BEFORE THE FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration	)	
	)	
	)	
	)	
Between	)	
	)	
	)	
	)	
American Federation of Government Employees, Local 4010	)	FCMS Case Number 070323-02359-1
	)	
	)	
	)	
And	)	
	)	
	)	
Department of Justice Federal Bureau of Prisons	)	Robert J. Claus - Grievant Discharge, Falsification of Medical History, Progressive Discipline, Remedies
	)	
	)	
	)	
	)	
Before	)	
	)	
	)	
Charles E. Donegan Arbitrator	)	
	)	

DECISION OF THE ARBITRATOR

I

JURISDICTION

The Arbitrator was selected by the parties, through the Federal Mediation and Conciliation Service (FMCS), in accordance with the agreement between the parties.

The hearing was held on November 15, 2007 and February 20, 2008 at 14601 Burbridge Road, S.E., Cumberland, Maryland 21502 by May 2, 2008.

II

APPEARANCES

Appearances for the parties were as follows:

For the Department of Justice, Federal Bureau of Prisons

Daniel Ritchey, Labor Relations Specialist

Anita Singleton, Technical Representative

Raymond Briggs, Captain (Former)

Gerald Lewis, Lieutenant (Former)

Jose Santini, Lieutenant (Former)

William Wagner, Lieutenant

For American Federation of Government Employees, Local No. 4010

Brian Lowry, President, Council of Local Prisons

Kurt Warneke, President, Local 4010

Robert J. Claus, Correctional Officer (Grievant)

Dwayne Person, Mid-Atlantic Regional Vice President, AFGE (Observer)

III

ISSUE

Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?

IV

APPLICABLE CONTRACT PROVISIONS

ARTICLE 31 – GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

...

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"

ARTICLE 32 – ARBITRATION

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

Section e. The arbitration hearing will be held during regular day shift hours, Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regular day shift hours. No days off adjustment will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses.

1. the Union is entitled to the same number of representatives as the Agency during the arbitration hearing. If any of these representatives are Bureau of Prison employees, they will be on official time.

V

JOINT EXHIBITS

J – 1 Master Agreement, Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees

J – 2 Arbitration hearing, Robert Claus

AGENCY FILE
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

ROBERT JOHN CLAUS, III

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LOCATION	DATE	DOCUMENT DESCRIPTION	SOURCE
1	03/07/07	Notification of Personnel Action	A. Singleton
2	03/07/07	Request for Personnel Action	A. Singleton
3	03/07/07	Agency Decision Letter	L. Hollingsworth
4	02/05/07	Written Response to Proposal Letter	R. Claus
5	04/26/06 (?)	Union's Written Response to Proposal Letter	K. Warneke
6	01/22/07	Proposal for Adverse Action	R. Briggs
7	12/07/06	SBIS Memo	J. Hackenbracht
8	12/01/06	Response to Interrogatories	R. Claus
9	11/20/06	Notice of Rights	R. Claus
10	12/16/05	Background Investigation	OPM
11	08/24/05	SF-85P-S, Supplemental Questionnaire for Selected Positions	R. Claus
12	02/05/99	Standards of Employee Conduct and Responsibilities	BOP

J – 3 Memorandum for Anita Singleton, Employee Services Manager FCI Cumberland, Maryland FROM: Dennis Smith, Chief Security & Background Investigation Section, SUBJECT: "E" Issue Case Robert J. Claus, III (Undated)

J – 4 Resolution of Derogatory Information, P 3000.02, 11/1/1993, Chapter 7, Page 32

J – 5 Anita Singleton – Permission to Use From "Greenwalt, Melissa R" 1/18/2007 10:46 A.M.

MANAGEMENT EXHIBITS

M – 1 Pre-Hearing Submission

M – 2 United States of America Merit Systems Protection Board, Docket Number SL07528810 128, Robert L. Bradley, Jr., Appellant, v. Veterans Administration, Agency, Before Daniel R. Levinson, Chairman, Mario L. Johnson, Vice Chairman, Samuel W. Bogley, Member, dated February 7, 1989

M – 3 United States of America Merit Systems Protection Board, 2007 MSPB 282, Docket No. CH-0752-04-0620-B-1, John Doe, Appellant, v. Department of Justice, Agency, December 4, 2007, Before Neil A.G. McPhee, Chairman, Mary M. Rose, Vice Chairman, Barbara J. Sapin, Member

M – 4 United States of America, 100 M.S.P.R. 447, Docket Number DE-0752-04-0155-1-1, Caleb Cameron, Appellant, v. Department of Justice, Agency, Before Neil A G. McPhee, Chairman, Barbara Sapin, Member dated November 3, 2005

M – 5 Request for Personnel Action RE: Robert J. Claus, III Effective Date 09/18/2005 Correctional Services GS 5

M – 6 The Guide To Processing Personnel Actions Table 11-A Excepted Appointments that are not based on Exercise of Reemployment or Restoration Rights (continued)

M – 7 Chapter 9. Career and Career-Conditional Appointments Table 9-A. Appointment Based on the Person Being or Having Been within Reach on a Civil Service Certificate of Eligibles (continued)

UNION EXHIBITS

U – 1 Reply to Robert Claus Request for Relocation from FCI Cumberland to FCI Beckley was recommended, dated October 2, 2006

U – 2 Douglas Factors (Checklist) Twelve Factors

U – 3 Federal Investigative Services, Suitability Referral Chart

U – 4 **cyberFEDS V3.0**

[Code of Federal Regulations]
[Title 5, Volume 1]
[Revised as of January 1, 2007]
[CITE: 5CFR315.803]

[Page 171]

TITLE 5 – ADMINISTRATIVE PERSONNEL

CHAPTER I – OFFICE OF PERSONNEL MANAGEMENT

PART 315 CAREER AND CAREER-CONDITIONAL EMPLOYMENT – Table of Contents

Subpart H Probation on Initial Appointment to a Competitive Position

Sec. 315.803 Agency action during probationary period (general).

The agency shall utilize the probationary period* as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

U – 5 Performance Log, Robert Claus, Correctional Officer, Standard Set #3B, Grade GS-06 from June 25, 2006 to September 23, 2006, GS-5 from December 24, 2005 to March 26, 2006, from 9/24/06 to 12/23/06, from September 25, 2005 to December 24, 2005, Employee Performance Appraisal, 4/24/06, Employee Performance Appraisal 12/18/06 (most of evaluations were excellent or outstanding)

U – 6 Memo from Robert Claus to J. Slater, Operations Lieutenant dated October 17, 2006 stating he found contraband in cell #109 in A-B

U – 7 Review of the Federal Bureau of Prisons Disciplinary System dated September 2004

VI

BACKGROUND

Correctional Officer Robert J. Claus was removed for making inaccurate statements on his pre-employment application. The Union filed a grievance and requested an arbitration.

The Arbitration, Charles E. Donegan, conducted a hearing on November 15, 2007 and February 20, 2008. Briefs were filed by May 2, 2008.

VII

POSITION OF DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS (AGENCY)

The Agency's position is essentially contained in excerpts from its post-hearing brief, which appear below.

AGENCY'S CLOSING ARGUMENT

COMES NOW the Department of Justice, Federal Bureau of Prisons, by and through its undersigned representative, and files this Closing Argument in the above titled matter.

BACKGROUND

The grievant, Mr. Robert J. Claus, after applying and submitting required background investigation documents, began his employment with the Federal Bureau of Prisons on September 18, 2005, as a Correctional Officer. Agency Exhibit 5. Thereafter, a "background investigation," was conducted on Mr. Claus as he was in a covered law enforcement position as a Correctional Officer. During the course of the background investigation, several inconsistent statements and/or questionable issues were discovered. See, Joint Exhibit 11, Supplemental Questionnaire for Selected Positions, Certifying Statement (My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith...).

On March 7, 2007, the Federal Bureau of Prisons, Federal Correctional Institution, Cumberland, Maryland, removed (fired) Mr. Robert J. Claus, from his federal civil service position as a Correctional Officer and federal law enforcement officer. Joint Exhibit 1, Tab 1. This removal action resulted from administrative charges of misconduct stemming from Mr. Claus' responses to hiring/background investigation employment documents. Joint Exhibit 2, Tab 3. Specifically, in a letter dated January 22, 2007, Mr. Claus was charged with "Providing Inaccurate Information During Employment Process." This letter further details two differing specifications of misconduct supporting the one charge. Joint Exhibit 2, Tab 6. In the first instance the proposal letter states/charges:

> *Specification A: During your pre-employment stage, you failed to reveal your mental health treatment. You were asked on the Questionnaire for Selected Positions form, SF85P-S, #5, Your Medical Record, "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?..." Your answer to the question was, "No." You signed and certified your answers on this form on August 24, 2005. During your Personal Reliability Subject Interview with the United States Investigations Services' investigator, conducted on December 9, 2005, you told the investigator you were experiencing anxiety and had trouble sleeping prior to your discharge from the Marine Corps. Your received counseling for anxiety and were given a prescription for Zoloft, which you took daily for about two months. In your response to your written interrogatories dated November 3, 2006, when asked*

why you failed to reveal your mental health treatment at the pre-employment stage, you responded, "On a personal level, it was hard for me to answer. In my perspective, I saw the question as a void in the application due to my circumstances. It is a very intimidating question and degrading for me to release that information on paper. I somewhat felt violated to be asked a question on such personal issues w[h]ere the sacrifices I made could jeopardize my employment before even consideration. I did, however, wait for the investigator interview to release my mental health history."

See, Joint Exhibit 2, Tab 11.

