In the Matter of the Arbitration	**OPINION AND AWARD**
between	**OF THE**
American Federation of Government Employees (AFGE) Local No. 1034	**ARBITRATOR**
	FMCS CASE NO. 13-59328
and	
Department of Justice Federal Bureau of Prisons Federal Correctional Complex Pollock, Louisiana	

ARBITRATOR Louise B. Wolitz

Date of Hearing: February 12, 2015
Place of Hearing: Federal Correctional Institution, Pollock, Louisiana
Briefs Filed: April 20, 2015
Date of Award: July 21, 2015

APPEARANCES:

For AFGE Local No. 1034:
Jason Shannon
Richard Logan

For the Bureau of Prisons:
Daniel Johnson

RELEVANT PROVISIONS:

MASTER AGREEMENT
Federal Bureau of Prisons and Council of Prison Locals American Federation of Government Employees

...

ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a*. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC. Section 7106:*

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 appointment from:*

        (1) among properly ranked and certified candidates for promotion; or

        (2) any other appropriate source; and

….

Section c. The preferred practice whenever Bureau of Prisons positions are announced under Section a (2)(c) above 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, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.

….

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

…

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

….

2. to be treated fairly and equitably in all aspects of personnel management;

….

6. to have all provisions of the Collective Bargaining Agreement adhered to.

….

ARTICLE 23 – UPWARD MOBILITY

Section a. Each institution will have an Upward Mobility Program designed to allow employees to successfully cross over from low skill occupations with limited potential to higher skill occupations offering greater opportunities for growth and development.

Section b. Vacancies which are to be filled under the Upward Mobility Program will be identified as such on the vacancy announcement and employees wishing to be considered for the vacancy must make application in accordance with the merit promotion plan in order to receive consideration….

ARTICLE 33 – MERIT PROMOTION

The Merit Promotion plan is herein incorporated as part of this Agreement. These procedures will not be changed, to the extent they are negotiable, for the life of this Agreement except in writing and in accordance with Article 42.

5 USC 2302 (b) Prohibited Personnel Practices

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

1. *discriminate for or against any employee or applicant for employment –*

    A. *on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S. C. 2000e-16)*
    B. *on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);*
    C. *on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C 791); or*
    D. *on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or*
    E. *on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;*

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 – -an evaluation of the work performance, ability aptitude, or general qualification of such individual; or

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

….

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;

….

Program Statement 3000.03

335.1 MERIT PROMOTION PLAN

1. PURPOSE AND SCOPE: This section prescribes the procedures to be used to implement federal merit promotion policy.

3. PROGRAM OBJECTIVES. This Merit Promotion Plan is deigned to:

a. Provide an effective, fair method of evaluating and selecting employees for promotion and for selecting employees for training programs that may lead to promotion.

b. Give selecting officials a choice from among the best qualified candidates.

c. Ensure that consideration is given to each qualified applicant without regard to political, religious, or labor organization affiliation or non-affiliation, marital status, race, color, sex, sexual orientation, national origin, nondisqualifying physical disability,or age.

335. 7 REFERENCE CHECKING

1. PURPOSE AND SCOPE: To establish procedures to enable selecting officials to check the references of candidates in the best qualified and/or non-competitive group.

2. STAFF AUTHORIZED TO PERFORM REFERENCE CHECKS. The selecting official or designee is authorized to conduct reference checking.
3. REFERENCE CHECK CONTACTS. Three categories of references may be checked:
** individuals in the applicant's current or past chain of command;*
** for technical positions, individuals expected to have knowledge of the applicant's technical skills (i.e., institutional, regional and/or Central Office counterparts); and*
- *personal and professional references provided by the applicant.*

6. INAPPROPRIATE AREAS OF INQUIRY. Inquiries are to be related to the employee's job performance and knowledge, skills and abilities.

THE HEARING:

The hearing on this matter took place at the Federal Correctional Institution, Pollock, Louisiana on April 20, 2015. Each party had a full opportunity to present its evidence, witnesses and argument and to cross examine each other's witnesses. The parties submitted in evidence Joint Exhibit 1, the Master Agreement; Joint Exhibit 2, the Grievance; Joint Exhibit 3, the Invocation of Arbitration; and Joint Exhibit 4, the Agency Response. The Agency submitted Agency Exhibit 1, Unredacted Reference Check Forms (to remain confidential); Agency Exhibit 2, Redacted Reference Check Forms; Agency Exhibit 3, Employee Performance Appraisal-Smith; Agency Exhibit 4, Standard Set Number 3B. The Union submitted Union Exhibit 5, Vacancy Announcement; Union Exhibit 6, Reference Check; Union Exhibit 7, Performance Evaluation, 2011 – 2012; Union Exhibit 8, Performance Evaluation 1st Quarter; Union Exhibit 9, Selection Listing; Union Exhibit 10, Assignment Cards – A. Smith; Union Exhibit 11, Assignment Cards – C. Lee; Union Exhibit 12 – Assignment Cards – C. Jones; Union Exhibit 13 – Assignment Cards – J. Draves; Union Exhibit 14, 2012 GS Pay Scale; Union Exhibit 15, 2015 GS Pay Scale; Union Exhibit 16, PS 3451.04 Awards; Union Exhibit 17, PS 3000.03 Performance Evaluations; Union Exhibit 18, PS 3000.03 Reference Checks; Union Exhibit 19, PS 3000.03 Merit Promotion Policy; Union Exhibit 20, 5 USC 2302 Prohibited Personnel Practices; Union Exhibit 21, 5 CFR 335.102 & 5 CFR 335.103. A transcript was reported by Renee Billingsley, Certified Court Reporter. All witnesses were sworn. The Union called witnesses Richard Logan, Executive Vice President, AFGE Local 1034; Adam Smith, Secretary, AFGE Local 1034, Correctional Officer and Grievant; Craig Lee, Captain; Curtis Jones Senior, Lieutenant; and John Gradiska, Captain. The Agency called no witnesses on direct examination, but cross examined the witnesses called by the Union. The parties agree that the deciding official in this case was Warden Ricardo Martinez, now retired. The Union attempted to call him as a witness. The Agency represented that he is currently retired and that he is unavailable for this hearing. The Union claimed that he has been available for other arbitrations and that the arbitrator should draw a negative inference from his unavailability for this hearing. The Agency denied knowledge of whether Mr. Martinez had been available for other arbitrations. The arbitrator does take judicial notice that the Agency did not produce Mr. Martinez, who was the deciding official in this matter, for this hearing, either in person or by telephone.

