
**IN THE MATTER OF ARBITRATION BETWEEN
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX, FORREST CITY, ARKANSAS
AND
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL UNION NO. 922 &
THE GRIEVANT GLEN BASHAW**

*****ARBITRATION AWARD***
FMCS#11-00286-3**

ARBITRATOR: Sidney S. Moreland, IV, FMCS
UNION ADVOCATE: Jeffrey Roberts and Roger Payne
AGENCY ADVOCATE: Michael A. Markiewicz and Rickey Galloway

Heard at the Federal Correctional Complex in Forrest City, Arkansas in the Training Center on Wednesday, November 7, 2012 @ 9:00 A.M. CST, before Sidney S. Moreland, IV, impartial Arbitrator, mutually selected by the parties under the authority of the Federal Mediation Conciliation Service.

ISSUE(S):

Union: Did the Agency violate statute, regulation, and/or the Master Agreement by their non-selection of the Grievant as GS-8 Correctional Officer, and if so, what is the appropriate remedy?

BACKGROUND:

The Federal Bureau of Prisons (“Agency”) operates a compound of correctional institutions in Forrest City, Arkansas for the United States Government referred to as the Federal Correctional Complex (“FCC”) Forrest City. The FCC employs approximately 600 correctional service employees serving in various positions.

The American Federation of Government Employees, Local Union Number 922 (“Union”) is recognized as the sole and exclusive representative/bargaining agent for all bargaining unit employees as defined in 5 U.S.C. Chapter 71, and under the provisions of the Civil Service Reform Act and the Federal Service Labor Management Relations Statute with respect to conditions of employment, pursuant to Article 1 of the Collective Bargaining Agreement, known formally as the Master Agreement (“Contract”).

The Contract (Joint Exhibit #1) was in effect at the time of the occurring incident(s) giving rise to this dispute. The Contract was entered into between the Agency and the Union on 02-06-98. The primary term of the Contract has expired, but the parties have extended it indefinitely, until a new contract is executed.

In September 2008, an inmate made a complaint against a correctional officer. The correctional officer purportedly intended to be the subject of the complaint was named Bradshaw, similar but differing from the Grievant Bashaw. However, the Agency mistakenly opened an investigation of the Grievant. The Grievant was unaware of the complaint and/or its’ disposition.

On 07-21-10, the Grievant was on vacation with his family pursuant to his allotted and Agency approved annual leave, when he received a telephone call from the Agency’s Lt. Sheldon who told him that he was the subject of an open investigation and that he needed to “come in” or report to the Agency in Forrest City and sign an affidavit to clear the matter up since the Grievant was up for a promotion. The Lieutenant further told him, “...people are trying to help you get promoted...” The Grievant and his family interrupted their vacation and returned to Forrest City, two hours away, where the Grievant learned the 18 month old allegations involved conduct by a different correctional officer (Bradshaw) allegedly acting in a post and at

an institution (FCI Low) where the Grievant had never before worked. The Grievant was directed to report to the Special Investigative Agent (SIA). SIA Thompson also told the Grievant that his promotion depended upon the investigation. The Grievant immediately informed the Agency (both Lt. Sheldon and SIA Thompson) that they were in error. Nevertheless, the Grievant complied fully with the Agency's requests and was first directed to sign the Agency's "Form B" entitled, "**WARNING AND ASSURANCE TO EMPLOYEE REQUIRED TO PROVIDE INFORMATION**", which is ordinarily used by the Agency to notify an employee that they are the subject of an investigation. The Form also states, "*You have a duty to reply to these questions and agency disciplinary action, including dismissal, may be undertaken if you refuse or fail to reply fully and truthfully...*" The Form B presented to the Grievant was pre-filled out with the Grievant's name on it. The Grievant cooperated fully with the Agency, including his signing of their Form B and an affidavit. The evidence also reflects that the Agency failed to properly compensate the Grievant for the time the Grievant spent on this date returning from vacation, reporting to the requesting Agency officials, and responding to the Agency's erroneous accusations, which did not occur during his normal shift hours; deprived the Grievant of his annual leave time; and constituted unpaid overtime. (Union Exhibit # 6) The Agency later restored two hours of annual leave to the Grievant, as a response to the filed grievance, but maintained they had not "ordered" the Grievant to appear and provide information.

On 08-09-10, both the Grievant Bashaw and officer Bradshaw were simultaneously considered by the Agency for a GS-08 promotion. The Agency did not select the Grievant Bashaw, who erroneously was still the subject of the open investigation, and should not have been. The Agency did select Bradshaw.

On or about 08-12-10, the Grievant spoke with the Warden about his non-selection and

the Warden told him that it was, in fact, due to the investigation or “open case” of the Grievant. The Warden cited no other reason. The Union President separately questioned the Warden at this time, concerning the Grievant’s non-selection and the Warden again stated that it was due to the Grievant’s investigation or “open case.” The Warden cited no other reason. The Union President then questioned the Grievant’s supervisor (Capt. Zielinski) concerning the Grievant’s non-selection and the Captain also stated that it was due to the Grievant’s open case. The Captain stated no other reason.