In the second instance, the proposal letter states/charges:

Specification B: During your pre-employment integrity interview, which you signed on July 27, 2005, Section E, Criminal and Driving History, question 9 asked: "Has the applicant used marijuana?" You answered "Yes." You indicated that the last occurrence was May 200 and that prior to May of 2000 you smoked marijuana less than 10 times. During your Personal Reliability Subject Interview with the United States Investigations Services' investigator, conducted on December 9, 2005, you told the investigator that the last occurrence was May 2001 and that you smoked marijuana less than 4 to 5 times. On your Military DD Form 2807-1 dated July 5, 2001, you indicated that 1999 was the last time you used marijuana and that you had used marijuana 10 times from 1997 to 1999. In your response to your written interrogatories dated November 3, 2006, when asked why did you fail to report your use of marijuana in may 2001 on the military physical examination form dated

July 5, 2001, you stated, "I did not tell the truth to the recruiter or the medical professional concerning the last time I had used the drug."

See, Joint Exhibit 2, Tab 8.

Subsequent to receiving the letter proposing his removal, Mr. Claus was given an opportunity to respond. Mr. Claus responded in writing in a letter dated February 5, 2007. Joint Exhibit 2, Tab 4. In this written response Mr. Claus admitted to the charges. With regard to Specification A, he stated:

*The Mental Health question at the interview was the hardest to elaborate on considering all issues were caused from combat, but **KNOWING** it would be seen as a discrepancy in the investigation, I provided the information for closure on the subject.* Emphasis Added.

He then excuses his KNOWING omission by stating he did not have to disclose the mental health information because "the counseling was for...marital problems and grief." This argument/defense is unpersuasive as the issue was his failure to disclose the mental health treatment by a professional and the prescription of Zoloft, not whether or not he had marital counseling. I would bring to the arbitrator's attention that the Union did not call any witnesses to confirm this self interested assertion with regard to "marital counseling." Neither the "counselor" or the "wife" testified at the hearing.

Wife regard to Specification B, Mr. Claus stated:

*I **DO** legitimately see the discrepancy concerning me lying to my recruiter...but I did not hesitate in telling the truth to the investigator that I lied to my recruiter. (Emphasis Added)*

Joint Exhibit 2, Tab 4.

Mr. Claus does not address his providing differing statements with regard to his drug use to the Agency and the background investigator.

The Union also responded on Mr. Claus' behalf in a letter dated April 26, 2006. Joint Exhibit 2, Tab 5. An arbitration hearing was then sought by the Union, on behalf of Mr. Claus, and November 15, 2007 and February 20, 2008. Thereafter, by agreement of the parties Closing Briefs were to be filed, but extended to be due on April 25, 2008.

QUESTION TO BE ANSWERED

The Agency and Union agree, the issue to be decided in this case is set by the Master Agreement, Article 31, Section h(1). (Joint Exhibit 1) Specifically, in accordance with the Master Agreement the issue to be decided is:

Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?

ARGUMENT

SUFFICIENCY OF THE EVIDENCE (JUST AND SUFFICIENT CAUSE):

The Agency has the burden to prove the charges sustained against Mr. Claus; and, that burden shall be carried by the preponderance of the evidence. 5 U.S.C. §1201.56(c)(2).

The Agency is of the firm opinion that the two sustained charges or specifications against Mr. Claus in this proceeding are supported by the preponderance of the evidence.

The underlying facts against Mr. Claus, and the cause of his removal, are virtually uncontested. Indeed, they are admitted by him, as is noted in each of the two Specifications. At hearing Mr. Claus did not substantially alter his previous admissions.

With regard to Specification A, he has clearly admitted to the charged conduct. However, has attempted to explain that he did not make the required disclosures detailed in Specification A because this matter pertained to marital counseling matters which would not be a required disclosure. First, it is clear that Mr. Claus stated contemporaneously in response to the investigator that these matters pertained to problems with sleeping, with no reference to marital issues. Moreover, the at issue background investigation and Specification A notes that Mr. Claus provided with a prescription for "ZOLOFT." The prescription and taking of a controlled medicine is clearly not "counseling" from a church, but "treatment" provided by a "health care professional." It was therefore incumbent upon Mr. Claus to answer this question, and to disclose the required information.

Additionally, and again while at haring, Mr. Claus seems to attempt to explain that he did not provide the discovered health care professional treatment because it pertained to marital counseling at a church. However, as noted in Specification A, Mr. Claus indicated that the did not prove this information because:

> *In my perspective, I say the question as a void in the application due to my circumstances. It is a very intimidating question and degrading for me to release that information on paper. I somewhat felt violated to be asked a question on*

such personal issues w[h]ere the sacrifices I made could jeopardize my employment before even consideration."

See, Joint Exhibit 2, Tab 8, p. 6.

Thus, Mr. Claus did not fail to disclose this information because he believed he had a right not to disclose because it pertained to marital counseling. As he states, he did not disclose this information, with intent, because he was afraid it "could jeopardize my employment before even consideration." Thus, he admits he withheld required information which he believed may have been relevant and useful to the Agency in its employment decisions, in attempt to gain considerations to which he may not have otherwise been entitled.

With regard to Specification B, the issue here is that Mr. Claus made two differing statements with regard to his "drug" use in the course of applying for employment with the Agency, during an initial integrity interview and then during a subsequent background investigation interview. In the first instance he indicated that he had indeed smoked marijuana and that:

"... the last occurrence was May 2000 and that prior to May of 2000 you smoked marijuana less than 10 times."

In the second background investigation interview, he stated:

"that the last occurrence was May 2001 and that you smoked marijuana less than 4 to 5 times."

It is self evident that within these two responses there are two separate and distinct inconsistent statements, one regarding the last time he smoked marijuana (May 2000 or May 2001) and the amount of times he smoked marijuana (less than 10 times or less than 4 to 5 times).

Indicative of Ms. Claus' veracity on the subject of his illicit drug use the investigator further questioned him as to why he made yet a third inconsistent statement on his military employment records. In response Mr. Claus stated:

> *"I did not tell the truth to the recruiter or the medical professional concerning the last time I had used the drug."*

So, on might ask, when does Mr. Claus tell the truth? The answer is: WE DON'T KNOW? However, we do know that when it suits his interest, he will NOT BE forthcoming or tell the truth.

The preponderance of the evidence shows that these two charges were properly sustained against Mr. Claus. Nevertheless, the Agency's proof of one specification IS sufficient to sustain the charge See CAMERON v. DEPT. OF JUSTICE 100 M.S.P.R. 477, p. 4 (November 3, 2005), citing, BURROUGHS v. DEPARTMENT OF THE ARMY, 918 F. 2d 170, 172 (Fed. Cir. 1990) (See also, LUCIANO v. DEPARTMENT OF THE TREASURY, 88 M.S.P.R. 355 (2001) The Board found it unnecessary to address certain specifications of a charge where the remaining specifications were sufficient to warrant sustaining the charge and penalty). Therefore, the Charge of Providing Inaccurate Information ... is clearly and completely sustained against the Grievant.

EFFICIENCY OF THE SERVICE & PENALTY DETERMINATIONS

Actions, such as the removal at issue in this proceeding, shall be taken only for such cause as will promote the efficiency of the service. 5 U.S.C. §7713(a). The Agency believes Mr. Claus' removal action was taken in the interest of the efficiency of the service. Moreover, the removal action was reasonable, and not beyond the bounds of the maximum reasonable penalty. In a recent, nearly identical Bureau of Prisons case, both of these elements have been squarely addressed in a recent Merit Systems Protection Board (MSPB) case. In CAMERON v. DEPT. OF JUSTICE 100 M.S.P.R. 477 (November 3, 2005), the Board sustained the Bureau of Prisons' removal of an employee in our facility in Lakewood, Colorado. IN CAMERON, the Agency removed this employee from employment for falsification of pre-employment documents. The employee appealed his removal to the MSPB. The Initial Decision from an administrative judge found "that the penalty of removal was not within the bounds of reasonableness, and she mitigated the removal to a 10-day suspension." The Agency appealed this decision in a Petition for Review (PFR) to a full board panel of the MSPB. In addressing only one specification and charge of several, the Board overturned the administrative judge and sustained the Agency's removal action.

In consideration of the removal penalty, on only one of the sustained charges, the Baord stated: It is not the Board's role to decide what penalty it would impose, but rather, whether the penalty selected by the Agency exceeds the maximum reasonable penalty. Id., CAMERON, p. 5., Citing, ADAMS v. U.S. POSTAL SERVICE, 96 M.S.P.R. 492 (204). After citing a plethora of supporting cases for the removal of a law enforcement official who had provided inaccurate or false information on employment

documents the CAMERON decision held: [W]e find that the penalty of removal was within the tolerable limits of reasonableness.

The Agency would ask the Arbitrator to take notice and consider that Mr. Claus was hired as a law enforcement official who is held to a higher standard of conduct than non-law enforcement civil service members. TODD v. DEPT. OF JUSTICE, 71 MSPR 326, 330 (1996) The safety of inmates and staff working at this facility demands that this standard be maintained. Moreover, it is beyond question that Mr. Claus' judgment and credibility as a law enforcement official have been destroyed by his actions. As stated by the Warden, deciding official, at hearing, she considered both aggravating and appropriate mitigating factors. Decision Letter, Joint Exhibit 2, Tab 3, and Hearing Transcript(HT), Vol. 1, pp 96-d104. Here the Warden determined that Mr. Claus' credibility as a law enforcement official, who could be called to testify in court, was permanently damaged. The Warden indicated that she would have proactive, affirmative, duty to disclose these credibility, impeachment, materials and issues to opposing parties in legal proceedings. HT, Vol. 1, p. 102.

The penalty of removal is also consistent with the Agency's table of penalties in the Standards of Employee conduct. Joint Exhibit 2, Tab 12, Attachment A, p. 12, No. 32. And, an additional note, the Standards of Employee Conduct states:

> While the principles of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including REMOVAL. Emphasis Added.

Joint Exhibit 2, Tab 12, Attachment A, Page 1.

The Warden found that the credibility of Mr. Claus, as called into question by his employment process and documents, could not be resolved by a lessor penalty than removal. As a law enforcement official, he had permanently damaged his credibility. HT vol. 1, p. 103-04. See, CAMERON, supra, p. 5, footnote 1 (Under Giglio v. U.S., 405 U.S. 150 (1972), (Investigative agencies must turn over to prosecutors, as early as possible in a case, potential impeachment evidence with respect to the employees/agents involved in the case. A Giglio impaired agent's testimony is of marginal value. A case that depends on such an impaired witness is at risk.)

