factors, consistent with Kane's testimony that she did not consider them. The Decision Letter's sparse analysis also does not reflect what, if any, consideration was given to the *Douglas* factors.

Employees have the due process right to respond to the charges against them – i.e., the specifications set forth in the Proposal. If new allegations arise after the Proposal, employees must receive notice and an opportunity to address them before the decision is made. The removal decision must stand or fall on the reasons given in the Decision Letter. Neither additional allegations in testimony nor arguments of counsel can alter or augment the bases for discipline. Assuming *arguendo* that bases for removal existed to which the employee had no opportunity to respond, reliance on them violates due process.

In this regard, it is abundantly clear that the Agency made a conscious and reasoned decision not to charge Grievant with a "conviction" under the Lautenberg Amendment. Although both parties devoted considerable energy to litigating and arguing the import of that law at hearing and on brief, it simply is not a part of the charges properly lodged against Grievant. In any event, however, the analysis articulated in the pre-Proposal e-mail exchange between Losasso and Spargo is on point: there has been no conviction of a misdemeanor crime of domestic violence for the August 2005 incident. Accordingly, the merits of this matter will be considered on the specifications stated in the Proposal and Decision Letters.

Similarly, although the Agency asserts on brief that Grievant was untruthful to the arresting officer in August 2005, and to the court in the recent Motion to terminate his probation early, neither charge was lodged at the time, nor was either allegation litigated at arbitration or elsewhere.

THE MERITS

By virtue of the Plea Agreement, Grievant does not contest the fact of an assault. The Agency has thus established that this off-duty conduct occurred. Grievant also admits he misused the government credit card, establishing that this conduct occurred. Those questions are about as far as the Proposal and Decision Letters got. They addressed only briefly the question of impairment of the efficiency of the service, and barely touched on the question of whether removal was the appropriate penalty. The impact of proven misconduct on the efficiency of the Service is at the heart of most of the *Douglas* factors; some factors bear on both that question and that of appropriate penalty. It was therefore gross error not to consider the *Douglas* factors in deciding on the level of discipline to be recommended.

Looking at the first *Douglas* factor, without question, an off-duty assault by a law enforcement officer is a serious concern, and even more so where the target of the assault is a family member. Unlike the general populace, law enforcement officers are authorized to carry weapons and undertake measures that would otherwise be criminal. They therefore must show restraint and judgment in their conduct. Assault thus was closely related to Grievant's position, duties, and responsibilities. Further, the consequences of the assault included removal of Grievant's ability to carry a weapon, thereby limiting him to posts where carrying a weapon was not required. On this record, such posts exist within the Agency; it has assigned others with similar temporary bans on weapons to administrative duties. The need to make such an assignment impacts the employee's duties. An element of assault is intent; it therefore cannot be said that the offense was inadvertent; on the other hand, the record contains no basis to conclude that Grievant sought any gain, and it was a single occurrence. The credit card misuse was also closely related to Grievant's duties and continued ability to perform those duties. It was intentional and temporarily resulted in a gain to Grievant; it was repeated over a short period of time. Overall, this factor heightens the appropriate level of discipline, albeit the portion relating to the credit card is somewhat ameliorated by the fact that Grievant had paid off the unauthorized charges by the time the Agency discovered the misuse.

Looking at the second *Douglas* factor, as a law enforcement officer, Grievant's position is not, strictly speaking, a fiduciary one, but it does require discretion, restraint, and good judgment. His job places him in contact with the public, and at times puts him in the public eye, albeit at a relatively low level in the Agency's hierarchy. Overall, this factor slightly heightens the appropriate level of discipline.

Looking at the third *Douglas* factor, Grievant's spotless disciplinary record mitigates the appropriate level of discipline.

Looking at the fourth *Douglas* factor, Grievant's "excellent" performance reviews over the past three years mitigate the appropriate level of discipline.

Looking at the fifth *Douglas* factor, the arrest and consequences that flowed from it have a negative effect on Grievant's ability to perform many of his job duties for as long as he remains barred from carrying a weapon, and cause reasonable concern over his ability to perform his assigned duties. On the other hand, his completion of the domestic violence program can reasonably be expected to burnish interpersonal tools that he did not use to good effect in his encounter with his ex-wife. The credit card misuse, and resulting temporary removal of the government credit, temporarily precluded performance of the portion of his duties that involve travel and raised a reasonable concern over his ability to perform duties relating to use of that credit card. Overall, this factor is a negative one.

The sixth *Douglas* factor is one on which both parties spent considerable time. Removal is on the table of offenses for almost every offense. Thus, the fact that removal is within the broad range of potential penalties on that table is only the start of the analysis; where the particular offenses fit within that scope requires reasoned analysis, not a knee-jerk move to the most severe possible penalty. The only evidence on consistency of punishment for an arrest on domestic violence charge and participation in a diversion program is that relating to employees who were *not* removed – and in some instances not disciplined in any manner – after an arrest on domestic violence charges.