On 08-25-10, the Union filed a formal grievance (Joint Exhibit # 2) initiating the matter at hand, alleging a violation of the following:

“Master Agreement: Preamble, Articles 3 Governing Regulations, Article 5 Rights of the Employee, Article 18, 19, 23 5, PS 3420.09, US Backpay Act, FLSA”

The grievance further sought as remedy:

- “1. Officer Bashaw be immediately promoted GS 8 with backpay.**
- 2. Officer Bashaw be awarded his annual leave back.**
- 3. The Agency cease and desist from violating policy, the contract, 5 U.S.C.**
- 4. Any appropriate action deemed necessary by a third party.**
- 5. Any relief requested by the Union before a third party.**
- 6. All cost related to a third party hearing be paid in full by the Agency.**
- 7. All leave that was used be returned in full and for each day used a day of administrative be granted.**
- 8. Mr. Bashaw be awarded an SSP.**
- 9. The Agency pay for all expenses Mr. Bashaw incurred during the travel time to the Institution.**
- 10. Demotion for any management official involved in the incident.”**

The grievance states that it was filed with the Warden of the institution.

On 9-24-10, the Agency denied the grievance. The Warden stated therein, in pertinent

part, “...my investigation of the grievance revealed Mr. Bashaw was contacted in error and there were no allegations made against him. The Special Investigative Agent (SIA) had in fact requested Officer Bradshaw. The Special Housing Unit (SHU) Lieutenant, who contacted Officer Bashaw, thought the SIA was requesting Officer Bashaw so he called him to see if he could help clear up any issues prior to the GL-08 Officer selections. However, Mr. Bashaw was neither ordered to report to the institution, nor was he promised anything for his appearance. Even though Officer Bashaw was not ordered to report to the institution, because he did report after being erroneously informed the SIA needed to speak with him, he was credited two hours of annual leave.” (Joint Exhibit # 3)

On 10-06-10, the Union invoked arbitration of this matter. (Joint Exhibit # 4)

On 01-05-11, Sidney S. Moreland, IV was appointed by the Federal Mediation & Conciliation Service to arbitrate this matter.

All parties were effectively represented by capable and competent advocates, who stipulated that the issue(s) were proper for arbitration, and that Sidney S. Moreland, IV, is the mutually selected arbitrator empowered to make a binding and final resolution of this dispute.

The parties presented 5 joint exhibits and stipulated the issue recited herein. The parties further stipulated the authenticity of Joint Exhibit #5; that the Grievant had an unblemished work record containing all performance evaluation ranking(s) of “exceeds”; and, that the Grievant was a stellar employee who had received numerous job related awards.

The parties stipulated that 5 subpoenaed witnesses: Officer Williams, Officer Oguin, Officer Barrett, Officer May, and Officer Marrs, if called to testify, would testify that the Grievant has provided on the job training to each of them to help them with their application(s), and in their opinion as correctional officers, the Grievant should have been promoted GS-08

before them.¹

The Union presented 7 exhibits and the Agency 2, in the presentation of their respective cases.

The Union presented 3 sworn witnesses, who testified in the following order:

Jeffrey Roberts, Union President
Glen Bashaw, Grievant
Denese Heuett, Warden

The Agency presented 2 sworn witnesses, who testified in the following order:

Donald Zielenski, Captain over Grievant
Rickey Galloway, Human Resource Manager

All parties stated that they were satisfied with the state of the record, subject to their objections and the additional evidence or arguments presented in their respective post-hearing briefs.

The Grievant, who remained present and alert throughout the hearing, stated that he was personally satisfied with the state of the record and that his Union had thoroughly and adequately represented him in this matter.

The parties requested and were permitted to file post-hearing briefs, which were received on 1-11-13 (Agency) and 01-11-13 (Union), read, and given due consideration by the Arbitrator.

OPINION/FINDINGS, Arbitrator Moreland:

The contrast in positions of the parties is quite simple. The Union avers that the Agency erroneously launched an investigation of the Grievant, allowed that investigation to linger open

¹ Hearing Transcript, Page 124: “Arbitrator: Do the parties wish to enter into a stipulation at this time? If so, which advocate would like to state it and the other concur? Mr. Roberts: The parties stipulate that officers Williams, Oguin, Barrett, May, and Marrs would testify that Officer Bashaw (Grievant) has provided on-the-job training to help them with their application, and in their opinion as correctional officers should have been promoted to GS-08 before them. Mr. Markiewicz: The Agency concurs.”

for nearly two years, and used that open investigation of the Grievant as an improper factor for consideration during their selection of candidates for a GS-08 promotion, which resulted in the Grievant neither considered nor selected by the Agency. The Agency seeks to simplify the case by asserting that the Grievant was never under investigation, and irrespective of the reason(s), non-selection for a position is not a permissible basis for a grievance.

Prohibited Personnel Practices

5 U.S.C. 2302, states, in pertinent part:

“5 USC 2302 Prohibited Personnel Practices

- (a) (1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).**
- (2) For the purpose of this section-**
 - (A) “personnel action” means-**
 - (i) an appointment;**
 - (ii) a promotion;....**
 - (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;... with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;**
 - (B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action-...**
 - (C) “agency” means an Executive agency and the Government Printing Office, but does not include-.....**
- (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-...**
 - (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of-**
 - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or**
 - (B) an evaluation of the character, loyalty, or suitability of such individual;...**
 - (4) deceive or willfully obstruct any person with respect to such person’s right to compete for employment;...**
 - (6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition**

or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;...