Based upon the above, the Agency remains of the firm opinion that Mr. Claus' removal action was taken in the interest of the efficiency of the service and that it was not beyond the bounds of the maximum reasonable penalty. This action should therefore be affirmed. As noted above, and as supported in CAMERON, this sanction should remain, even if the arbitrator sustains only one of the two Specifications in the charged misconduct.

AVERRED DEFENSES ANSWERED

While the underlying facts of Mr. Claus' removal are clearly detailed and appear to not be in contention, the Union's defenses are not clearly stated, but almost cryptic. Nevertheless, I will attempt adduce the anticipated defensive arguments by the Union and address each in turn below. However, before doing so, I first wish to fully establish that the Agency contests that each of these "defenses/justifications" are contrived, are not supported by evidence or rationale argument. Secondly, even if these justifications are believed, each of these arguments are clearly insufficient justifications to excuse or mitigate the charged misconduct.

FIRST DEFENSE/JUSTIFICATION: The Union seems to have argued at hearing that Mr. Claus was not treated equally with a similarly situated employee, Officer Knight. The Union argued at hearing that Officer Knight was removed for similar charges, but the matter was settled and that employee was brought back. The arbitrator dealt with this argument at hearing after a portion of the Knight "settlement agreement" was read into the record which showed the Agency and the Union agreed the Knight settlement, AND TERMS THEREOF, were confidential and would not be cited in any other case as precedent setting. (See, HT Vol. 2, p. 77-97). After extensive argument by both parties, the arbitrator ruled (Speaking to the Union Representative):

> I allowed you to ask the question did he write the proposal to remove Officer Knight, and he said yes, and I allowed that. I am not allowing you to ask if those two situations are similar That I am not going to permit. This is where we end...

HT. Vol 1, p. 113, lines 11-17.

Thus, and the arbitrator is certainly correct, by the Union's signing of the Knight settlement and accepting the "confidentiality" clause, they are indeed precluded from now arguing that Officer Knight and the grievant were similarly situated and/or that they were subsequently treated differently.

SECOND DEFENSE/JUSTIFICATION. Mr. Claus, or his representative, seem to indicate that he eventually told the truth (to the investigator), and therefore he ultimately resolved or alleviated his misconduct. This is not a sufficient justification or defense. As stated in BRADLEY v. VETERANS ADMINISTRATION, Doc. No. SL07528810128:

> There is no question that providing inaccurate information to a supervisor is a serious offense which can neither be condoned nor tolerated. The fact that the appellant stated the truth three months later, and only while being investigated for his action, does not warrant an inference that he did not intend to deceive...Falsification of records is an action which goes to the appellant's reliability, veracity, trustworthiness and ethical conduct and thus directly impacts upon the efficiency of the service.

Id., p. 10-11.

THIRD DEFENSE/JUSTIFICATION: The Union representative attempts to argue that the Agency's removal of Mr. Claus was somehow untimely, and therefore this action could not be taken. As the arbitrator learned at the hearing it was not until the U.S. Investigative Services Investigator concluded his investigation and then the Office of Personnel Management (OPM) turned over their investigation to the Agency that we had authority to move on this matter.

In Joint Exhibit 2, Tab 7, we see that Mr. Claus did not certify his interrogatory responses until December 1, 2006. See also, Joint Exhibit 2, Tab 8 (Interrogatories, Certifying Statement and Signature of December 1, 2007). Thereafter, the Agency's Security and Background Investigation Section issued its December 7, 2006 letter to the Warden and recommended, "...this case be reviewed by the Warden for possible falsification of pre-employment documents. See, Joint Exhibit 2, Tab 7, p.3.

It is unclear how the Union could argue that the Agency should have taken action, before the investigation was complete, or before Mr. Claus had an opportunity to

fully respond to the concerns arising from his background investigation. Moreover, taking an action before the investigation was complete would have been in violation of the Master Agreement, Article 30, Section d(1). Section d(1) states:

> [W]hen an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation WILL NOT be proposed until the investigation has been completed and reviewed by the Chief Executive Officer [Warden] or designee. Emphasis Added.

Thus, the processing of Mr. Claus' removal could not have happened much faster. Even with the intervening holidays in December and January, by January 18, 2007, the Warden had reviewed the files and the Employee Services Manager, Anita Singleton, had sought and then received authorization from OPM to use their investigative materials in the agencies proposal against Mr. Claus. See, Joint Exhibit 5. After receiving authorization, a proposal letter for Mr. Claus' removal was drafted, finalized, and then issued to him on January 22, 2007.

In PHILLIPS v. DEPARTMENT OF INTERIOR, 95 M.S.P.R. 21 (2003) a law enforcement official was removed for similar charges on nearly and identical underlying issues. (CAMERON, supra, p. 7, cites to this case). In PHILLIPS, Background, p. 3, we see that the employee's falsification regarding her mental health treatment was discovered by the Agency in November 1996, but she was not removed until November 1997, a year later. In our case, the Agency processed the matter in far less than on year from the date of the discovery of the at matter issues. From the time that Mr. Claus had certified his responses to the investigation, December 1, 2006, to the

Agency's final removal action, March 7, 2007 was only three months. Additionally, in Philips we see that the "falsified" employment documents were filled out in 1990, yet she was not removed until 1997. Thus, the removal of Mr. Claus was completely timely. If the Agency had processed this matter any faster the Union would be alleging we violated the Master Agreement and rushed to judgment.

FOURTH DEFENSE/JUSTIFICATION: The Union seems to also argue that since Mr. Claus was a good employee from a performance standard, that his removal is unwarranted in this matter. As the arbitrator knows, good performance is only one factor of many to consider in determining a penalty. In this case, the Agency stipulates that Mr. Claus was a good performer. However, in each of the above cited cases, those employees all had no noted deficit in performance. In this matter, as in the cited cases, the performance does not mitigate the very serious nature of the offense. If he was to remain an employee, he would always have credibility issues which the Warden would have an affirmative duty to disclose to opposing counsel. CAN I LIE ON AN APPLICATION FOR EMPLOYMENT AND THEN PROTECT MYSELF FROM REMOVAL BY MY GOOD PERFORMANCE? IF SO, WHAT POINT IS THERE I N HAVING A BACKGROUND INVESTIGATION?

FIFTH DEFENSE/JUSTIFICATION: Finally, the Union argues that since Mr. Claus' underlying SUITABILITY was set at an "E" issue code, Minor Issues, he should not have been removed. The Union misperceives the case on this point. Mr. Claus was not removed by the Agency because of the "underlying" conduct, he was removed for Failing to Provide Accurate Information in the employment process. As in PHILLIPS, supra, the MSPB noted:

As a penalty-enhancing factor, we note that the appellant was not removed for having been treated for depression, but rather, for her falsification of item 25 on her SF-86 about an issue that potentially concerned a suitability requirement for her law enforcement position. It is well settled that law enforcement officers are held to a higher standard of conduct. *Thompson v. Department of Justice*, 51 M.S.P.R. 43, 50 (1991). Though the appellant may have had benign reasons for withholding the "mental condition" information, it is undisputed that her falsification of her SF-86 was deliberate and, therefore, directly implicates her honesty and fitness for employment as a law enforcement officer.

PHILLIPS, INFRA, p. 6, paragraph 16.

CONCLUSION

The Agency has carried the burden, and proved the charges sustained against Mr. Claus in accordance with Title 5, United States Code, Section 7701(c)(1)(B). We have demonstrated that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. Additionally, Mr. Claus' removal was certainly taken to promote the efficiency of the service and is not beyond the maximum reasonable penalty. Finally, the Union has not prevailed on, or proven, any defense which it has attempted to establish in this case. Thus, the arbitrator must find for the Agency and leave the removal of Mr. Claus undisturbed.

VIII

POSITION OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4010 (UNION)

The Union's position is essentially contained in excerpts from its post-hearing brief, which appear below.

UNION'S CLOSING BRIEF

On November 15, 2007 and February 20, 2008, an Arbitration hearing was held at the Federal Correctional Institution in Cumberland, Maryland. The proceeding was presided over by the Honorable Charles E. Donegan.

I. THE ISSUE

Was the adverse action of grievant, Robert Claus, taken for just and sufficient cause?

If not, what shall be the remedy?

II. UNION'S POSITION

* That the removal of Robert Claus was not taken for just and sufficient cause;

* That the delay in the adverse action taken by the Agency precludes the removal of Robert Claus;

* That the Agency committed harmful error in these proceedings which mandates reinstatement of Robert Claus and restoration of all of his emoluments associated with his case;

* That the Agency's decision was not in accordance to law, therefore mandating reinstatement of Mr. Claus and restoration of all of his emoluments associated with his job, including seniority, back-pay and benefits;

* That the action of the Agency was contrary to the mandates of MSPB law, in that the agency did not consider factors outlined by MSPB in ***DOUGLAS vs. VETERAN'S ADMINISTRATION;***

* That the Agency has failed to sustain the specifications in the proposal letter, thereby requiring reinstatement of Mr. Claus and restoration of all of his emoluments associated with his job, including seniority, back-pay and benefits;

* That the punishment was not reasonable;

* That the Agency has unclean hands; and

* That there are no threshold issues.

III. ARGUMENT

On March 7, 2008, the Agency officially removed Robert Claus from employment as a correctional officer with the Bureau of Prisons. (JE2, tab 3) This document was signed off on by Warden Lisa Hollingsworth. The sustained charge was Providing Inaccurate Information. In this letter the Warden only states that she had given full consideration to the proposal (JE2, tab 6). Warden Hollingsworth goes on to state that she found the removal fully supported by the evidence in the file, and that Robert Claus' supervisors have lost confidence in his ability to perform his job. Warden Hollingsworth also states in the removal notice that no mitigating or alternative sanctions were

considered, and that the penalty sustained was consistent with the Agency's table of penalties.

