VOLUNTARY LABOR ARBITRATION
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of:

FEDERAL BUREAU OF PRISONS
FEDERAL TRANSFER CENTER
OKLAHOMA CITY,
Employer,

-and-

COUNCIL OF PRISON LOCALS,
AFGE, LOCAL 171,
Union.
_____/

Arbitrator: **Doyle O'Connor**
FMCS #200123-03290
Grievant: Bryan Houck
Issue: Termination

Appearances:

EMPLOYER:
Kimberly Knipe

UNION:
John-Ed L. Bishop & Joshua L. Davis

Witnesses:
John B. Fox, Warden
Carl Bailey, Human Resource Manager
Louis Thomas, Special Investigative Agent
Shawn O'Brien, Senior Officer Specialist
Bryan Houck, Grievant, Senior Officer
Josh Lepird, Correctional Counselor & Pres. Local 171
_____/

DECISION AND AWARD

I. SUBMISSION

This matter came before the arbitrator pursuant to the terms of the collective bargaining agreement between the parties and upon the inability of the parties to voluntarily resolve the dispute. The question before me is whether the Employer has violated the contract by terminating the employment of Senior Officer Bryan Houck. The parties agreed that the matter was properly before the Arbitrator for resolution on the merits and that there were no timeliness or other procedural impediments. The hearing in this matter was held as scheduled on October 21 & 22, 2020, via videoconference, owing to the pandemic. The parties each had ample opportunity to present evidence through witnesses and through documents. Both parties filed timely post-hearing briefs at which time the record was closed. There was no assertion in the closing briefs that there had been any defect in the proceedings. The evidence introduced, any legal or arbitral authorities relied upon, and the arguments of advocates have all been fully considered in the issuance of this Decision and Award regardless of whether or not specifically mentioned.

II. ISSUE SUBMITTED

The sole issue before the Arbitrator, as submitted by the parties, is:

> **Was the action** [*of terminating Houck's employment*] **taken for just and sufficient cause, or if not, what shall the remedy be?**

III. SUMMARY OF FACTS AND DISPUTES

This case is somewhat unusual in having from nearly the outset a frank admission of wrongdoing and culpability on the part of the Grievant.

Senior Officer Bryan Houck was employed at FTC Oklahoma City and had over 22 years of exemplary service as a correctional officer. He was routinely rated as exceeding expectations, had no prior record of discipline, and had of course been promoted up through the ranks.

On January 9, 2019, Houck was approached by his superior Lt. James Draves, who advised Houck that Houck was next up on the 'mandatory overtime' list and that a man was needed to work a double shift. The BOP has a common and well-understood system of assigning overtime based on a seniority system with a regularly posted roster that advises employees on their status in the event mandatory overtime might be needed. When overtime work arises, the Employer may first seek volunteers, but then in the absence of volunteers, goes down the established list to compel an appropriate employee to work the overtime. Particularly during the period in question, mandated overtime was a common, and unwelcome, event.

Houck advised Lt. Draves that Houck could not work the overtime, as he had a long-standing medical restriction. Lt. Draves told Houck that he, Draves, did not have any such medical documentation and Houck responded that he could not work and would take the issue up later with the Captain. See, Lt. Draves Memo of 1/9/19. Lt. Draves moved on down the list until he secured an employee to work the overtime.

The exchange was, as the evidence at hearing established, far from out of the ordinary. Houck had for some four years prior to that event declined to work mandatory overtime, based on a medical restriction limiting Houck to an 8-hour day. That 8-hour restriction had been routinely and repeatedly honored by the multiple command officers who variously supervised Houck. Indeed, that evening Lt. Draves went through multiple employees prior to approaching Houck, with several declining to work the overtime based on medical restrictions or otherwise. It is undisclosed by record evidence why after four years Houck's prior medical restrictions were no longer honored on that one shift and without prior notice.

Houck then greatly compounded his problems. In what Houck attributes to a panic reaction, Houck manufactured not just one but later two new unsigned medical excuse letters, dated January 9, 2019 and February 27, 2019, that he presented to the Employer in the hope of not

being again mandated to work overtime. In the ensuing investigation, the Employer quickly determined that the two letters were forgeries. Houck doubled-down, at least initially, and during the investigation signed affidavits asserting that the letters were legitimate and had been emailed to Houck by his doctor's office.

The investigation resulted in a Proposal Letter of October 30, 2019, in which formal charges against Houck were delineated: **Charge 1: Failure to Follow Supervisor's Instructions**; and **Charge 2: Providing Inaccurate Information.** Charge 1 relied entirely on Houck's failure to work the overtime. Charge 2 expressly relied solely on the submission of the medical documentation, with the specific finding that Standards of Conduct 3420.11 prohibits any "*falsification, misstatement,* [or] *exaggeration of a material fact in connection with any record".* The Standard Schedule of Disciplinary Offenses and Penalties provides ranges of penalties for each offense, with **Offense #5 Failure to Carryout Instructions of Superiors** warranting "*Official reprimand to removal*" and with **Offense #34 Falsification of Record** warranting a penalty of "*30-day suspension to removal*" for a first offense and "*45-day suspension or removal"* for a second offense, with a 3rd offense warranting immediate removal.