On this record, the Agency has no consistent policy of removing all law enforcement personnel who commit an assault, or who are temporarily barred from carrying a firearm. To the contrary, it has assessed

little or no discipline for such off-duty conduct in multiple instances addressed on the record; it has promoted at least one law enforcement officer who had previously gone through the diversion program. In each instance, it simply assigned the employee in question to a position that did not require carrying a weapon for the duration of the ban on carrying a weapon. Neither the policy in effect at the time of Grievant's removal nor the current policy requires removal in all instances where the employee is temporarily disqualified from carrying a firearm. Instead, each calls for removal of the *firearm and ammunition* for the period when the employee is so disqualified; removal of the *employee* is only one option named.

The record also does not establish that employees are automatically removed for misuse of a government credit card. On the contrary, at least one employee was retained, with only a suspension, after both misusing the government credit card and being arrested on domestic violence charges. The Agency has, however, suspended employees for credit card misuse. On this record, this factor mitigates the penalty.

Looking at the seventh *Douglas* factor, no evidence exists that Grievant's offenses were known outside his family, local law enforcement and courts in the case of the arrest and diversion, and the chain of command within the Agency. Therefore, unless he were to violate the terms of his probation and thereby cause a conviction to be entered, the lack of notoriety mitigates the penalty.

Looking at the eighth *Douglas* factor, as a law enforcement officer, Grievant knew or should have known that it was improper to assault his ex-wife. He admitted at the time of its discovery that his misuse of the credit card was improper. This factor elevates the level of appropriate penalty.

Looking at the ninth *Douglas* factor, Grievant's positive work record and clean disciplinary history suggest he is capable of being rehabilitated. Other employees who have gone through diversion programs after an arrest on domestic violence charges have been rehabilitated to the extent of later gaining promotion. Grievant's successful completion of the domestic violence curriculum required by the Plea Agreement is consistent with positive prospects for rehabilitation. The fact that he repaid the improper credit card charges on his own initiative also indicates positive prospects for rehabilitation. This factor mitigates the penalty.

Looking at the tenth *Douglas* factor, a separation and divorce can be stressful. That is not a license to inflict physical harm on a former loved one; it is, however, an unusual personal stress. As his immediate supervisor recognized, Grievant's temporary personal stress also played a role in the credit card misuse. This factor slightly mitigates the penalty.

Looking at the eleventh and final *Douglas* factor, a range of alternative sanctions was available to deter this conduct. The court proceedings themselves were a form of sanction; perhaps this explains why the Agency imposed no discipline on some employees who were already in the grip of the court system. The Agency has also used lesser sanctions for both kinds of misconduct. This factor mitigates the penalty.

Taken as a whole, the *Douglas* factors lead to a conclusion that removal was an excessive sanction; however, some discipline was in order. A not uncommon Agency response to an arrest on domestic violence charges and entry into a diversion program is assignment to administrative duties and counseling; Grievant has already completed counseling. Credit card misuse has led to suspensions. Looking at these charges in combination, the most severe discipline consistent with just cause and with the efficiency of the Service is a 10-working-day suspension. Such a sanction should be sufficient to impress upon Grievant the need to keep his personal and work affairs separate and to conform himself to standards of behavior consistent with the elevated standards of conduct generally recognized as appropriate for a law enforcement officer.

For all the above reasons, it is concluded that the Agency did not have just cause to remove Grievant from his position as an IEA Officer with the Agency, nor did it take this action only to promote the efficiency of the Service. However, the Agency did have just cause to suspend Grievant for 10 working days, and such a suspension would promote the efficiency of the Service. As a remedy, the removal shall be rescinded; all reference to it shall be expunged from Grievant's personnel record and other files; and, consistent with the Back Pay Act, Grievant shall be reinstated and made whole for all loss of earnings and benefits occasioned by the removal. The first 10 working days following his removal shall be treated as a disciplinary suspension for which no back pay is due. As requested by the parties, the Arbitrator will retain jurisdiction over the remedy and any disputes arising therefrom, including any attorneys' fee application.

AWARD

1. The Agency did not have just cause to remove Grievant from his position as an IEA Officer with the Agency, and did not take this action only to promote the efficiency of the Service.
2. A penalty of a 10-working-day suspension for misuse of the government credit card and off-duty misconduct of assault would be consistent with just cause and would promote the efficiency of the Service.
3. As a remedy, the removal shall be rescinded; all reference to it shall be expunged from Grievant's personnel record and other files; and Grievant shall be reinstated and made whole, consistent with the Back Pay Act, for all loss of earnings and benefits occasioned by the removal, less interim earnings, except that the first 10 working days following his removal shall be treated as a disciplinary suspension for misuse of the government credit card and off-duty misconduct of assault.
4. As requested by the parties, the Arbitrator will retain jurisdiction over the remedy and any disputes arising therefrom, including any attorneys' fee application.

LUELLA E. NELSON - Arbitrator