The parties' Master agreement (JE1), states "Article 6, Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules and regulations, including the right: 2. ***To be treated fairly and equitably in all aspects of personnel management.***

Removal is not the first option in the Agency's table of penalties regarding this charge. Warden Hollingsworth admits and testifies to this fact and never gave a consideration to the Douglas Factors (UE2). Warden Hollingsworth was egregious in her proposed and sustained action of Robert Claus. Even if a sustained action was necessary based on Warden Hollingsworth belief, no staff member should be treated differently than any other staff member when the same basic infraction of the table of penalties occurs, and the cases somewhat mirror one another. This should always be consistent in order to avoid perception of favoritism/cronyism. Office of Inspector General (OIG) prepares an annual report on sustained disciplinary/adverse actions annually. (UE7) outlines inconsistencies in the Bureau of Prisons' disciplinary process. Page 20 shows that many staff charged with falsification of government documents only received oral reprimand, it doesn't even speak to the volume of cases in which less than a fourteen (14) day adverse action was taken. Examples are provided in this exhibit where many cases where action may have been sustained by OIG/OIA, the deciding official took no action.

During the hearing it was noted (UE 8 and UE 9), that an employee by the name of Nicholas Knight who was terminated for the same infraction as Robert Claus for falsifying a pre-employment application was given his job back as a correctional officer about a week prior to the first initial day of this arbitration hearing. The Agency, in this case, had Mr. Knight sign a confidentiality agreement. During the hearing the Agency threatened action against Mr. Knight and the Union if we called him as a witness and he testified. Warden Hollingsworth testified that she also requested a waiver (UE9) on behalf of Mr. Knight to the Mid-Atlantic Regional Director Kim white, which was ultimately denied. Warden Hollingsworth testified she did not request a waiver for Mr. Claus. Let it also noted that when a background investigation of any type is conducted that Office of Personnel Management (OPM) assigns a classification code to each case. The Suitability Referral Chart (UE3) outlines severity of background interrogatories in order of "A through E." Mr. Knight's suitability charge which was classified by OPM was considered a "D" class charge which is considered "Moderate" in nature. Mr. Claus interrogatories were classified by OPM as an "E" class charge (JE3) which is codified "Minor" and the lowest possible severity of all charges alleged. These actions as stated above alone set the appearance of treating staff inequitably and unfairly regarding the disciplinary process by the deciding official in both cases which was Warden Hollingsworth.

The Agency committed harmful error. Robert Claus should be reinstated with restoration of full emoluments of his position due to the Agency's commission of harmful

error in their procedures, the Agency's engaging in prohibited personnel practices in this process, and the Agency's making of a decision which was not in accordance with law.

In Cornelius v. Nutt, 472 U.S. 648, 105 S.Ct. 2882, 86 L.Ed.2d 515 (1985), the United States Supreme Court was required to interpret the Civil Service Reform Act of 1978, which is set forth at 5 U.S.C. 7101, et seq. In discussing this Act, the Supreme Court noted that the 1978 Act is "a comprehensive revision of the laws governing labor relations between federal agencies and their employees." Justice Blackmun, who delivered the opinion of the Court, stated that "among the major purposes of the Act were the preservation of the ability of federal managers to maintain 'an effective and efficient government' as well as the strengthening of the position of federal unions and making the collective-bargaining process a more efficient instrument of the public interest." The Court noted that under this, particularly 5 U.S.C. 7101, a federal employee subjected to disciplinary action taken pursuant to the Act, may appeal the Agency's decision. Justice Blackmun stated that under the Act, when an appeal is taken, the Agency's decision must be sustained if it is supported by appropriate evidence, but, on the other hand, the Agency's decision may not be sustained if the employee 'shows harmful error in the application of the Agency's procedures in arriving at such decision', citing 5 U.S.C. 7701 c (1) and (2). The Merit System Protection Board has followed the federal law and Cornelius in applying the harmful error standard. 5 U.S.C. 7701, Section c currently provides:

(1) Subject to paragraph (2) of this subsection, the decision of the Agency shall be sustained under subsection 9b) only if the Agency's decision–

(A) in the case of an action based on unacceptable performance described in Section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of evidence.

(2) Notwithstanding paragraph (1), **the Agency's decision may not be sustained under Subsection (b) of this Section if the employee or applicant for employment–**

(A) shows harmful error in the application of the Agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in Section 2302 (b) of this title; or

(C) shows that the decision was not in accordance with law.

1. Failing to properly mitigate the appropriate penalty with the employee performance appraisals and award which were not in the disciplinary packet and negating the possibility of progressive discipline as stated in the Master Agreement;

2. Allowing an arbitrary discipline system. Mr. Claus was not a probationary employee at the time of his removal from service (UE4). Six months into Mr. Claus' employment with the Bureau of Prisons, Dennis Smith, Chief, Security Background Investigation Section (SBIS), a Bureau of Prisons employee, wrote a memorandum to Ms. Anita Singleton, Employee Services Manager assigned at FCI-Cumberland, MD. This memorandum (JE3) was written to inform Warden Hollingsworth that Mr. Claus did

not meet the guidelines for acceptability. If the Warden wished to retain Mr. Claus, the case would have to be sent to the Regional Director's Office, Ms. White for a waiver approval. Again, this was not done, although we know it was done for Nickolas Knight. Mr. Claus met his one year anniversary date six months later, and was employed an additional 12 months after the March 15, 2006 investigation completion date.

3. Causing the initial pre-employment interview questions to continually undergo a metamorphous process; and

4. A delay of over 18 months from the date of the initial employment until the removal.

The Agency failed to sustain the Specifications by a preponderance of the evidence, the standard of proof required of it in cases of adverse action.

Under USC 7701: "the decision of the Agency shall be sustained...only if the Agency's decision...is supported by a preponderance of the evidence." The MSPB"s regulation for this Federal Statute, 5 CFR 1201.56 reiterates this rule, and defines "preponderance of the evidence' as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." The case precedents on falsification of employment documents are numerous:

A charge of falsification requires an agency to prove, a preponderance of the evidence, that the employee provided incorrect information and that the incorrect information was provided with the intent to deceive or mislead the agency. *Forma v.*

Department of Justice, 57 MSPB 97 (1993), *Raymond v. 'Department of the Army,* 34 MSPR 476, 482 (1987). The requisite intent can be established directly or by circumstantial evidence. *Hanna v. Department of the Army,* 89 FMSR 5402. That the employee supplied incorrect information cannot itself control the question of intent, however, the plausible explanations are to be considered in determining whether a falsification was intentional. *Id.* The Board has long held that not every falsification of an application, however minor, unintentional, or far removed in time, will constitute grounds for removal. See Klein v. Dept. of Labor, 6 MSPR 292, 294 n.1, 6 MSPB 249 (1981). Although intent may be established by circumstantial evidence, incorrect information cannot by itself control the question of intent. Listerman v. Dept. of Justice, 31 MSPR 19779, 181 (1986). "Wrong information cannot, by itself, control the question of intent." Seas v. USPS, 73 MSPR 422, 427 (1997). Plausible explanations are to be considered in determining whether falsification of or relating to government records is intentional. Walker v. USPS, 10 MSPR 341, 343 (1982); see Haebe v. Dept. of Justice, 288 F.3d 1288, 1305 n.35 (Fed. Cir. 2002) (a blunder, that is, "mere negligent disregard for the truth," does not constitute "reckless disregard" circumstantial evidence of intent); Blake v. Dept. of Justice, 81 MSPR 394, 410-11, 30 (1999) (plausible explanation deflected a charge of a false report of working conditions); Rackers v. Dept. of Justice, 79 MSPR 262, 278 91998) plausible explanations must be considered; the intent to deceive is to be resolved from the totality of circumstances.

Between December 9 and December 16, 2005, Ms. Janine Hackenbrach conducted a personal subject interview of Robert Claus (JE2, tab 10). It is revealed that although Mr. Claus may not have stated to the military information prior to enlistment in

the Marine Corp accurate times or dates of marijuana usage, these documents along with all employment and investigative documents he filled out prior to gaining employment with the Bureau of Prisons, he never hid or deceived the Bureau in this regard. Mr. Claus in his pre-employment paperwork stated he thought 8-10 ties regarding the use of marijuana, he stated later on that he thought it was more like 4-5 times, but had erred on the side of caution. This is not a negative disregard of the truth. Mr. Claus never lied or covered up trying marijuana.

Robert Claus was asked if he had ever consulted with a mental health professional (JE2, tab 11). The question states you do not have to answer "Yes" if you were involved in marital, grief, or family counseling not related to violence by you. Mr. Claus was interrogated regarding this question many different ways, many different times. Mr. Claus was in combat in Iraq as a United States Marine. Mr. Claus was suffering from grief, because of his mission in Iraq, as well as the separation he and his wife were facing due to him being gone from home for over a year, and the high stress and trauma he faced as a combat soldier, which was also putting a strain on his marriage. He never deliberating falsified the pre-employment document. When he filed this out, he told the truth that he was suffering from grief due to his service in Iraq, as well as the stress and strain he and his wife were facing from the separation caused by the long length of tour. When Mr. Claus filled out this document he did not intentionally cover up the truth as it was known to him. Robert Claus' explanation of the events is consistent and plausible.

There is no evidence to indicate Robert Claus intentionally provided false information. There was no evidence presented that Robert Claus demonstrated reckless regard for the truth.

The Agency, under 5 CFR 752.203, is limited in its presentation of proof, to the material relied upon, and only the material relied upon, to make the decision to terminate employees. When all of the documents and testimony are read together, there was simply no demonstration that Robert Claus attempted to conceal his background from the Agency. Robert Claus past behavior did not damage or lessen the Bureau's integrity. The Agency after finding that Robert Claus would not be suitable for employment only six months into his employment, allowed him to work another 12 months for a total of 18 months without any limitations or restrictions to any area of the prison, staff, or the community. This does not suggest the actions of this employee could be so egregious that removal would be the only option, should any action for corrective behavior be made. How can the Agency say they have lost confidence in the ability for the employee to maintain their integrity or the ability to perform their job when they allowed them to do such for a prolonged period of time?