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;....

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of-

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;...

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title..."

The facts deduced from the testimony and evidence reveal a host of legal errors by the Agency, which individually and/or collectively, constitute a prohibited personnel action by the Agency, as prohibited by 5 U.S.C. 2302, supra. More specifically, the Agency initiated an investigation of the Grievant following an inmate's allegation of misconduct that did not remotely involve the Grievant; occurred when the Grievant was not working; and allegedly occurred in an area of the prison and at a post where the Grievant had never worked. The Agency, irrespective of having no factual basis to proceed, then used those unchecked allegations to open an investigation of the Grievant. The Agency was informed of their error and chose not to close the investigation of the Grievant. The Agency then eliminated the applicant Grievant from promotion consideration because he was the subject of an open investigation, running counter to sections (b)(2) (4) and (6) of the prohibited personnel practice statute, supra.

Although the Agency denied investigating the Grievant, despite uncontradicted testimony to the contrary, they concur that the consideration of an employee being investigated as a factor

during the merit promotion process would be a prohibited personnel practice. 2

In concurrence with the testimonial evidence of the Agency officials who agreed the Agency conduct described would constitute a prohibited personnel practice, Union Exhibit # 4 is the Minutes of the Agency's Labor Management Relations 2011 Meeting, wherein recurring issues of importance are addressed for the purpose of nationwide conformity in the administration and defense of the Agency's duties. During this meeting, the Agency nationally answered the question relevant to the Agency's conduct in the matter at hand. The Minutes state, in pertinent part:

"6. Allegations

**When you have allegations made against you, what effect does that have on your career, if any?
Does the BOP have a reference check question for supervisors to fill out on bargaining unit staff who rate best qualified-has the staff member been disciplined in the last two (2) years?
Does this prevent an individual from being transferred?
Does this prevent staff from receiving awards and/or promotions?**

Resolution:

Policy does not allow selecting officials to exclude employees from consideration for promotion, reassignment, transfer, or awards based on pending allegations of misconduct..."

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The Agency's directive underscores the impropriety of considering pending allegations of misconduct and using that consideration to exclude the best qualified applicant Grievant from

2 Hearing Transcript Page 73: Mr. Roberts= "Warden, I want to make sure, your answer is that an open investigation is not a subject of qualification for promotion?" Warden Huette= "No."
Hearing Transcript Page 77: Arbitrator= "I think he is perhaps asking your opinion and your depth of knowledge. You may not know without doing some research. That is okay if you don't. There is a lot to know with federal regulations and statutes ya'll have to work within, but you have a basic understanding of what is a prohibited personnel practice. I think his question is, would that rise to the level of a prohibited personnel practice if in the hiring or selection of someone an open investigation was considered?" Warden Huette= "I don't know the answer for sure. I would assume, yes. But I don't know the answer." Arbitrator= "You would assume, yes, it would be a prohibited personnel practice, and it's your opinion that that should not be considered?" Warden Huette= "Yes."
Hearing Transcript, Page 111: Mr. Roberts= "So, when you go back to Joint 5 on block 6, inappropriate areas of inquiry, inquiries are to be related to the employee's job performance, knowledge, skills, and abilities-right?" HR Manager Galloway= "Uh-huh." Mr. Roberts= "That's the envelope we look at when we hire or promote somebody; is that correct?" HR Manager Galloway= "Uh-huh." Mr. Roberts= "Anything other than that, would that be a prohibited personnel practice?" HR Manager Galloway= "It could be, yes."

promotion consideration.

Agency's Duty of Timeliness of an Investigation

The Agency expounded upon the prohibited conduct by the dilatory manner in which the unwarranted investigation of the Grievant was handled. Had the Agency simply taken competent and responsible steps to immediately correct their mistake and close the unwarranted investigation of the Grievant, even after the Grievant demonstrated to the Agency that their investigation of him was in error, then the Grievant's stellar career would not have become damaged and stymied from a clearly deserved promotion, and the Agency could not have considered such an improper factor during their promotion selection process resulting in the prohibited personnel practice, nor could they be accused of doing so. Instead, the Agency extraordinarily allowed the fallaciousness to languish and fester for over 18 months, far in excess of the Agency's customary and acceptable time frame, while the Grievant applied for the job promotion.³

Management Rights and the Parameters of Hiring/Promoting

The Agency asserts that the mistake emanated from the Grievant (Bashaw) having a similar name as the correctional officer accused (Bradshaw), and the "mistaken identity" is of no consequence for two reasons: First, the candidates selected for promotion came off a best qualified list generated by their Office of Personnel Management ("OPM") thereby satisfying the

³ Article 30, Section d. of the Contract states, "Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions." The Office of Inspector General (OIG) states in their Report Number I-2004-008: "According to the OIA Chief, investigations conducted by OIA investigators should be completed within 90 days and local investigations conducted at the institutions should be completed within 60 days." Acting Warden and former internal affairs special agent, Denese Heuett, testified that 120 days is the preferred time frame for concluding an investigation of an employee. Hearing Transcript, Page 71, Mr. Roberts= "...is there a time frame associated with investigations, when they should be conducted and completed?" Ms. Heuett= "We as the Agency like to have the investigation within 120 days..."

properly ranked duty created by statute; and secondly, non-selection for promotion is not a grievable matter under the Contract and federal regulation. A careful examination of the facts and the controlling regulations do not support the Agency's defense.