Houck provided a written response, of November 1, 2019, Jt Ex 4, to the Proposal Letter in which he unequivocally apologized for the trouble he had caused, and acknowledged the '*terrible judgment'* he had exercised. Houck offered background information, not to excuse his conduct, but to offer what he believed '*contributed'* to his exercise of bad judgment. He noted his diagnosis with type-two diabetes, which had in part led to gastroparesis, which caused his intestines to periodical fail to function properly, leaving him in considerable pain and discomfort. He noted his lower back degenerative disk disease.

Houck also raised, then and at hearing, several issues with family illnesses and his resulting burdens as caregiver. Houck's father was then dying of the late stages of sarcoidosis, for whom Houck served as a daily

caregiver to allow respite time for his mother. Houck's wife had battled chronic lupus and suffered a series of strokes leading to a major stroke during the investigative phase of this dispute. Houck himself had survived colon cancer, with resulting surgery to remove a portion of his colon. Houck also suffered a temporarily debilitating knee injury, on the job, which also required surgical intervention.

To his credit, Houck did not assert in his written response that any of the health related burdens, whether his own or that of family members, excused his conduct. As he put it, his "*world was collapsing"* and in the midst of it he made a *"terrible decision".* Houck expressly acknowledged in his response that he did "*deserve punishment",* but he pled not to be fired.

On November 6, 2019, the Union filed its own written response to the Proposal Letter, Jt Ex 5. The Union similarly did not seek to minimize or deny Houck's culpability for submitting the faked doctor's notes. The Union succinctly analyzed the application of the several relevant *Douglas* Factors, forthrightly acknowledging that the mitigating facts that had been identified were "*not an excuse for his behavior"* but should "*provide important extenuating factors"* regarding the appropriate level of discipline. The Union argued for progressive discipline, less than discharge, as indicated by the Standard Schedule of Penalties, asserting that, "*there are alternative effective sanctions that will deter others from this behavior, but lack the finality of termination*".

On December 19, 2019, Warden John B. Fox issued his Decision Letter, Jt Ex 8, rejecting the arguments by Houck and his Union, and finding that the appropriate penalty was termination of employment, effective December 20, 2019. The Warden understandably and appropriately found Houck's submission of faked doctor's slips to constitute '*providing inaccurate informatio*n' and to have been a serious violation. Warden Fox did his own analysis of the *Douglas* Factors, many of which were not in dispute, and several of which clearly impacted heavily on his decision-making process. Several of Warden Fox's findings warrant close review.

In the termination letter, Warden Fox relied expressly, and heavily, on the fact that Houck gave untruthful affidavits during the original investigation. Fox expressly found that Houck's giving of a false affidavit is what '*irreparably damaged his ability to work effectively'* and that this portion of the charge '*could subject* [his] *testimony to impeachment'* and thereby '*seriously compromise the Agency's'* ability to enforce the law. The Union challenges any reliance of the affidavit issues as the assertions related to the affidavits were not a part of the Proposal Letter and the Union argues that to rely thus on a new charge after the investigation and the responses to the Proposal Letter was a due process violation.

With the termination letter, Warden Fox also provided his separate analysis, Jt Ex 7, dated November 29, 2019, of the twelve *Douglas* factors for reviewing the appropriateness of discipline. See, *Douglas v Veterans Administration*, 5 MSPB 208 (1981). As otherwise noted herein, many of those 'factors', and the underlying factual premises, were not disputed in this case and will therefore not be extensively discussed. Some do warrant examination.

Warden Fox found, regarding the 2nd Charge: Providing Inaccurate Information:

1. **Nature and Seriousness of Offense**

The entirety of the Warden's findings on this Factor were limited to making the factual finding, by then uncontested, that Houck had provided inaccurate information when he submitted the faked doctors' slips. The Warden engaged in no apparent analysis or comparison of how this particular wrongful act compared in 'severity' with other acts of falsification that could arise contrary to that rule.[1]

Warden Fox found:

6. **Consistency with Penalties for Others**

[1] The prohibition in the Rules is on *'falsification'* as to a '*material fact'*. Here, Houck falsified the medical

> . . . I believe removal would not be inconsistent with the penalties applied to others for similar misconduct. I am aware of the range of sanctions for similar charges have ranged from no action to removal . . . although I have decided cases in the past for similar charges, I consider each case . . . based on the facts and circumstances unique to that case.

A difficulty with reviewing Fox's findings as to Factor 6 is that he cites to no particular factual basis for how these charges warranted removal when others ranged from '*no action to removal'*. His assertion that he decides each case based '*on the facts and circumstances unique to that case'* is rendered essentially unreviewable by an absence of any discussion in his findings of what facts made this case unique. Further, at hearing, Warden Fox was questioned regarding several other cases he decided involving falsification of records, where the penalties imposed were seemingly 5 to 7 days suspensions, and the Warden's only response was that he did not remember the particulars of those cases.

Warden Fox next found:

> **7. Consistency with the Table of Penalties**
>
> The range of sanctions available for a first offense *[of falsification of records*] is a 30-day suspension to removal. Accordingly, removal would be consistent with the range of penalties . . .

Warden Fox's written analysis offered no insight into how he determined that removal, rather than a 30-day suspension, or some other intermediate penalty, was appropriate.