The punishment was not reasonable. In the Merit systems Protection Board case of Brown v. Department of Treasury, 61 M.S.P.R. 484 (1994), in which the Board mitigated a removal, the Board stated:

The Board has held that it has the authority to mitigate an Agency-imposed penalty found to be "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." If the Agency's judgment clearly exceeds the

limits of reasonableness, it is proper for the Board to specify how the Agency's decision should be corrected to bring the penalty within the parameters or reasonableness.

The Board went on to state that although falsification of documents is a serious misconduct, it does not mean that falsification, per se, mandates removal in every case.

The board, in Brown, went on to state that "the Board has held that factors of particular relevance in determining reasonableness of a penalty in a falsification case are: (1) The nature and seriousness of the offense and its relation to the appellant's duties; (2) the appellant's past disciplinary record; (3) the effect of the offense upon the appellant's ability to perform on a satisfactory level; and (4) the mitigating factors surrounding the offense." The balancing test does not appear to have been performed here. The Agency argues in its dismissal letter (E2, tab 3) Mr. Claus actions have destroyed his credibility and effectiveness that Claus "position as a Federal law enforcement officer requires the highest standards from its law enforcement officer." While our past work record has been acceptable and you have no prior discipline record, it does not shield your actions. It is clear from the evaluations of Robert Claus and the testimony of his supervisor's that Claus had been an exception employee. In its dismissal letter the Agency claims "there are/were no mitigating factors. The penalty is certainly within the overly broad guidelines established by the Agency in Program Statement 3420.09, Standards of Employee Conduct (JE4) since the guideline for the 1st offense of falsification begins at letter of reprimand and extends to removal. Also, (UE1) is a request for transfer Mr. Claus submitted for approval to relocate. This request was signed off on by Warden Hollingsworth, Captain R. Briggs, Warden Charles Felts from FCI-Beckley where the relocation would have been, and Associate Warden

D. Stevens. This memorandum has the word "Recommended." This was approved well after the Agency gained knowledge that Mr. Claus was being questioned regarding suitability. However, Mr. Claus was no longer on a probationary status. Robert Claus' review period was complete. If the Agency Warden had originally intended on terminating the employment of Mr. Claus, why did she approve and sign off on this letter? No new data was collected that she was unaware of previously.

The Agency has recently faced a situation as to where they have questioned pre-employment background past an employee's probationary year. Some employees have been tenured about the same length as Mr. Claus, and some have went as long as three years. The Agency has refused to consider Douglas Factors when there may be a circumstance that non-probationary employees are disciplined for, but refuse to mitigate down to a less severe sanction. The Agency has, as the Warden testified to, tried to hold the standard that you cannot discipline probationary employees. You either have to fire them or clear them. In this case of Robert Claus, he is not a probationary, and has the right to be treated fairly and equitably in all aspects of personnel management.

The factors for determining reasonable discipline, created by *Douglas v. Veterans Affairs*, 5 MSPR 280 (1981), 81 FMSR 7037 are:

1. Seriousness of the offense.
2. The employee's job.
3. Prior discipline.
4. Past work record.

5. The trust factor.
6. Consistency of penalty.
7. Table of penalties.
8. Notoriety of the offense.
9. Prior notice.
10. Rehabilitation potential.
11. Mitigating circumstances.
12. Alternative sanctions

The Warden state she did not consider the Douglas Factor to have mitigated this case and certainly the Bureau of Prison has a staff of attorneys who review all disciplinary proposals and decision letters for the appearance of compliance with Douglas.

Yet, there should be some way to impose a "reasonable" punishment, if any. Falsification of a pre-employment application is an area that is not without reported cases. Some Arbitrators are guided by a four part test, i.e., to determine whether discipline is warranted: (1) Was the misrepresentation willful? (2) Was the misrepresentation material to the hiring? (3) Was it material to the employment at the time of the discharge? (4) Has the employer acted promptly and in good faith? *See, Huntington Alloys, Inc. and United Steelworkers of America,* 74 LA 176 (1980), *Veterans Administration Medical Center and American Federation of Government Employees,* 91 LA 588 (1988), *Tiffany Metal Products manufacturing Company and International Brotherhood of Teamsters,* 56 LA 135 (1971).

Other arbitrators are guided by a two part test, i.e., (1) The applicant's failure must be willful or deliberate. (2) And the matter or matters involved in the question must

be material. *See, Firestone tire and Rubber Company and United Rubber Workers of America*, AFL-CIO, 93 LA 381 (1989).

Both tests should be considered. Neither line of cases or proposed test(s) should be considered over the other. *See, City of Miami and Local 1907, AFSCME*, 107 LA 12 (1996). Let's combine the tests:

(1) Was the misrepresentation willful? Or (1) The applicant's failure must be willful or deliberate.

Robert Claus was forthcoming at all times with respect to all questions the Agency submitted to him. The Agency questioned Robert Claus regarding other information that was not reported by Mr. Claus, but was part of pre-employment questioning. (JE2, tab 10) first page, last paragraph, the Agency accepted the fact that Mr. Claus misread the directions on the SF85P by not entering all the locations he was stationed while he was in the Marine Corp. Page two, paragraph sic, Mr. Claus inadvertently omitted his daughter when he completed the pre-employment paperwork. These two examples alone show the human factor in filling out employment applications. The Agency used the words omitted and inadvertently to justify their interpretation.

(2) Was the misrepresentation material to the hiring? Or (2) And the matter or matters involved in the question must be material:

If Robert Claus had answered the question "yes" to question 5 on the pre-employment application (JE2, tab 11) it would not have disqualified him from

employment. Robert Claus' behavior prior to his employment fell within the Standards of Acceptability established to hire employees.

(3) Was it material to the employment at the time of the discharge? Or (3) And the matter or matters involved in the question must be material:

The evidence presented at hearing supports that it was immaterial. It is clear from the evaluations of Robert Claus (UE5), the testimony of the Captain and the termination letter itself that Diaz had been an excellent employee. His performance as a correctional officer was above reproach and he was a trusted employee. That should have been material as to whether his past behavior would make him subject to coercion and thereby a security threat. ***As the investigator points out on (JE2, tab 10) second page, last paragraph. All information is clear and consistent with case papers. There is nothing in the subject's background or regarding the subject's character or conduct that could result in exploitation, blackmail, or coercion, to include his use of marijuana and his episodes of anxiety.***

(4) has the employer acted promptly and in good faith? The adverse action taken against Robert Claus for removal was an action taken too late by the Agency on information lacking in sufficiency to support and warrant any disciplinary action beyond the minimal punishment. Eighteen months cannot be considered prompt under the circumstance. The Union concludes the agency was not acting in good faith. In a recent arbitration ruling at *Federal Detention Center Miami and AFGE, Council of Prisons Local 33, Local 501,* 107 LRP 34548 (Fed. Arb. 04/26/07), the arbitrator acknowledged that the grievant knowingly omitted material information from his

employment application but that information was not material at the time of the grievant's discharge. He referred to the four-part test and two-part test outlined in C above, which is used by some arbitrators in falsification cases. The Arbitrator incorporated both tests into his ruling. In his summary, he pointed out that the grievant failed to acknowledge two disciplinary recommendations that he received in a previous position. The Arbitrator found that he answered "no" when he should have answered "yes," and at the time of his hiring, the grievant's false statements were material to his employment. However, the Arbitrator also found that the agency did not act promptly. It waited until two years after the grievant was hired to notify him of its investigation, and it didn't remove him until 16 months after that. Citing a ruling of another arbitrator, he explained that sustaining a discharge under such conditions would make the arbitrator a party to practices that are not accepted in sound industrial relations. The time frames in this Bureau of Prisons case are eerily similar to the time frames in the Claus case.

In the case of American Federation of Government Employees, Local 919 and Department of Justice, Bureau of Prisons, U.S. Penitentiary, Leavenworth, KS, 92 FLRR 2-1620, a copy of which is attached, the arbitrator found that the diwscharge based upon falsification of pre-employment documents was nto justified where the removal occurred three years after the grievant began working for the agency. The Arbitrator found that the Agency mechanically applied the contract's requirements for high standards of employee conduct. The performance logs of the employee containing "exceeds" and "outstanding" ratings were very much like the performance appraisals of Robert Claus (UE5). The Arbitrator found there was not just and sufficient cause for the

termination and ordered the grievant reinstated with back pay and benefits. The same should apply in this case.

In a recent decision from a case in Chicago, AFGE Local 3652, Council of Prison Locals 33, v. Department of Justice, a copy of which is provided, the Arbitrator concluded that "the bottom line finding is that the adverse action taken against Grievant of removal was an action taken too late by the Agency on information so misconstrued and so lacking in sufficiency to support and warrant any disciplinary action beyond the most minimum penalty associated with the infracting Offense 32, which is but an "official reprimand."

The Agency has unclean hands.

The problems the Agency has had in disciplining its employees is well-documented in an OIG Report dated September 204 (UE7). This report clearly outlines faults in the system that are supposed to ensure that disciplinary decisions are reasonable, consistent and timely.

There were numerous issues presented to Robert Claus to provide clarification of. He submitted documentation to each investigator to resolve all derogatory information. If he had not, Janine Hackenbrach was required by Program Statement 3000.02, Human Resource Manual, Chapter 7, to prepare a memorandum documenting the discussion and the employee's acknowledgement of the reporting requirement and submit it with the employee's security file. There was no such memorandum in this case submitted by the Agency during the hearing or otherwise. The Union has no way of knowing what Janine Hackenbrach placed in the investigation file other than the documents submitted by Mr.

Claus. Under the negotiated program statement for Human Resources, this should have ended this inquiry. The explanation was plausible. There was no evidence that this was any type of intent to deceive or mislead the Agency.

The two questions utilized by the Agency to terminate Robert Claus are no different in reality to the three questions which they chose not to present testimony at the hearing. None of the specifications had merit. All should have been resolved by the adjudicator, Janine Hackenbrach. The Agency violated it's own intent by using the information in a punitive action.