5 U.S.C. 7106 states, in pertinent part:

“5 USC 7106 Management rights

- (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-**
 - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and**
 - (2) in accordance with applicable laws-**
 - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;**
 - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;**
 - (C) with respect to filling positions, to make selections for appointments from-**
 - (i) among properly ranked and certified candidates for promotion; or**
 - (ii) any other appropriate source;...**
- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating-...**
 - (2) procedures which management officials of the agency will observe in exercising any authority under this section; or**
 - (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.”**

The Agency's statutory management rights and limitations, supra, are recited in Article 5 of the Contract, where an additional “Section c.”, infra, further addresses the Agency's duties when undertaking employment selections. The statute also authorizes both parties to negotiate procedures which management officials will observe in exercising any authority hereunder, which the parties have done in Article 5 and in Program Statement 3000.03, infra. Article 5 of the Contract states, in pertinent part:

“ARTICLE 5 Rights of the Employer

Section c. The preferred practice whenever Bureau of Prisons positions are announced...is to select from within the Bureau from all qualified applicants. This shall not be construed as limiting the recruiting function or any other rights of the Employer.

In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.”

Article 5 adds more restrictive language upon the Agency’s selection procedures wherein the parties negotiated and agreed upon a “*preferred practice...to select from within the Bureau from all qualified applicants.*” This language prohibits the Agency from arbitrarily removing any *qualified* applicant from consideration for promotion, such as the Grievant, absent statutory authority or a Union negotiated provision allowing such.

Also negotiated pursuant to 5 U.S.C. 7106 (b) (2), is Program Statement 3000.03, which limits the Agency’s job selection criteria to three areas: job performance and knowledge; skills; and abilities. Program Statement 3000.03 states, in pertinent part:

“Chapter 3, Federal Program Statement P3000.03...

6. INAPPROPRIATE AREAS OF INQUIRY.

Inquiries are to be related to the employee’s job performance and knowledge, skills, and abilities...”

This Agency policy clearly narrows the scope of factors for consideration when management is selecting a job applicant and further limits their inquiries to “job performance and knowledge, skills, and abilities.” (Program Statement 3000.03, 6., supra.) Here again, the Agency has breached their own negotiated policy by considering factors pertaining to the Grievant beyond the scope of job performance and knowledge, skills, and abilities.

Incorporated into Article 5 and Article 33 of the Contract, 5 C.F.R. 335.103 Agency Promotion Programs and/or The Merit Promotion Plan, further restricts the Agency’s latitude in selecting candidates for hiring/promotion.⁴ 5 C.F.R. 335.103 states, in pertinent part:

⁴ Article 33 of the Contract repeats Article 5’s incorporation of 5CFR335.103 as a negotiated provision of the Contract.

“5 CFR 335.103 Agency Promotion Programs

(b) Merit promotion plans.

Except as otherwise specifically authorized by OPM, an agency may make promotions under Section 335.102 of this part only to positions for which the agency has adopted and is administering a program designed to insure a systematic means of selection for promotion according to merit. These programs shall conform to the requirements of this section.

(c) Merit promotion requirements-

(1) Requirement 1. Each agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this section. Actions under a promotion plan-whether identification, qualification, evaluation, or selection of candidates-shall be made without regard to political, religious, or labor organization affiliation or non-affiliation, marital status, race, color, sex, national origin, non-disqualifying physical handicap, or age, and shall be based solely on job-related criteria.

(2) Requirement 2. Areas of consideration must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Agencies must also ensure that employees within the area of consideration who are absent for legitimate reason, e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments, receive appropriate consideration for promotion.

(3) Requirement 3. To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the Office of Personnel Management (OPM). Methods of evaluation for promotion and placement, and selection for training which leads to promotion, must be consistent with instructions in part 300, subpart A, of this chapter. Due weight shall be given to performance appraisals and incentive awards.

(4) Requirement 4. Selection procedures will provide for management’s right to select or not select from among a group of best qualified candidates. They will also provide for management’s right to select from other appropriate sources, such as re-employment priority lists, reinstatement, transfer, handicapped, or Veteran Recruitment Act eligibles or those within reach of an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency’s affirmative action goals....

(d) Grievances-

Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures. The

standards for adjudicating complaints are set forth in part 300, subpart A, of this chapter. While the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance...

The negotiated program statement, federal regulation, and the parallel Contract provisions cited herein, mandate that “*procedures for promoting employees are based on merit and are available in writing to candidates*”; and that “*agencies must list appropriate exceptions, including those required by law or regulation*”; and that “*actions under a promotion plan...shall be based solely on job related criteria*”; (See 5 CFR 335.103 (b)(1), supra); and that “*inquiries are to be related to the employee’s job performance and knowledge, skills, and abilities...*” (See Program Statement 3000.03, 6, supra). The evidence presented holds no exceptions listed, promulgated, negotiated, or properly noticed, that allows for the consideration by the Agency of an open investigation of a candidate qualified for promotion. The Agency’s consideration of their erroneous open investigation of the Grievant as a factor for his non-consideration for promotion is neither *merit* based nor can it be deemed *job-related criteria*.