Warden Fox next found:

> **10. Potential for Rehabilitation**
>
> . . . you admitted the unsigned medical notes was not actually furnished by Dr. K's office . . .you apologized for your mistake and asked that I consider a penalty of less than removal . . . You also appeared to be remorseful . . . Based on the totality of the facts and circumstances of this case I do not believe there is potential for rehabilitation.

Again, Warden Fox's written analysis of this Factor offered no factual insight into the Warden's determination that there was no 'potential for rehabilitation'.

Warden Fox next found:

> **11. Mitigating Circumstances**
>
> . . . you admitted to your actions . . . you apologized for your mistake . . .you appeared to be remorseful. You indicated you have been affected by serious health conditions affecting you, your father, and your wife . . .you have sought counseling through the EAP. You have 22 years and 2 months of service and no prior discipline . . .You have demonstrated exceeds performance on your most recent yearly evolution.

Warden Fox's written analysis of *Douglas* Factor #11 simply stops after reciting the mitigating factors, without any analysis or explanation whatsoever of how they did or should impact his discipline decision.

Warden Fox next found:

> **12. Adequacy/Effectiveness of Alternative Sanctions**
>
> I have considered whether alternative sanctions such [as] formal counseling or additional training would have the desired corrective effect and promote the efficiency of the service. However I do not believe that is appropriate in this case.

Warden Fox's written analysis of *Douglas* Factor #12 simply stops after reciting two alternative possibilities (neither of which were included in the Standard Schedule of Penalties), without offering any insight into his analysis. Of particular note, his consideration of alternatives to removal did not include the penalty expressly suggested for a 'falsification of records' violation of a 30-day disciplinary suspension.

Consistent with Warden Fox's letter of December 19, 2019, Houck was terminated from employment after 22 years of service, and nearly a year after his dodging of overtime on January 9 and his falsification of a related medical excuse.

At the hearing in this matter, Houck testified seemingly honestly and, consistent with his earlier representations to the employer, Houck did not seek to excuse his actions based on the many stressors in his life, and rather offered those difficulties in an effort to illuminate what even he seemed to perceive as an inexplicable loss of judgment on his part. Notably, by the time of the hearing, Houck was able to locate a copy of the original and legitimate medical excuse from 2014, Un Ex 2, on which the Employer had relied for four years in routinely excusing him from mandated overtime.[2] The letter expressly released Houck from working over 8 hours per shift. Had either the Employer or Houck timely located that excuse letter, the controversy would not have arisen.

The Union introduced testimony establishing that *'falsification of records'* is not an uncommon charge in the BOP and at the Oklahoma FTC. Employees have throughout the system been found to have falsified records of when, or if, they made assigned rounds to check on prisoners. The Union asserted, through seemingly competent testimony, that following the notorious death-in-custody of Jeffrey Epstein, where officers were found to have falsified records regarding completion of mandatory rounds to check on prisoners on 'suicide watch', the BOP nationally tightened up on enforcement of accuracy in rounds records. The death, and resulting crackdown, occurred after Houck's offense, but before the completion of the investigation and the selection and imposition of penalty.

The Union provided ultimately uncontested testimony that several employees were charged with 'falsification of records' for incidents occurring after Houck's offense and had 5 to 7 day suspensions imposed.

For at least several years prior to the events in question, Houck had been routinely assigned to work the call center or the front gate, essentially protected work assignments that had no inmate contact, with the assignment premised on Houck's earlier work-related injury from a fall

[2] During the hearing, the treating Doctor's office faxed confirmation of the authenticity of the 2014 exemption from work over 8-hours in a shift.

during a training exercise. The January 9 overtime assignment would have involved Houck in assignment to an inmate-contact area.

The Employer has the burden of establishing both that charged misconduct occurred and that the level of discipline imposed was for '*just and sufficient cause'*.

IV. RELEVANT CONTRACT LANGUAGE

This case is a dispute over the proper interpretation and application of the language of the 2014-2017 Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals-AFGE (Joint Ex 1) to the present facts. The primary relevant Contract articles include:

> **Article 30-Disciplinary and Adverse Actions**
>
> **Section a.** The provisions of this article apply to disciplinary and adverse actions which will be taken for just and sufficient cause and to promote the efficiency of the service, and nexus will apply;
>
> **Section c.** The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

While not a contractual mandate as such, both parties appropriately rely on the Merits Systems Protection Board's (MSPB) enunciated standards for imposition of discipline, as set forth in *Douglas v. Veterans Admin*, 5 MSPR 280 (1981). Understandably, not all factors are relevant in every case. The twelve (12) factors are:

> (1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> (3) The employee's past disciplinary record;

(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
(6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) Consistency of the penalty with any applicable agency table of penalties;
(8) The notoriety of the offense or its impact upon the reputation of the agency;
(9) The clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
(10) Potential for the employee's rehabilitation;
(11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

V. DISCUSSION AND OPINION

A. Role of the Arbitrator in Deciding a Case

As the advocates are of course aware, although individuals whose interests are affected by such decisions often are not aware, an Arbitrator is a mere creature of the Contract and is bound to apply its terms as drafted. As famously noted by Justice Douglas, an arbitrator "*does not sit to dispense his own brand of industrial justice*", or typically to assess the wisdom of actions that were taken, rather the faithful arbitrator applies the rules created by the Contract between the parties. See, *Steelworkers* v *Enterprise Wheel*, 363 US 593 (1960). The task in issuing a Decision is to examine the facts and determine if the disputed action was proper under the applicable contractual language.