IV. CONCLUSION

For the reasons set forth herein, the Union respectfully requests that the removal action of Robert Claus not be sustained, and that: (1) The Arbitrator expunge all agency files of the adverse action and return Mr. Claus back to work; (2) The Arbitrator order the Agency to make Mr. Claus whole in all respects for wages, TSP contributions, retirement contributions, accrued annual leave, and sick leave he would have received from February 2, 2007, until the date he returned back to work for the Bureau of Prisons; (3) All negative records pertaining to this instant case be removed from all personnel files the Agency keeps regarding Mr. Claus; (4) The Arbitrator order the Agency to pay Mr. Claus the highest percentage of interest allowed by law for lost wages; (5) A posting listing the violations by the Agency in this matter and corrective remedies ordered by the Arbitrator; (6) Any and all other remedies which may be applicable or which the Arbitrator may deem appropriate.

IX

DISCUSSION

The Arbitrator has carefully read and studied all the documents admitted at the hearing, his own handwritten notes at the hearing, the transcript, and the parties post-hearing briefs. The above has been supplemented by additional research and study.

First, the Arbitrator finds that the grievance in this case is arbitrable because he has been given the right under Article 32 of the contract between the Agency and the Union. The issues involve the interpretation and application of the contract.

Second, the Arbitrator finds that the Agency has acted in violation of the Collective Bargaining Agreement. The proper discipline in the instant case is a thirty (30) working day suspension.

The Arbitrator is cognizant that the burden of proof in this arbitration rests upon the Agency to establish that it has not violated the CBA. Based on a careful review and study of the entire record, the Arbitrator finds that the Agency has not met that burden. The Union did meet its burden of proving a violation.

The Arbitrator does not find it useful to cite all the specific evidence in the record but recognizes that there was an extensive record. Like in most arbitrations, there was considerable conflicting evidence in the instant case. The preponderance of the credible, pertinent evidence was presented by the Agency.

Third, the Arbitrator feels that it would be beneficial to review various standards for discipline and related issues, which are discussed below (See Elkouri and Elkouri,

HOW ARBITRATION WORKS, Sixth Edition, 2003). (Generally and pages 953-954, 964-967, 983-984, 987-990, and 1221-1222).

E. Review of Penalties Imposed by Management

i. Judicial Recognition

Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct. These decisions rely on the Supreme Court's statement in *Paperworkers v. Misco, Inc.* that the arbitrator is to bring his informed judgment to bear in order to reach a fair solution of a problem, especially when it comes to formulating remedies.. In *Misco*, the arbitrator based his finding that there was not just cause for discharge on his consideration of seven criteria, including the reasonableness of the employer's position, the relation of the degree of discipline to the nature of the offense, and the employee's past record. The Court noted that "courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract " The Court further stated:

> Normally, an arbitrator is authorized to disagree with the sanction imposed on employee misconduct. In *Enterprise Wheel [Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 592, 46 LRRM 2423 (1960)], for example, the arbitrator reduced the discipline from discharge to a 10-day suspension...[T]hough the arbitrator's decision must draw its essence from the agreement, he "is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*"

The more prominent of the factors relevant in the review or evaluation of penalties assessed by management for misconduct of employees are considered briefly below.

i. Nature of the Offense: Summary Discharge Versus Corrective Discipline

It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." In this regard, an arbitrator explained:

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warning or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction.

In cases of extremely serious offenses, arbitrators recognize the need to enforce the discharge penalty. Summary discharge in lieu of corrective discipline of the employee is deemed appropriate for very serious offenses. The definition of disqualifying "serious offense" remains elastic. Sleeping on duty, for example, at least where the act is intentional and the employee attempts to avoid detection, usually warrants termination even though it is the employee's first offense. Summary discharge was deemed appropriate for an employee driver who failed to report an accident, even though it was the only time he had been disciplined. The arbitrator determined that, although "failure to report an accident," standing alone, would not likely merit discharge, the employee's failure to report the accident, coupled with his bizarre behavior and his failure to take medicine prescribed for a psychiatric condition, warranted discharge.

In one case, summary discharge was deemed appropriate for a single act of negligent work performance. In that case, a service technician did not perform crucial pressure test required by the employer's protocol and thus failed to find a gas leak in the customer's heater connector. Because of the risk of explosion and fire to which the

customer was exposed by the oversight, the arbitrator found the negligent discharge of the employment responsibilities justified the employee's immediate discharge.

In the less serious cases, arbitrators are very likely to change or modify an employer's discipline if such discipline is too harsh for the offense committed. In those cases, discipline may be considered to be excessive "if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it punitive rather than corrective, or if mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or has failed to follow, progressive discipline procedures.

Moreover, arbitrators are likely to set aside or reduce penalties when the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline. Thus, demotion of an employee for absenteeism was found to be inappropriate where, although the employer had warned the employee that his absenteeism was a problem, the employer had failed to inform him that he could be demoted if his attendance did not improve. Even when the misconduct is of a serious nature, the employee must not be lulled into believing that he or she will not be subject to sanction. Thus, the discharge of an employee for insubordination as set aside because the employee had been insubordinate in the past without being subject to any discipline.

Most awards where penalties are modified involve a combination of mitigating circumstances. One study that examined the trends in arbitration awards involving discharge cases found that the prior work record of the grievant was the most

commonly cited factor given consideration by arbitrators, with another frequently cited consideration being the motivation or reasoning behind management's action.

ii. Due Process and Procedural Requirements

Discharge and disciplinary action by management has been reversed where the action was found to violate basic notions of fairness or due process. Borrowing from the constitutional imperative of due process operative in the governmental employment context, arbitrators have fashioned an "industrial due process doctrine." To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. The primary reason arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline where there is little or no evidence on which to base a just cause discharge. Thus, consideration of industrial due process as a component of just cause is an integral part of the just cause analysis for many arbitrators.

Arbitrators may consider an employee's prior disciplinary offenses in determining the propriety of the penalty assessed for a later offense. The double jeopardy principle does not apply, provided the later discipline is not "based *solely* on past violations for which discipline had already been imposed."

vii. Grievant's Past Record

Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may

be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for the offense. In many cases, arbitrators have reduced penalties in consideration of the employee's long, good past record. In turn, an arbitrator's refusal to interfere with a penalty may be based in part on the employee's poor past record.

xii. Unequal of Discriminatory Treatment

It generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all the employees). Applying this general rule, one decision recognized: "[T]here must be reasonable rules and standards of conduct which are consistently applied and enforced in a non-discriminatory fashion. It is also generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; thus all employees who engage in the same type of misconduct must be treated essentially the same.

In this regard, one arbitrator declared: "Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices."

Where a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment. Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that

the employer improperly discriminated against an employee. Thus, "[i]n order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.

Where the union does prove that rules and regulations have not been consistently applied and enforced in a nondiscriminatory manner, arbitrators will refuse to sustain a discharge or will reduce a disciplinary penalty. However, arbitrators will uphold variations in punishments among employees if a reasonable basis exists that justifies such differences. In one case, the employer was held to have had just cause to discharge an employee who had coordinated and served as leader in a "sickout" that violated the labor contract. The arbitrator reasoned that the instigator could be punished more harshly with discharge, even though other employees received only warnings.

That variations in penalties assessed do not necessarily mean that management's action has been improper or discriminatory was persuasively elaborated by on arbitrator:

> The term "discrimination" connotes a distinction in treatment, especially an unfair distinction. The prohibition against discrimination requires like treatment under like circumstances. I the case of offenses the circumstances include the nature of the offense, the degree of fault and the mitigating and aggravating factors. I here is no discrimination, or no departure from the consistent or uniform treatment of employees, merely because of variations of discipline reasonably appropriate to the variations in circumstances. Two employees may refuse a work assignment. For one it is his first offense, there being no prior warning or misconduct standing against his record. The other has been warned and disciplined for the very same offense on numerous occasions. It cannot be seriously contended that discrimination results if identical penalties are not meted out.

UNEQUAL OR DISCRIMINATORY TREATMENT

As stated in Elkouri, it generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in penalties does exists, variations will be permitted notwithstanding the charge of disparate treatment. Discrimination is an affirmative defense and the Union has the burden of proving that the Agency improperly discriminated against an employee. In the instant case, the Arbitrator was unable to determine whether there was unequal or discriminatory treatment because of the confidentiality of the Officer Knight settlement.

APPLICATION OF ELKOURI AND ELKOURI PRINCIPLES

The Arbitrator will now attempt to apply some of the arbitral principles cited above in Elkouri and Elkouri to the instant case.

JUDICIAL RECOGNITION OF ARBITRAL DISCRETION

Court decisions recognize broad arbitral discretion to review the reasonableness of the penalty imposed by the employer in relation to the employee's wrongful conduct. In the instant case, the Arbitrator finds that there was not just cause for the employer to remove the Grievant. The Arbitrator bases his finding on the reasonableness of the discipline, the seriousness of Grievant's misconduct and his past record. Arbitrators are expected to bring their informed judgments to bear in order to reach a fair resolution of a problem.

NATURE OF THE OFFENSE

The Arbitrator finds that the penalty imposed on Grievant was too harsh considering the offense involved. The discipline was not in step with the principles of progressive discipline and was not corrective instead of punitive. In fact, the Agency could have imposed a penalty from reprimand to removal.

DUE PROCESS PROCEDURAL REQUIREMENTS

The Agency in the instant case did not take action against the Grievant in a timely fashion. The Agency continued to employ the Grievant for a year after it decided to terminate him. Grievant had excellent and outstanding ratings during this period.

GRIEVANT'S PAST RECORD

As stated in Elkouri some consideration generally is given to the past record of the disciplined employee. The employee's past record often is a major factor in the determination of the proper penalty for the offense. In the instant case the Grievant had an excellent employment record. There was an adequate basis for mitigating the removal. The Agency had not acted fairly, appropriately and reasonably in imposing the removal. Elkouri points out that employees who have a past record of discipline may be given a harsher disciplinary penalty than first time offenders. The Grievant in the instant case was a first time offender.