Requirement 4 of the regulation provides that “*selection procedures will provide for management’s right to select or not select from among a group of best qualified candidates.*” Here the regulation merely recites the mandate of including a best qualified list process in the Agency’s selection procedures and the Agency’s right to select or not select from that group. It does not invalidate or overrule the 5 U.S.C. 7106 (a)(2)(C)(i) statutory mandate, or the Article 5 contractual mandates, that obligate the Agency to fill positions by making those selections from among *all qualified applicants* and *properly ranked candidates*.

Arbitrability of Grievance

The Agency employs Section (d) of the regulation as the linchpin of their case, citing the “*Grievances*” language therein, to argue that the grievance is barred, to wit: “...*While the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance...*” Here, the Agency’s case fails for two reasons: First, the grievance is predicated upon the Agency’s procedural conduct of identifying the Grievant and removing him from his ranking as a candidate for promotion on the best qualified list, a proper subject for grievance. Secondly, the Grievant’s *non-selection* did not emanate *from among a group of properly ranked and certified candidates*, as the group immediately became improperly ranked by the Agency’s consideration of the improper factor which removed the very qualified Grievant from the group, thereby rendering the entire group improperly ranked. The Grievant’s non-selection was never competitively based from among a group of properly ranked candidates (i.e. the best qualified list) as the regulation contemplates. The Agency never considered the Grievant for promotion due to their open investigation of him. Said differently, *non-selection* of the Grievant from among a group of properly ranked and certified candidates never occurred; non-consideration did.

Unfair Labor Practice

Unfair labor practices(s) are spelled out in 5 U.S.C. 7116, and arise in this matter in the course of the remediation of the grievance. 5 U.S.C. 7116 states, in pertinent part:

“5 U.S.C. 7116 Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency...

- (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;**
- (7) to enforce any rule or regulation (other than a rule or regulation implementing**

**section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
(8) to otherwise fail or refuse to comply with any provision of this chapter...”**

The Agency’s act of disqualifying the Grievant from promotion consideration because he was under investigation, clearly a promotion selection factor not permitted by the Contract nor the negotiated regulations, constitutes a statutory unfair labor practice for the remedial purposes of this matter, and the applicability of 5 U.S.C. 5596, *infra*. Specifically, the facts presented demonstrate the Agency’s unilateral act of enforcing a rule (consideration of an investigation as a factor to disqualify an otherwise qualified candidate for promotion) that conflicts with the Contract without consulting/negotiating with the Union, is a practice prohibited by 5 U.S.C. 7116 (a) (5) and (7), *supra*. Further, the Agency’s conduct, is a labor practice prohibited by 5 U.S.C. 7106, as proven by the facts presented and more specifically described herein, and thus constituting an unfair labor practice pursuant to 5 U.S.C. 7116 (8), *supra*.

Back Pay Act

The grievance seeks as remedy the Agency making the Grievant whole in accordance with the Federal Back Pay Act. Accordingly, a discussion of the statute becomes warranted in this finding. 5 U.S.C. 5596 states, in pertinent part:

“5 U.S.C. 5596 Back Pay Due to Unjustified Personnel Action

(b) For the purposes of this section, “agency” means-

(1) an Executive agency...

(c) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee-

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect-

- (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and**
- (ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701 (g) of this title; and**

(B) for all purposes, is deemed to have performed service for the agency during that period, except that-

- (i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee with the time limits prescribed by regulations of the Office of Personnel Management, and**
- (ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.**

(2) (A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest-

- (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;**
- (ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and**
- (iii) shall be compounded daily.**

(C) interest under this paragraph shall be paid out of amounts available for payment under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowance, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purposes of this subsection, “grievance” and “collective bargaining agreement” have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, “unfair labor practice” means an unfair labor practice described in section 7116 of this title and (with

respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and “personnel action” includes the omission or failure to take an action or confer a benefit...”

For purposes of applicability, the Agency’s conduct in this matter (prohibited personnel practice pursuant to 5 U.S.C. 2302) constitutes the requisite “*unjustified or unwarranted personnel action which has resulted in the...reduction of...part of the pay, allowances, or differentials of the employee*” or Grievant.

The matter at hand, even upon the execution of the award rendered herein, does not constitute the “*setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates*” as prohibited under (b) (3) of the Back Pay Act, supra. To the contrary, nothing in this award disturbs promotions previously made by the Agency. Furthermore, the Grievant has met the minimum qualification requirements prescribed by the OPM for the GS-08 position, for which he was improperly denied promotion, as required in 58 FLRA 123.

Concerning the payment of the Grievant for the overtime he endured on 07-21-10, the Agency avers that Grievant was not “ordered” to come in. The Grievant testified that his immediate supervisor, Lt. Sheldon, told him to “come in” to clear up an investigation due to his upcoming promotion. The Agency offered no testimony to refute this dialogue, leading to the factual finding that the Grievant, as a result of his immediate supervisor’s directive, interrupted his family’s vacation, drove nearly two hours to the institution, spent another two hours signing documents (Form B and an affidavit) and answering questions for the SIA; all because of the coerciveness of his commanding officer’s words.