Consistent with the above, the parties should understand that nothing in this Decision and Award is intended to substitute for the Employer's legitimate right and need to lawfully direct and evaluate the conduct of its

employees, and address infractions, where done in accordance with the Contract, and applicable statutes, regulations, and caselaw.

B. Merits of the Dispute

This case presents in a somewhat unusual stance. Most of the core facts are undisputed by the Grievant and the Union. There are no disputes as to the appropriateness of the rules relied on in this matter, the *Standards of Employee Conduct*, and there is no claimed lack clarity or lack of notice of the applicable rules. There is no claim that the Grievant did not violate the rules, at least as to the "*providing inaccurate information"* charge, and therefore there is no claim that the Grievant is not culpable. Grievant admits, as he has for a protracted period, that he fabricated two doctor's slips and submitted them to his Employer. There was no substantive defect in the investigation. Grievant and the Union concede that there was 'just and sufficient cause' for some level of disciplinary action by the Employer. The undisputed issues will not be addressed at length in this Decision, although well-argued by the parties, precisely as those issues are not in dispute. Ultimately, and in particular as to the more serious of the two charges, the issue is whether, as argued by the Employer, the BOP exercised management discretion "*within tolerable limits of reasonableness*", as defined by the caselaw, or had *"just and sufficient cause"* as mandated by the CBA and as routinely analyzed by Arbitrators in reaching the decision that termination was the appropriate level of discipline. Within the Federal system, the Merit System Protection Board (MSPB) decision in *Douglas v Veterans Administration*, 5 MSPB 208 (1981), provides an often relied upon rubric or set of a dozen factors (referred to as the '*Douglas* Factors', set forth above) that are routinely relied on by Employer decision-makers in determining whether discipline is warranted and by Arbitrators in reviewing

the particular decision-making process. As is to be expected not all twelve factors are relevant to any particular case.[3]

The two charged offenses will be addressed separately, below.

1. The Charge of Failure to Follow Supervisor's Instructions

The evidence adduced at hearing does not establish that any 'direct order' was ever given or that Houck refused to follow such an order.

The Employer relies on the June 9, 2019 hearsay, and *pro forma*, affidavit of Lt. Draves, which asserts that a direct order was given, that Houck refused to stay, and that Houck made no effort to arrange for someone else to work the overtime. That affidavit of Draves is materially contradicted by Draves' own contemporaneous memo of January 9, 2019, the day of the incident, in which Draves does not assert that a direct order was given, nor that it was disobeyed. Likewise, Draves' contemporaneous version of events does not assert that Houck 'made no effort' to find a replacement. Other evidence, including the supervisors overtime log, establishes that, as would be routine, Draves simply went down the overtime roster to the next potentially eligible individual, within moments of Houck reminding Draves that Houck was on a 'no overtime' medical restriction. That log also establishes that several other officers are listed as having 'refused' the offered overtime, before the offer was even made to Houck. There is no suggestion that any adverse action was taken against the other 'refusing' officers. Draves was not called to give testimony and the best evidence in the record of Draves recollection of events is his contemporaneous report of January 9, 2019.

[3] The Employer, in addition to reliance on the *Douglas* Factors, also frames the issues in the alternative as compliance with the comparable factors posited by Arbitrator Carroll Daugherty for determining whether there was 'just cause' for discipline. *See Enterprise Wire Cos.*, 46 LA 359 (1966). For purposes of this Decision, those methods of analysis are treated as essentially different rubrics for applying the same test and only the *Douglas* Factors will be expressly discussed.

The proofs offer no explanation of why the Employer, after honoring Houck's 'no overtime' medical restrictions from 2014 forward, suddenly decided, without notice, on the evening of January 9, 2019, to ignore that restriction and treat Houck's effort to decline offered overtime, based on an existing medical restriction, as insubordinate. The Department's testimony underscored that there was, and had for some extended time been, a chronic problem with getting sufficient employees willing to work mandated double-shift overtime.[4] Nonetheless for over four years the Employer, through multiple supervising Lieutenants, had not just routinely but invariably excused Houck from mandated overtime, based on his medical restrictions, which arose from a workplace injury requiring multiple surgeries. The Employer's oblique assertion that no one in management could *'recall'* having seen or received the December 2014 medical restriction note, while nonetheless consistently honoring it for over four years, strains credulity.

The evidence establishes that on January 9, 2019, Lt. Draves told Houck he was 'next up' on the mandatory overtime roster. Houck responded, as he routinely had for years, that he had a medical restriction precluding his working more than an 8-hour shift. The evidence shows that Lt. Draves then, undoubtedly grudgingly, moved on down the overtime roster to the next man up. There is no competent evidence that Draves ever gave Houck a direct order that, notwithstanding his medical restrictions, Houck must work the overtime. There is substantial evidence, in Lt. Draves' own contemporaneous memo about the events, that no such order was given.