LENGTH OF SERVICE WITH THE COMPANY

Long service with the Company, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. In the instant

case the Grievant did not have long service with the Agency but he did have an excellent or outstanding work performance.

KNOWLEDGE OF RULES

As Elkouri states, one of the two most commonly recognized principles in the arbitration of discipline cases is that there must be reasonable rules or standards, consistently appied and enforced and widely disseminated. In the instant case the Arbitrator was not able to determine this factor because of the confidentiality of the Officer Knight settlement.

LAX ENFORCEMENT OF RULES

Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past. In the instant case the arbitrator was not able to determine this factor because of the confidentiality of the Officer Knight settlement.

Fourth, the Arbitrator finds that the Agency has met its burden in sustaining the charges against the Grievant by a preponderance of the credible evidence. The Agency was justified in imposing discipline on the Grievant. However, the discipline of removal was excessive because of mitigating facts and circumstances that were present in the case.

Fifth, the Arbitrator finds that the removal of the Grievant was not reasonable under the facts and circumstances of the instant case. The presence of a number of mitigating factors justify reducing the discipline to a thirty (30) working day suspension.

Sixth, the Arbitrator finds that there are a number of mitigating facts and circumstances in the instant case that justify a lesser penalty than removal of the Grievant.

Seventh, the Arbitrator finds that the removal of the Grievant was not taken for cause necessary to promote the efficiency of the Agency.

Eighth, the Arbitrator finds that the fact that the Grievant eventually told the truth to the investigator to some extent alleviated his conduct. The Bradley v. Veterans Administration, Doc. No. SL07528810128 is not controlling because the Arbitrator finds a difference between an inaccurate statement on a pre-employment application and providing inaccurate information to a supervisor. In addition, the Grievant's responses to the question about consultation with a mental health professional or use of marijuana do not demonstrate a willful intent to deceive. The questions were somewhat ambiguous. The Grievant cannot be expected to remember precisely the number of times he used marijuana over almost a ten-year period.

Ninth, the Arbitrator does not agree with the Warden that the credibility of the Grievant could not be resolved with a lesser penalty than removal. The Arbitrator notes that the Grievant was charged with providing inaccurate information instead of false information. Providing inaccurate information is less serious than providing false information. Providing false information requires willful intent which was not present in the instant case.

Tenth, the explanations by the Grievant concerning the inaccurate statements on his pre-employment application are plausible. The Arbitrator finds that the Grievant

seemed somewhat confused in answering the questions concerning mental health treatment and the use of marijuana. His testimony at the hearing did not indicate an evil intent to mislead the Agency. Mere inaccurate information without bad intent will not sustain a removal.

Eleventh, the Arbitrator finds that the Agency's removal of the Grievant is untimely. The Grievant and the Union are not responsible for the fact that OPM and the Bureau of Prisons did not complete their investigations in a timely manner. The Agency allowed the Grievant to work 12 months after finding that he would not be suitable for employment.

Twelfth, the Arbitrator finds that the excellent job performance since his hiring is a mitigating factor concerning his removal. The Arbitrator concurs with the Agency that good performance is only one factor to consider in determining a penalty. However, the Arbitrator considers good performance important along with the additional mitigating factors in the instant case.

Thirteenth, the Arbitrator finds that since the Grievant's underlying suitability was set at an "E" issue code Minor Issues, it is a mitigating factor. The Arbitrator understands, but does not accept, the Agency's contention that the Grievant was not removed by the Agency because of his "underlying" conduct but was removed for Failing to Provide Accurate Information in the employment process. The Grievant testified credibly at the arbitration hearing.

Fourteenth, the Arbitrator finds that the Warden, the deciding official, did not consider factors outlined by MSPB in Douglas v. Veterans Affairs, 5 MSPR 280 91981), 81, FMSR 7037. The Warden also stated in the removal notice that no mitigating or

alternative solutions were considered. Factors for creating reasonable discipline, created by Douglas include seriousness of the offense, prior discipline, past work record, table of penalties, notoriety of the offense, mitigating circumstances and alternative sanctions. Applying these factors under the facts and circumstances of the instant case require a penalty of less than removal.

The Warden said she did not know about Grievant's marital problems but did know that his supervisor spoke favorably about him. She stated that she did not consider his evaluations in her decision to remove the Grievant. In addition, the Warden testified that the E Code violation the Grievant was charged with was a minor offense. Furthermore, the Warden testified that another employee, Nicholas Knight, was removed for inaccurate statements. She also testified that she had requested a waiver for Mr. Knight based on background information. Mr. Knight had answered "No" to usage of marijuana on his application for employment. The Knight case resulted in a settlement and the details and facts of that case are confidential and, therefore, not available to the Arbitrator. It is not possible for the Arbitrator to determine whether there was a disparity of treatment in that case and the instant case. Finally, the Warden testified that the largest discipline she had proposed short of termination was 50 to 60 days. The largest sustained penalty was 45 days. The combined charges may include falsification.

Captain Raymond Briggs testified that in another case involving integrity issues, such as lying, he had changed a proposed 50-day suspension of Officers Spriggs and Godlove into a 25-day suspension. Therefore, there is definitely a precedent for a suspension instead of removal in an integrity case. The specific facts of the Spriggs and Godlove cases were not provided to the Arbitrator so that they could be compared

with the instant case. Captain Briggs testified that Grievant was a solid and pretty good officer. Lieutenant Gerald Lewis testified that the Grievant was conscientious, reliable officer, he would want him on his shift and he had no reason to doubt the Grievant's integrity.

Lieutenant Jose Santini testified that Grievant made some big finds of contraband, performed well, was attentive and was truthful with him.

Lieutenant William Wagner testified that Grievant was a good employee, dependable, trustworthy and thought his firing was a loss to the Agency. He was also not aware of anybody being fired for falsification.

Fifteenth, the Arbitrator finds that the Agency did not apply progressive discipline in the instant case. As pointed out in Elkouri, Arbitrators consider progressive discipline a very important factor in evaluating the reasonableness of discipline imposed. Progressive discipline is especially important where the employee is a first offender and the offense is not every serious. In the instant case the Agency should have imposed progressive discipline which is corrective and not punitive.

Sixteenth, the Arbitrator finds that the proper discipline in the instant case is a thirty (30) working day suspension. This decision is based on all the facts and circumstances of the instant case. The penalty of removal is unreasonable in the instant case.

Seventeenth, the Arbitrator makes no finding concerning whether the Grievant was treated equally with a similarly situated employee, Officer Knight. The settlement agreement in the Knight case and its terms are confidential.

MANAGEMENT CASES

1. CAMERON v. DEPARTMENT OF JUSTICE, 100 M.S.P.R. 477 (November 3, 2005).

In Cameron, the Grievant made a false statement during has pre-employment interview in which he stated that he had not been disciplined in former or current civilian employment. The fact was that he had been suspended from his position at Safeway for writing a check to Safeway with insufficient funds. That case easily distinguishable from the instant case and is not controlling. The offense in Cameron was far more serious. The penalty of removal in the instant case was not reasonable.

2. BRADLEY v. VETERANS ADMINISTRATION, DOC NO. SL07528810128.

In Bradley, the employee willingly and knowingly submitted falsified travel claims and inaccurate information with the express purpose of defrauding the government. This was a far more serious offense than existed in the instant case The Arbitrator finds that in the instant case the Grievant did not willingly and knowingly attempt to perpetrate a fraud on the Agency.

4. PHILLIPS v. DEPARTMENT OF INTERIOR, M.S.P.B., 2003

In Phillips, the employee's gross false answer of "No" to question in Agency sensitive position questionnaire asking whether employee had ever had a nervous breakdown or had medical treatment for a mental condition. The MSPB found that the

falsification was deliberate and directly implicated her honesty and fitness for employment as a law enforcement officer. In the instant case, the Arbitrator finds that the Grievant's offense was less serious and not deliberate. Furthermore, the fact that the Warden did not take into account the Douglas factors made the penalty of removal unreasonable.

The Arbitrator reviewed a large number of falsification and related cases in the Bureau of National Affairs (BNA) LABOR ARBITRATION REPORTS. Some of these cases are cited below.

(1) TOWER AUTOMOTIVE PRODUCTS CO. 115 LA 1077 (WOLFF NEUTRAL CHAIRMAN 2001)

DISCHARGE

[1] Burden of proof

Employer's burden of proof for discharge of employee for falsifying employment application is clear and convincing evidence, even though some arbitrators apply strictest standard of "beyond a reasonable doubt," since "clear and convincing evidence" standard is strict enough.

[2] False employment application

Employer had just cause to discharge employee who said on employment application he had no criminal record, despite contention that he thought it meant only felonies, where he had been convicted of at least two misdemeanors, application did not mention words "felony" or "misdemeanor," and he was not credible witness; he knowingly misstated that he had attended high school, he admitted he "probably had" more than two convictions, after discharge, and then admitted he did.

[3] False employment application

Employer had just cause to discharge employee, who falsified his employment application as to prior criminal convictions and education, where employer discharged 17 other employees for falsification of applications, eight discharges were grieved, and all were upheld either during grievance process or at arbitration.

The Arbitrator finds that the Employer's burden of proof for discharge of employee for falsifying employment application is clear and convincing evidence. The Agency did not meet that burden in the instant case. However, the Agency is justified in imposing a thirty (30) working day suspension.

(2) SUGAR CREEK PACKING CO., 110 LA 733 (HIGH 1998)

DISCHARGE

1. Employment application – Drug conviction

Employer had just cause to discharge employee who falsely answered "no" to employment-application question whether he had been convicted of felony, even though application stated that giving false information "may," not will, be grounds for discharge, since grievant's conviction for drug trafficking was serous enough matter for employer to be concerned, and for it to conclude that it was inappropriate for grievant to continue as employee.

The facts existing in the instant case were for less serious than an applicant who lied about his conviction for drug trafficking.