Conclusion

Even if the Grievant was legitimately the subject of an allegation of misconduct, which he clearly was not, the Agency's negotiated policy and Contract, federal regulation, and statute, clearly prohibit the Agency from considering pending allegations of misconduct, unfounded or not, during the merit selection process. Given the broad latitude afforded the Agency in the selection process, the Agency's action of denying promotion, are ordinarily irreversible. However, the statutes, Contract, and regulations discussed, *infra*, clearly dictate that the Agency does not possess the complete discretion in promoting, as they aver.

It is the Warden's own words, corroborated by those of the Lieutenant and the SIA, wherein the "open case" of the Grievant was cited as the only factor for his non-consideration, which differentiates this case from many other selection grievances. The irrefutable evidence reveals a direct connection between the improper Agency actions and the failure of the Grievant to be selected for promotion.

The Grievant applied for the GS-08 promotion, for which he was clearly qualified, as evidenced by testimony and by the fact that he appeared on the Agency (OPM's) best qualified list from which the Agency began their selection process. The statutory language governs the Agency in "*filling positions*" and to make those final selections "*from among a properly ranked*" pool of candidates. Whenever an applicant within that pool (the best qualified list) is improperly excluded from consideration and/or his application is considered less meritorious based upon any disallowable or improper Agency consideration, the selection chances of all those remaining in the pool are thereby increased as a matter of fact, and the entire pool then becomes improperly ranked. The Agency's statutory duty is not simply met once the best qualified list is generated by OPM and sent to the institution, as the Agency avers. The Agency's statutory duty to hire and promote from a properly ranked list is ongoing and continuous throughout the entire selection

process, and includes maintaining the integrity of the properly ranked list until the process is concluded.

When the elimination or degrading of a properly ranked candidate is predicated upon an improper consideration, then the group is no longer *properly* ranked in accordance with the federal regulation (5 C.F.R. 335.103; Program Statement 3000.03; and 5 U.S.C. 7106) and, likewise the Agency has then breached their authority to fill positions pursuant to 5 U.S.C. 7106 and Article 5 of the Contract. The sheer weight of the sworn and uncontradicted testimony concludes that at least four different Agency officials (Lieutenant Sheldon, SIA Thompson, Captain Zielinski, and Warden Outlaw) stated to the Grievant and/or the Union President that the Grievant was not selected due to the “open case” or investigation of him that was pending, even after it was demonstrated to the Agency that their investigation of the Grievant was in error. At no point throughout this matter, has the Agency cited any other reason for the Grievant’s non-consideration/non-selection. None of the three Agency officials who are clearly culpable in this matter (Warden, Lieutenant, and SIA) were called by the Agency to refute the evidence against them, and counter the Union’s case. The Grievant’s Captain, who could have corrected this matter during the informal resolution step of the grievance, testified that he had no recollection of this matter. The Agency produced no witnesses to refute or rebut the Union’s presented testimony and allegations, but instead offered confirmations that the open investigation of the Grievant was considered.⁵

⁵ Hearing Transcript, Page 84: Mr. Roberts= “Do you recall an informal resolution attempt on this case?” Captain Zielinski= “...As far as any specifics with this case, no, I don’t recall...”

Agency Exhibit #2 was a memorandum prepared by SIA Thompson for the Warden dated 8-27-10, after the grievance was filed, in which Thompson admits open investigations were being used as a factor by the Warden during promotions. In describing his actions with the Grievant, SIA Thompson wrote: “...I was trying to clear a staff misconduct case investigation quickly at the request of the Warden...I believe the Warden was looking at staff for possible GS-08, Senior Officer Specialist promotion. Just to ensure there wasn’t going to be any sustained cases for

The Agency argues that the best qualified list is properly ranked by their Office of Personnel Management (OPM) where the list is constructed from all applicants and forwarded to the subjective institution Warden, who then undertakes the filling of the position(s). The Agency further avers that as long as the list was properly ranked during its formation by OPM, they are then free to make selections without recourse under the reading of their prescribed management rights in Article 5 of the Contract and 5 U.S.C. 7106, as well as their right to select pursuant to 5 CFR 335.103. The Agency's position disregards the clear prohibition against considering certain non-negotiated/non-posted and disallowed factors during *all* phases of the selection process, without exceptions, and without distinguishing between the steps. To adopt the Agency's myopic interpretation of exclusive and broad management authority to fill positions while considering factors other than "job performance and knowledge, skills, and abilities" would result in rendering the negotiated provisions, the federal regulations, and the statutes meaningless to the sanctified, impartial, and sensitive process of federal hiring and merit promoting.

Furthermore, the Agency bargained and negotiated this issue with the Union, resulting in the Article 33 and Article 5 inclusion of 5 CFR 335.103, *supra*, into the Contract, which further recognizes the parameters placed upon the Agency, namely the prohibition of the Agency from considering outside factors and/or factors other than those allowed by contract, regulation, negotiated policy, and statute. When the Agency improperly considered the open investigation of the Grievant as a factor in the GS-08 selection process, the chain reaction leading to statutorily

possible discipline on any staff member who might be getting promoted..." The Agency did not call SIA Thompson to testify.