Had such an order been given, for example if Lt. Draves had hypothetically said "*I am sorry but I have no one else to assign and you must*

[4] It was abundantly clear that management at the FTC was concerned over, and resented, the fact that some employees had medical restrictions precluding mandatory overtime, which was understandably perceived as complicating the task of scheduling sufficient staff. HR Manager Carl Bailey's testimony was particularly troubling in asserting that, owing to the difficulties in securing sufficient employees to work overtime, he questioned why *any* employee with work restrictions would be allowed to continue employment with BOP, seemingly contrary to the BOP's recognized contractual and statutory obligation to '*reasonably accommodate*' such restrictions.

work the OT" or had said, "*I do not see any doctor's slip in our records, so I am ordering you to work the OT*", Houck may well have faced the Hobson's choice of obeying the order, contrary to his doctor's advice, or relying on his Doctor's imposed medical restrictions. Houck did not have to make that risky choice as no such order was given on January 9, 2019. There is no competent evidence that Houck refused to "**Follow his Supervisors' Instructions"** on January 9, 2019, and that charge is therefore not proven.

2. The Charge of Providing Inaccurate Information

The evidence adduced at hearing does establish that Houck was culpable for conduct that constituted *'providing inaccurate information'*, where he submitted faked doctors' slips to his Employer in support of his effort to avoid mandated overtime.[5]

The advocates' arguments over whether the standard of proofs met by the Employer must precisely match those needed to support a charge of 'f*alsification*' rather than the less-clear standard for the generic *'providing inaccurate information'* ultimately is not determinative. The BOP Proposal Letter; the Warden in his *Douglas* Factors memo of 11/29/ 2019; and the Warden's Decision Letter of 12/19/2019, all use the phrases interchangeably. The nature of the offense was sufficient framed and proved, and regardless, culpability has been acknowledged throughout. Houck faked doctors' slips and submitted them to the Employer.

The question before the Arbitrator on this charge likewise is not whether there was culpability nor whether some penalty should have been imposed. Both issues have been conceded by Grievant and his Union from the outset. The dispute is over whether the Employer violated Contract Article 30 (a) and 30(c) by imposing the penalty of termination, rather than a lesser sanction.

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[5] As noted above, it is not clear that Houck's admitted '*falsification*' involved a '*material fact'* as required by the Rule, where his falsification was ultimately only of the identity of which doctor had found him unable to work.

The notoriety of the Epstein incident seemingly, and not surprisingly, caused the BOP nationally to tighten up on falsification of rounds records, by increasing the severity of penalties imposed in recognition of the sometimes-critical nature, and public scrutiny, of the accuracy of those records. Generally where an employer has a range of discretion, as here, in selecting from possible levels of discipline, it is not inappropriate of an employer to increase the presumptive level of discipline based on an increased recognition of the harms that might flow from particular offenses. It is however problematic to apply those tightened standards on a retroactive basis, as seemingly happened here, where the offense was pre-Epstein but the penalty determination was post-Epstein.

The Standard Schedule of Disciplinary Offenses and Penalties provides ranges of penalties for each offense with **Offense #34 Falsification of Record** warranting a penalty of "*30-day suspension to removal*" for a first offense, and "*45-day suspension or removal"* for a second offense, with a 3rd offense warranting immediate removal. These ranges are intended to be relied upon nationally to provide some, at least rough, comparability in the imposition of discipline for similar offenses. Warden Fox imposed the most severe penalty listed as available for that offense. While Fox recited the *Douglas* Factors in his memo, the real question is whether those Factors were given any more than a perfunctory nod.

Much of Warden Fox's deliberation, both explicit and implicit, was focused on his perception of the severity of the offense. To be sure, falsification of documents, or providing inaccurate information, by a Federal law enforcement official is inherently a serious offense. However, as the Standard penalties expressly reflect, not all such offenses warrant a similar penalty. As with most offenses, there is *bad*, and there is almost always *worse*. Fox's conclusion that the entire category of *'falsification'* required termination as the default penalty was an objective failure to factually apply the *Douglas* factors. Indeed, it was a frank rejection of the legitimacy of the Standard Schedule of Penalties. Houck's fabrication was as to a largely

irrelevant fact--the identity of the doctor who wrote him a medical release slip. Houck had a valid medical slip excusing him from overtime. Although the Employer honored that excuse for over four years, on the critical night, and thereafter, it claimed to not have a copy of the slip. Houck's manufacturing of a faked replacement slip was obviously wrongful, but ultimately of little substance.

There are many other forms of fabrication that would be much more egregious. Grievant's dishonesty for example did not involve covering up a crime or some form of collusion with a prisoner or the importation of contraband--any of which could compromise an officer's ability to function in a prison environment and all of which are of far greater inherent severity. Additionally, Houck did not engage in falsification for the purpose of 'personal gain', one of the *Douglas* standards, nor was it a repeat offense. Houck had not even engaged in the more common 'Epstein' offense of faking records of having made rounds, and offense that could cause the BOP to be held in disrepute or even incur claims for civil liability. Notwithstanding the above, Warden Fox clearly found that *any* such 'falsification' warranted termination, despite the Standard Penalties proving ranges of penalties for 1st, 2nd and 3rd offenses. The Warden's failure to properly consider the *Douglas* factor as to '*severity'* constitutes a failure to find '*just and sufficient cause*' for termination, and is therefore a violation of Contract Article 30(a).

Similarly, and because of his categorical finding that 'falsification' always required termination, it is clear from the documents, as well as from Warden Fox's testimony at hearing, that he never in fact considered any penalty other than termination. In his formal analysis of *Douglas* Factor #12, Fox asserted that:

> I have considered whether alternative sanctions such [as] formal counseling or additional training would have the desired corrective effect and promote the efficiency of the service.