(3) TEXTRON AUTOMOTIVE EXTERIORS, 114 LA 1229 (DANIEL 2000)

DISCHARGE

1. Falsified application

Discharge was appropriate penalty for employee who falsified his employment application to conceal that he had been discharged from earlier job for absenteeism, where he would not have been hired if employer had known that he had been fired for absenteeism, employer hired no other employees who were fired elsewhere for absenteeism, and grievant had no valid basis to say he had voluntarily left his last employment; attorney's statement that grievant had good claim against former employer but that damages were too small to make lawsuit worthwhile does not furnish basis for claiming he was not fired.

2. Falsified application – Union animus

Employer did not violate National Labor Relations act when it discharged union steward for falsifying his employment application, where there are no incidents of past threats or indications of animosity to ward grievant because of his union activities.

The facts cited in the above case are for different and much more serious than those existing in the instant case.

(4) TRANE COMPANY, 104 LA 1121 (JOHNSON 1995)

DISCHARGE

– Falsification of employment application

Employer had just cause to discharge employee who lied in his job application about whether he had been convicted of a crime, about his educational background, and who failed to provide gap in his work chronology for time he was in prison, even though he had 14-month good employment record, since employer cannot allow deliberate regard for truth to be ignored.

In the instant case, the Grievant had not been convicted of a crime and any misstatement of facts was not nearly as great or those cited in the above case.

(5) RALSTON PURINA COMPANY, 102 LA 692 (DUDA 1994)

DISCHARGE

– Falsification of application – Medical information

Just cause existed to discharge employee who made false statements regarding his medical history on employment application, even though it was his first offense and agreed penalty ranged from written warning to possibility of discharge, where falsifications were numerous, deliberate, and material, they concerned matters of obvious importance to employer, contention that grievant answered "yes" instead of "no" several times on post-employment medical questionnaire because he was anxious to get back to work demonstrates gross negligence at least, and it was not shown that either investigation or discharge decision was arbitrary, capricious, or unreasonable.

– Falsification of application – Delay in investigation

Four-month delay between discovery of grievant's falsification of medical history on employment application and imposition of discipline does not preclude finding of just cause for discharge, where it took one month for employer to obtain necessary information from physician following receipt of physician's bill that triggered inquiries, several more weeks to get workers' compensation information and to review grievant's employment files, and another month before pant manager was available to approve interrogations of grievant, and grievant was not prejudiced by delay.

In the instant case the Grievant's statements were not numerous and deliberate. Furthermore, in the instant case the Agency did not act promptly in imposing discipline.

(6) CONE MILLS CORP, 103 LA 745 (BYARS 1994)

DISCHARGE

- **Falsification of employment application – Socialist party agenda – Free speech**

Just cause existed to discharge employee whose falsification of employment application was discovered after company investigated him for distributing socialist literature, where discharge resulted from falsification of job application, not from his political affiliations and activities; falsification is material because grievant sought job with company to serve agenda of Socialist Workers Party rather than just to obtain employment.

- **Probationary employee – Intercompany seniority**

Employee who passed three-month probationary period at one of employer's plants may not be discharged as probationary employee, with no recourse to arbitrator, during first three months of work at new plant to which he transferred, where employee who transfers between plants retains corporate seniority that includes "employee benefit programs," and while neither contract provision on "corporate seniority" nor provision on "plant seniority" nor provision on "plant seniority" specifically mentions probation period, right to grieve disciplinary actions is more compatible with right to such programs than with rights enumerated in definition of "plant seniority," company's interpretation that seniority is only counted for time within one plant would mean that employee might have to serve multiple probation periods, and if parties intended term

"employment" to be limited to employment within given plant, they would have specifically said so.

Any inaccurate facts stated by the Grievant in the instant case was to obtain employment rather than to serve any particular agenda.

(7) ST. MARIE'S GOPHER NEWS, 93 LA 739 (EISELE 1988)

– Falsification of application – Conviction – Credibility

Employer properly discharged employee, who had indicated on employment application that he had never been arrested or convicted of crime, when it discovered that he had been convicted of assault for striking live-in girlfriend prior to commencement of employment, despite contention that domestic problems are private and irrelevant to employment, where employer had strong, published, unambiguous policy against falsification of application, it had right to demand honest in every facet of employment, and grievant's evasive manner and conflicting testimony warrants conclusion that falsification was willful.

– Falsification of application – Evidence – Juvenile record

Juvenile record of grievant is admitted over strong union objection in proceeding arising from discharge for failure to disclose conviction for domestic abuse on employment application, but portions concerning contracts with police are found to be irrelevant and will not be considered.

REMEDY

– Falsification of application – Reinstatement

Employer that property discharged grievant for willful failure to disclose conviction for domestic abuse on employment application is ordered to bargain in good faith, upon union request, concerning reinstatement, where there are lingering concerns as in whether technically prevent grievant's record from being cleared, whether falsification resulted from error in judgment whether grievant's poor demeanor at hearing was due to nervousness, whether year of satisfactory work should be considered, and whether questions about arrest are illegal.

The material facts in the instant case are greatly different from the misconduct cited in the above case. The Grievant in the instant case did not conceal a crime.

(8) PEOPLES GAS SYSTEM, INC., 91 LA 951 (SERGENT 1988)

DISCHARGE

– Falsification of company records

Employer had just cause for discharge of serviceman who falsely stated that he never filed claim for worker's compensation and who falsely responded negatively to question in employment application about his prior employment with employer. Falsification of records is extremely serious offense; omission and falsification were willful and deliberate misrepresentations of facts material to decision to hire employee; despite warning that falsification or omission would be cause for dismissal, employee engaged in misrepresentation with intent to deceive employer; employer acted promptly and in good faith when it discovered misrepresentations and omissions; employer fairly investigated facts and imposed penalty given in similar cases.

In the instant case the Arbitrator finds that the Grievant's conduct was not willful and a misrepresentation of material facts.

(9) PENN WHEELING CLOSURE, 121 LA 1220 (DEAN 2005)

DISCHARGE

[1] Leaving premises – Employer investigation – Arbitrator's authority to modify discipline

Employer did not have just cause to discharge employee who violated plant rules that prohibited leaving plant during scheduled working hours without supervisor's permission, where employer failed to weigh possible mitigating factors; it is difficult to conclude that discharge is warranted for what amounts to employee's error in judgment in failing to seek supervisor's approval; inasmuch as employee's absence from premises for 15 minutes falls within 20 minute relief period provided for a contract.

[2] Leaving premises – Progressive discipline – Arbitrator's authority to modify discipline – Work records

Employer did not have just cause to discharge employee who left plant during scheduled working hours without supervisor's permission, where employer has committed itself to general policy of progressive discipline, it has failed to articulate rational reason for departing from this policy to impose drastic penalty of discharge, and grievant appears to be employee whose conduct, with no previous disciplinary history, will likely be corrected by penalty more consistent with his offense.v

In the instant case the Agency did not follow progressive discipline. The Arbitrator uses his authority to modify the drastic penalty of removal to a thirty (30)

working day suspension. The Grievant appears to be an employee whose conduct will be corrected by this more appropriate discipline.

(10) SOLUTIA INC., 121 LA 26 (SZUTER 2005)

BACK PAY

[5] Falsification

Remedy for employee, who was discharged without just cause for falsely claiming to be disabled, is reinstated without back pay, where he falsely claimed he had non occupational injury, which gave him more money; he is also ordered to reimburse employer, by repaying amount outright unless offset against workers compensation benefits is allowed.

In the instant case the proper remedy is a thirty (30) day suspension. The offense was considerably less serious.

(11) TRAILMOBILE TRAILER, 112 LA 1108 (COHEN 1999)

DISCHARGE

1. False application

Employer did not have just cause to discharge employee who falsely answered question on employment application about whether he had ever been convicted of felony, where he had previously been refused jobs when he revealed his background, he worked for nearly year and a half without incident, he appears rehabilitated, and society is beginning to realize that if convicted felons are not given employment and second chance, they will have no recourse but to resort to lawlessness.

2. False application

Employee who was discharged without just cause is reinstated without back pay, where he lied on question on employment application about whether he had ever been convicted of felony, but that misconduct did not warrant discharge.

In the instant case, even if the Grievant lied on his employment application, he told the truth to the investigator. He also worked a year and a half without incident and now appears to be rehabilitated. Grievant's offense in the instant case isnot nearly serious or a felony conviction and warrants a thirty (30) working day suspension but not discharge.

(12) FIRESTONE TIRE & RUBBER CO., 93 LA 381 (COHEN 1989)

DISCHARGE

– **Falsification of medical history – Intent**

Just cause did not exist to discharge grievant who stated on employment application that she had not had any "pain, injury, operation, or disability" even though she had recurrent arm and wrist pain and brief disability on previous job, where she filled out medical history form hurriedly and made several careless, unjustifiable errors, but errors and omissions were not result of intentional plan to deceive or defraud employer.

REMEDY

– **Falsification of medical history – Reduction of penalty**

Grievant who made careless errors and omissions – concerning previous wrist and arm pain – on medical-history portion of employment application is reinstated with no loss of seniority but no back pay, provided she is physically qualified for former duties; if she is not able to perform such duties, here case is to be handled in accord with contractual disability provisions.

The falsification of medical history in the above case is far more serous than any falsification in the instant case.

The case cannot be cited for the proposition that management cannot discipline an employee for providing false information up to removal. It can only be cited for the proposition that Management cannot remove an employee where Management has not considered the Douglas factors in imposing discipline and there are other mitigating facts and circumstances such as seriousness of offense, employee's good work record lack of willful intent of employee to deceive Management and the lack of Management to follow proper procedures.

X

DECISION AND AWARD

The Arbitrator finds that management violated the Collective Bargaining Agreement removing the Grievant. The proper discipline is a thirty (30) working day suspension. The Grievant must also mitigate his damages.

The grievance is granted in part and denied in part.

Dated this 31st day of August, 2008.

CHARLES E. DONEGAN
ARBITRATOR
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