The Agency stated during the hearing that Lt. Sheldon was involved in an altercation with an inmate and would not be able to testify, however, Lt. Sheldon appeared at the conclusion of the hearing and avowed no physical harm or impediment that could have circumvented his testimony.

Joint Exhibit #3 is the Warden's response to the grievance, wherein he stated, "...The Lieutenant who contacted Officer Bashaw (Grievant), thought the SIA was requesting Officer Bashaw so he called him to see if he could help clear up any issues prior to the GL-08 officer selections..."

prohibited personnel practice (5 U.S.C. 2302 (b) (4) and (6)) are the inevitable results.

The Grievant's unblemished work record, including his exceptional record of performance evaluations; his receipt of numerous awards; and the Agency's utilization of him to provide on-the-job training to countless other Agency employees-reveal his undeniable qualification and deservedness of selection. The Agency failed to offer evidence of any allowable factor that would have constituted a legitimate reason for the Grievant's fair and subjective non-selection, leaving the Union's assertions unreduced. The evidence presented also reflects a broad consensus among both Agency officials and the Grievant's colleagues that the Grievant was/is deserving of the GS-08 promotion and would have been selected for the promotion if considered.⁶

While the entire selection process has been tainted, calling into question the legality of all of the Agency's selections and non-selections for this position, we are limited in our remediation to only the Grievant, who has timely filed the unilateral grievance at hand challenging the Agency's personnel action. The duty of justifiably fashioning a limited remedy that avoids vitiating selections that may have been proper, requires the retroactive promotion of the Grievant only, who was improperly denied consideration for the position for which he applied and made the best qualified list, because the Agency contemplated an open investigation of him. Nothing

⁶ Human Resource Manager, Rickey Galloway testified that the Grievant's supervisor, Lt. Sheldon, stated after the grievance was filed that he thought the Grievant deserved the GS-08 promotion. Hearing Transcript, Page 113: Jeff Roberts= "When you talked to Sheldon, did you ask him why he told Bashaw (the Grievant), you need to get in here and clear this up so you can get your GS-08...?" Rickey Galloway= "...He basically told me that he was going to help him get his 8 because he thought he deserved it..."

Agency Exhibit #2 is the memorandum from SIA Thompson to the Warden, wherein Thompson states of the Grievant's promotion to GS-08, "...I believe he should have a good chance at getting his GS-08, if he made the best qualified list..."

Additionally, the Agency stipulated to the fact that 5 correctional officers selected for GS-08 positions would testify that the Grievant deserved to be promoted to GS-08 before them. (Hearing Transcript, Page 125, and Footnote 1, supra.)

more and nothing less would reflect the fairest remedy of this matter.

The parameters imposed upon arbitral authority and the emanating arbitration awards pursuant to 5 U.S.C. 7122, Article 32, Section h. of the Contract, and Federal Labor Relations Authority precedent, is not lost upon this tribunal. 5 U.S.C. 7122, states in pertinent part:

“5 U.S.C. 7122 Exceptions to Arbitral Awards

Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator’s award pursuant to the arbitration...If, upon review, the Authority finds that the award is deficient-

- (2) because it is contrary to any law, rule, or regulation; or**
- (3) on other grounds similar to those applied by Federal Courts in private sector labor-management relations;**

The Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations...”

In the case at bar, management lacked the legal right to consider hiring/promotion factors other than those prescribed by law, regulation, negotiated program statement, and/or contract. Accordingly, the correction of the Agency’s unlawful conduct pursuant to this arbitration award cannot logically be deemed an infringement upon the Agency’s rights, as there is no inconsistency between the two. The Agency clearly has the legal right under 5 U.S.C. 7106 to hire/fill positions/make selections for appointments from among properly ranked candidates and no legal right to do otherwise. The definition of *properly ranked* is further concluded by a collective reading of the cited regulation and the negotiated Contract provisions and policy, none of which allow the Agency to unilaterally create, add, or apply additional considerations during the merit promotion process, such as whether or not a candidate is the subject of an open investigation.

It is also noted that the Agency possesses the legal authority to accommodate the retroactive promotion of the Grievant, pursuant to 5 U.S.C. 7106 (b), supra, which serves to

empower the Agency to rectify improper hiring practices by negotiating “*appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.*” The statute serves to empower the informal resolution step of the grievance process, and does not limit the Agency’s authority to rectify the Grievant’s injustice at any certain stage of proceeding or within any prescribed time frame. Program Statement 3000.03, cited herein, also contains negotiated authorization for the Agency to utilize an “exception” to the merit promotion plan for “corrective action” situations, such as the one necessitated by this matter. (See Program Statement 3000.03, Human Resource Management Manual, Section 335.1, paragraph 6.e.).

Accordingly, since the Grievant fulfilled all of the requirements for the promotion at hand and would have been promoted had the Agency acted properly, an arbitration award ordering the retroactive promotion is not inconsistent with law or Contract, and therefore does not represent an infringement upon the Agency’s legal rights. Rather, the arbitration award herein directs the Agency to utilize the legally prescribed remedies to carry out the personnel action they would have undertaken had they acted properly, by making the appropriate promotion arrangements for the Grievant who has been proven adversely affected by the Agency’s 5 U.S.C. 7106, negotiated policy and contract authority violations.