The assertion is curious as neither of the supposed 'alternative sanctions' are among those countenanced by the national Standard Penalties. Fox's

categorical decision that 'falsification' warranted discharge left him blind to the actual alternative offered by the national Standards of a 30-day suspension. This error led Fox to fail to even consider available and recommended corrective discipline less than termination, and as such, constituted an abuse of his discretion and thereby a violation of Contract Article 30(c), in which the parties commit to seeking to use "*discipline designed primarily to correct and improve employee behavior*".

Warden Fox also relied on his finding as to the perceived severity of the offense to obviate any real analysis by Fox of the *Douglas* Factor #11 regarding mitigation. Fox leap-frogged over the obligatory consideration of mitigating factors by his reliance on the severity finding, despite the fact that the national Standard Penalties obviously recognize that a range of appropriate penalties exists, even for repeat offenders. Fox recited, and had seemingly sincere concern, regarding the myriad mitigating factors present in this case, but could not bring himself to seriously consider their applicability. Houck indisputably had multiple serious health problems of his own, including suffering through colon cancer, which he and the Warden had in common and had commiserated regarding. Houck had a dying father for whom he was a daily caregiver. Houck's wife was suffering from lupus, an inexorably degenerative autoimmune disease, which had led to her having a series of strokes. His life was an unenviable parade of illness and resulting hardship. In that context, his Employer suddenly and inexplicably stopped honoring, and denied knowledge of, a medical release slip that had kept Houck out of forced overtime for four years. Such mitigating factors were raised not to excuse his behavior, but to be taken into account when weighing the nature of corrective action warranted by his misconduct. Those factors were given no weight or consideration by the Warden. The Warden's failure to properly consider the *Douglas* factor as to '*mitigation'* constitutes a failure to find '*just and sufficient cause*' for termination, and is therefore a violation of Contract Article 30(a). The Warden's failure to properly consider the *Douglas* factor as to '*mitigation'* similarly constitutes an abuse of

discretion and thereby a violation of Contract Article 30(c), in which the parties commit to seeking to use "*discipline designed primarily to correct and improve employee behavior*".

Warden Fox again relied on his categorical finding that *'falsification'* warranted termination to side-step any substantive consideration of the *Douglas* Factor #10 on the prospects for rehabilitation. Warden Fox's written analysis of this Factor offered no factual insight whatsoever into the Warden's determination that there was no 'potential for rehabilitation'.

Houck's long and unblemished record alone argued that he was a good prospect for rehabilitative efforts. The fact that he sought out counseling through EAP and his church, prior to any imposition of discipline, was a supportive sign. The fact that Houck, not immediately but early on, admitted his fabrication, his culpability, and the appropriateness of his being penalized and expressed seemingly real remorse and chagrin with himself for his misconduct also supports a rehabilitative effort. The very fact that the Warden articulated his belief that Houck's remorse was real should have supported a conclusion that rehabilitation was a worthy effort. The fact that Houck's fabrication was not for gain and did not involve some scheme to defraud or involve misconduct with a prisoner all should have been factors supporting a rehabilitation effort. Fox inappropriately ignored all of these readily available facts, and offered no factual basis for his failure to consider rehabilitation options. It is apparent that Fox, in his understandable anger and disappointment with Houck over Houck's wrongdoing, forgot the essential fact that it is *only wrongdoers* who ever need rehabilitation. Fox's failure to give any substantive consideration to rehabilitation, and his failure to articulate any reasons for that failure, were an abuse of discretion and constitute a violation of Article 30(a) which requires that there be *'just and sufficient'* cause for the penalty imposed.

Warden Fox similarly abused his discretion regarding the mandated review of *Douglas* Factors 6 and 7 relating, respectively, to consistency with penalties imposed on others comparably situated and consistency with the

agency's established range of penalties, as well as with *Douglas* Factor 12 which examines the efficacy of alternatively penalties. Fox's review of these three factors was his most perfunctory, and again, seemed tainted by his categorical conclusion that a 'falsification' charge can in essence only be addressed by termination.

As to Factor 6, Fox explicitly recognized in his Decision Letter that the range of penalties that he personally had imposed for similar offenses was from *'no action to removal'*. Without any fact-based explanation, he chose in this instance termination. When confronted on cross-examination with the fact that he had contemporaneously imposed both 5 and 7 day suspensions on other employees at the same facility found guilty of 'falsification', Fox could only offer that he didn't "*remember"* the specifics of those cases. The record closed without any evidence introduced by the Employer to address that otherwise unexplained facial disparity in penalties at this facility.

As to Factor 7, Fox offered less than a perfunctory nod to the obligation to substantiate his decision. The Standard Range of Penalties provides that the offense of 'falsification', 1st offense, warrants a penalty of 30-day suspension up to removal. Fox noted that since he was imposing removal, it was within range.

Perhaps most perplexing is Fox's handling of *Douglas* Factor #12, which requires an analysis of whether alternative sanctions could be effective. Fox inexplicable asserted that he considered the alternative sanctions of "*formal counseling or additional training".* Neither of those sanctions is within the range anticipated by the Standard Schedule for a falsification offense. Both 'alternatives' appear facially inadequate for such an offense, with the suggestion of '*additional training'* particularly inapposite. It was left unexplained why the Warden did not consider a 30-day suspension as expressly authorized by the Standard Schedule, rather than two clearly inappropriate slap-on-the-wrist options.

The Employer, and its local management, are routinely and appropriately granted significant discretion, and deference is given to that

exercise of discretion, in fashioning remedies and penalties for the inevitable transgressions that occur in every workplace. Such deference is premised on the actual fact-based exercise of discretion. Here, the decision-making process was flawed, as discretion was not in fact applied, and the mandatory *Douglas* Factors (the closely related Factors 6, 7 & 12) regarding determining the appropriate level of discipline to be imposed where wrongdoing is found, were all ignored. A pre-ordained level of discipline was imposed which bore little if any relationship to penalties imposed on other employees, to penalties expressly authorized by the national Standard Schedule, and without actual consideration of the efficacy of readily available alternative penalties. These failings constitute an abuse of discretion and are cumulatively a violation of the mandate of Article 30(a) that the level of discipline imposed be supported by 'just and sufficient' cause.

The evidence, as noted, establishes Houck's wrongdoing and culpability and the appropriateness of imposing a corrective level of discipline. However, the record evidence also supports the conclusion that the Employer violated Contract Article 30(a) and 30(c), where there was no *'just and sufficient'* cause for termination, rather than a lesser corrective penalty; where the Employer deviated from compliance with the Contract and the *Douglas* Factors by failing to substantively consider mitigating factors and the prospect for rehabilitation of this long term employee; and where the penalty imposed deviated without substantive basis from the penalties impose in the same facility for comparable offenses. A disciplinary suspension of 30-days was, and is, the appropriate level of corrective discipline consistent with the Standard Schedule of Penalties for a 1st offense.

3. Due Process Claim regarding the Charge of Providing Inaccurate Information

The Union asserts that the termination of Houck was fundamentally tainted by a due process violation, in that conduct that was not expressly

raised in the Proposal Letter played a substantive part in the Warden's decision to terminate Houck. The Employer has an affirmative due process, and Contractual, obligation to properly put the employee, and his Union, on notice, through a Proposal Letter, of the conduct at issue and the charges being levied. A failure of that obligation can, in itself, warrant reversal of a disciplinary decision. See, *Seeler v. Dept. of Interior*, 118 MSPR 192, 2012 MSPB 36; *Lopes v Navy,* 2011 MSPB 63.

The Proposal Letter was express and narrow in relying on an assertion that:

> Your actions in submitting unsigned and unverified medical documentation in order to avoid mandatory overtime form the basis for this charge.

It is clear, beyond dispute, that the Warden's Decision Letter relied repeatedly, extensively, and substantively on uncharged conduct. The Warden referenced and clearly relied on a finding that in addition to submitting the admittedly-faked medical slips, Houck had later signed untruthful sworn affidavits, which sought to confirm the authenticity of the bogus medical slips. The Warden was understandably upset by having a Federal law enforcement officer mislead in an affidavit. The Warden made express his finding that a substantial reason for terminating Houck was that the finding of dishonesty in an affidavit damaged Houck's standing with his supervisors and damaged his utility as a law enforcement officer where the finding might be relied upon to challenge the credibility of future testimony in a contested matter with an inmate.

The parties' Contract, Article 30(e) mandates that a proposal letter must "*inform the employee of both the charges and the specifications"* he is facing. The Proposal Letter did not expressly put Grievant on notice that the Employer was relying on a claim that Houck had submitted a false affidavit. Rather, the Proposal Letter obliquely referred to the affidavits but did not assert that the contents, or truthfulness, of the affidavits were a basis for a charge. While the Proposal Letter was not a model of clarity, it is not

necessarily the case that it must be flawless in order to give minimally adequate notice. Given the findings above, it is not necessary to substantively decide the issues related to the Union's substantial argument that the Proposal Letter was so deficient in putting Houck, and his Union, on notice of the charges that it constituted a due process, or Article 30(e), violation, although such defect could have, standing alone, potentially warranted the reversal of this disciplinary action. See, *Seeler*.

VI. CONCLUSION

As found above, the charge of failing to following a supervisor's instructions was not factually established. Instead, the evidence taken as a whole establishes that Houck sought to avoid an overtime assignment that he perceived as improper. His belief was reasonable, where the Employer had for a little over four years routinely and regularly honored a medical restriction that precluded Houck working more than eight hours in a day. When asked to work the overtime, he objected, advising his supervisor of the medical restriction. The supervisor did not then order to him to work notwithstanding the medical restriction, and therefore, Houck did not and could not have disobeyed that non-existent order. As later determined, Houck was in fact correct and ultimately, at hearing, produced his copy of the medical slip that had been provided to the Employer back in 2014 and honored by the Employer until January 2019, at which point, for never explained reasons, the Employer ceased honoring the medical restriction and denied any knowledge of it. The grievance is sustained in its entirety as to the first charge.

As also found above, Houck was culpable on the charge of falsification or of '*providing inaccurate information*', as it was phrased in both the Proposal Letter and in the notice of termination. Houck faked two doctor's slips. He has long admitted that. His conduct was a violation of the Employer's express rules, indeed would have been chargeable conduct even in the absence of any specific rule.