The factual evidence concludes that the Grievant was denied consideration for the GS-08 position for no other reason than the Warden’s arbitrary and unlawful decision not to consider him due to the Grievant being under investigation. The unchallenged evidence factually proves the Grievant was best qualified and there was no allowable factor existing for the Agency’s non-selection of him. The preponderance of evidence presented reasonably concludes that if simply considered by the Agency, the Grievant would have been one of the best qualified applicants

selected for promotion to a GS-08 position on 08-09-10. Therefore, to direct the retroactive selection of the Grievant by arbitration award, merely represents a reconstruction of what the Agency would have done if they had acted properly, and the only fair and the least problematic remedy of this grievance, and in doing so, we create no infringement upon the Agency's legal right(s) to select from among properly ranked candidates in accordance with law and policy.

AWARD/RULING:

The grievance, timely filed and pursuant to the negotiated grievance procedure between these parties, as authorized by 5 U.S.C. 7121 and Article 31 of the Contract, is hereby sustained.

A preponderance of the evidence and testimony presented have factually proven that the Agency violated 5 U.S.C. 7106, 5 C.F.R. 335.103, Article 5 of the Contract, Article 33 of the Contract, and a negotiated and bargained for Program Statement, Chapter 3, Section 3000.03 by falsely accusing the Grievant of misconduct; by opening an investigation of the Grievant for the unveracious misconduct; by failing to conclude the unwarranted investigation of the Grievant in a timely manner; by using the open investigation of the Grievant as an improper and disallowed factor of consideration during their merit promotion procedure for the GS-08 position; and by selecting and/or non-selecting candidates for promotion from an improperly ranked group.

A preponderance of the evidence and testimony presented have factually proven that the Agency violated 5 U.S.C. 2302 and/or committed a prohibited personnel practice by their non-selection of the Grievant while considering factors other than those based upon merit and the Grievant's job performance and knowledge, skills, and abilities.

The Agency shall promote the Grievant to the GS-08 Senior Officer Specialist position retroactively to 08-9-10, as enforcement of and adherence to, the procedures mandated in 5 U.S.C. 7106 (a) (2).

The Agency shall immediately refrain from considering factors for the hiring or promotion of employees that are not permitted by the collective bargaining agreement; by the negotiated Program Statement 3000.03; by 5 U.S.C. 7106; and/or by 5 CFR 335.103.

The Grievant shall be entitled to all back pay lost by the Agency's non-consideration of his best qualified application for GS-08 resulting in his non-selection for promotion, and all other benefits that would have been received by the Grievant, if promoted to GS-08 on 08-9-10, as allowed by 5 U.S.C. 7122 and in accordance with 5 U.S.C. 5596.

The Grievant shall be entitled to the overtime pay differential for his 07-21-10 time spent addressing the Agency's erroneous investigation of him, while on approved annual leave and outside of his regularly scheduled shift, pursuant to 5 U.S.C. 5596.

The Grievant shall be entitled to a restoration of the annual leave lost as a result of his 07-21-10 time spent addressing the Agency's erroneous investigation of him, while on approved annual leave, pursuant to 5 U.S.C. 5596.

Nothing herein shall preclude the Grievant from collecting any claim for expenses, fees, interest, pay, allowances, or differentials allowable under 5 U.S.C. 5596 and pursuant to this Award, as a result of the actions and/or inactions by the Agency which have resulted in the Grievant's harm of improperly being denied promotion consideration, lawful overtime, and annual leave.

The Arbitrator shall retain jurisdiction for the purpose of calculating the amount(s) owed the Grievant pursuant to 5 U.S.C. 5596, if requested by either party, however such jurisdictional retention shall not be construed as delaying or interrupting the time allowed for the filing of an exception to this Award pursuant to 5 U.S.C. 7122.

Nothing contained in this Award substitutes the judgment of the Agency's management

to lawfully direct employees, evaluate employees, rate employees, reward/award employees, promote employees, and/or assign work in accordance with federal statute, federal regulation, negotiated program statements, and the collective bargaining agreement.

Credibility of the witnesses, their testimony, and the documentary evidenced introduced by the parties in this matter was weighed, objectively considered, and form the factual determinations by the Arbitrator, from which this Award is predicated upon. The Arbitrator's legal conclusions herein are consistent with all applicable standards of the laws controlling the Agency's conduct in this matter. This Award does not contain a citation of all authorities and presented facts that were considered by the Arbitrator in the deliberation of this matter. All motions and/or objections, by either party, not addressed herein or during the hearing of this matter, have been considered and denied.

The Arbitrator's costs shall be borne equally by both parties, pursuant to Article 32, Section d, of the Contract, however, nothing herein shall preclude the Union from receiving reimbursement for said costs from the Agency under the provisions of 5 U.S.C. 5596 and the awarding of the same herein.

The entirety of this document, including citations, background, opinion, and the recitation of evidence and facts, shall inclusively be considered as the Arbitration Award resolving this matter, for purposes of appeal, interpretation, scrutiny, application, or execution hereof. Section headings and/or titles are for reference only.

Hereby signed this 25th day of January, 2013



**Sidney S. Moreland, IV,
Impartial Arbitrator**

#3288, FMCS

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