What has not been established is that there existed *'just and sufficient'* cause to terminate this 22 year employee with an otherwise exemplary record over a first-offense for which the Standard Penalty is a 30-day suspension or removal. This failure is a violation of Contract Article 30(a) and its demand for *'just and sufficient cause'* for discipline. The evidence established that other employees in the same facility had been penalized with short-term suspensions of 5 to 7 days on similar charges. The Employer failed in its obligation to establish that the penalty imposed was at least 'comparable' to penalties imposed on other employees with similar violations, or that the penalty deviated upwards for some articulable reason. The manifest failure of the Employer to even substantively consider a lesser constructive or progressive penalty, especially where a 30-day suspension was indicated by the Standard Penalties, was a violation of the Contract Article 30(c) mutually stated preference for progressive discipline.

The Employer likewise has an affirmative obligation to substantively consider the *Douglas* Factors as part of its decision making process. As discussed above, the Employer gave no real substantive factual consideration of several of the Factors, in particular, those relating to mitigation and rehabilitation.

By terminating the employment of Houck in the absence of 'just and sufficient' cause, the Employer has violated the Collective Bargaining Agreement, Article 30(a); has violated the Contract Article 30(c) by failing to substantively consider progressive or constructive discipline less than termination; acted contrary to its obligations under the MSPB policies and the specific *Douglas* Factors promulgated by the MSPB, in particular regarding the failure to substantively consider mitigating factors and the prospect for rehabilitation; acted contrary to the BOP's Standard Schedule of Disciplinary Offenses and Penalties without an articulable basis for the deviation; and the termination was an unwarranted personnel action under the Back Pay Act, 5 USC § 5596 (b).

Based on the above analysis, and taking into account the mitigating factors, Grievant's prior long exemplary record, his objectively ascertainable prospect for rehabilitation, the discipline imposed on other employees who committed arguably comparable offenses, and in particular in reliance on the BOP's Standard Schedule of Disciplinary Offenses and Penalties a disciplinary suspension of 30 days was, and remains, the appropriate and sufficient penalty.

While the Employer acted inappropriately in terminating Grievant under all of the facts, and relevant contractual and regulatory obligations, it remains that Grievant bears substantial and primary culpability for the sequence of adverse events he set in motion. For that reason, and for the reason that to do otherwise would yield an unwarranted windfall and reduce the intended primarily curative effect on grievant (and potentially on his co-workers) of the discipline imposed, no back pay is awarded.

The Union has sought an award of attorney's fees under the Back Pay Act, 5 USC § 5596 (b). Although the Employer has in this instance erred, and the termination of Houck is being set aside, it cannot be said that the BOP acted in bad faith or that its arguments were clearly without merit or wholly unfounded. An award of fees in this matter would not serve the interests of justice.

VII. AWARD

Based on the findings and analysis above, the grievance is granted in part and denied in part.

Senior Officer Houck is to be immediately offered reinstatement to a position, shift, and duties comparable to those to which he was assigned in January 2019, and otherwise consistent with his classification and seniority, with a report date not later than 30 calendar days following the date of this Award. Houck is to be given reasonable time to give notice to any current employer and to report for duty.

Houck's status during the period following the termination of his employment, which is reversed by this Award, will be recorded for future disciplinary purposes as a 30-day unpaid disciplinary suspension, consistent with the penalty set forth in the Standard Schedule of Disciplinary Offenses and Penalties for a First Offense of falsification of records. The 'reckoning period' for possible future disciplinary reliance on this suspension will begin to run upon Houck's actual return to active service. No backpay is awarded for any portion of the period of absence from employment following the formal termination and up until 30 calendar days following the issuance of this Award ordering reinstatement, given the severity of the offense and Houck's culpability in the offense.

The Employer will treat Houck for all other purposes as if he had worked throughout, including by the restoration of all service and seniority credits for all purposes, excluding the 30-day unpaid disciplinary suspension. The Employer will similarly restore all leave banks, including for missed accruals, as to fail to order restoration of such leave banks would have Houck, with well established health issues, returning to work without available leave time. The Employer will pay for, or reimburse Houck for, any net medical expenses incurred in the interim following his termination, where those expenses would have been otherwise covered by Employer provided health insurance had Houck remained employed, including for the net payment by Houck of health insurance premiums pursuant to COBRA or otherwise. The Employer will confer with Houck and the Union regarding its calculation of benefits owed prior to tendering payment or amending records. Houck is to be offered reinstatement without delay and despite any possible dispute or uncertainty regarding the calculation of the benefit remedies awarded.

Following his return to employment, the Employer will restore to Houck the previously provided accommodations, which were in effect prior to the controversies of January 2019, and based on his legitimate medical restrictions, including his routine assignment to call center or front gate

duties, as well as continuing to accommodate the restrictions on his working over 8 hours per day. Nothing in this Award is intended to restrict, or expand, any authority the Employer would otherwise have to routinely seek an updating or confirmation, from Houck's treating medical providers, of those prior medical restrictions and of the extent of any ongoing need for such restrictions.

The Union's request for an award of attorney fees is denied.

Jurisdiction over this matter is retained for a period of one hundred and 20 (120) days from the date of the Award to allow either party an opportunity to seek clarification of, or resolve any dispute over the implementation of, the make whole portion of the relief ordered.

Doyle O'Connor, Arbitrator, NAA

Dated: January 15, 2021