At the close of the hearing, the parties agreed to proffer briefs, to be postmarked April 20, 2015, which were timely received by the arbitrator.

The arbitrator has carefully studied the evidence provided by the Joint Exbibits, Agency Exhibits and Union Exhibits in the record; the testimony of the witnesses as reflected in her notes and transcribed in the transcript; the briefs of the parties; and the citations attached to the parties' briefs. We note specifically the attachment to the Agency's brief, *American Federation of Government Employees, Local 1658 and U.S. Department of the Army, Army Tank-Automotive and Armaments Command, Warren, Mich, 61 FLRA 80, Federal Labor Relations Authority 61 FLRA No. 15, 0-AR-3926, July 8, 2005.* We note specifically also the attachment to the Union brief, *FMCS 11-00286-3, Arbitration Award* decided by Arbitrator Sidney S. Moreland, IV in *United Stated 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.*

THE ISSUES:

The Agency has raised a threshold issue that this grievance is not arbitrable under Article 5 (c) of the Master Agreement. We will address this issue first. So the first issue before us is:

1) Is applicant Adam Smith's non-selection for a promotion arbitrable under Article 5 (c) of the Master Agreement and/or 5 CFR 335.103?

If we find the grievance not to be arbitrable, the grievance must be substantively dismissed. If we find the grievance to be arbitrable, we then get to the merits. The parties did not stipulate the issue statement regarding the merits. We define the issue regarding the merits as the Union did:

2) Did the Agency violate the Collective Bargaining Agreement known as the Master Agreement, statute, or federal regulation, by its non-selection of Adam Smith, the grievant, as a GS-8 Senior Officer Specialist, and if so, what is the remedy?

BACKGROUND:

A Vacancy Announcement POL-2012-0044 was posted by the Bureau of Prisons for a Correctional Officer (Senior Officer Specialist) position, GL-0007-08, full time, permanent, with 20 vacancies at FCC Pollock. There were 36 applicants competing for the 20 positions. The Open Period was Thursday, February 23, 2012 to Thursday, March 15, 2012. Adam Smith, then Senior Officer at the Federal Correctional Complex (FCC) in Pollock, Louisiana, applied for one of the Senior Officer Specialist positions. Mr. Smith was referred back to the local institution along with the other applicants on a listing of Best Qualified applicants. Based on the information provided in his application, Mr. Smith was rated and ranked in

accordance with the Agency's Merit Promotion Plan and was included among the list of candidates certified as Best Qualified on the promotion certificate which was forwarded to the selecting official, Ricardo Martinez, Warden, at FCC Pollock. The Agency then further vetted the applicants through the reference check process. Mr. Smith was ranked as average to below average in the six ranked categories of the reference check form. Yet, 23 days earlier, the Agency had rated Mr. Smith as Excellent on his yearly performance evaluation. Warden Martinez made his selections for the Senior Officer Specialist positions on May 8, 2012, and made additional selections from the same announcement on July 1, 2012. Adam Smith was not among the applicants selected.

The Union filed an official grievance stating that the Bureau of Prisons at the Duty Station FCC Pollock, La. violated the following: Master Agreement Article 6, Section b (2) & (6), Article 23, Article 33, 5 U.S.C. 2302, 5 U.S.C. 5596, 5 U.S.C. 7116, Program Statement, P3000.03, Chapter 3 (335.71), 5 CFR 335. 103, and 58 FLRA 123. The grievance said:

> *In response to a Confidential Reference Check request on Senior Officer Adam Smith for Job Announcement POL-2012-0044, Lieutenant Craig Lee, Lieutenant Curtis Jones, and Captain John Gradiska answered the request for information. In the block that notes "Current Skill/Ability Level", these supervisors provided information that caused Officer Smith to be rated from "Below Average to Average", when in fact Officer Smith's last yearly rating was "Outstanding", and his quarterly ratings for rating year 2013 were "Excellent to Outstanding".*
>
> *The rating Supervisor's input about Mr. Smith violates 5 U.S.C. 2301, Prohibited Personnel Practices (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* ***personal knowledge or records of the person*** *furnishing it and consists of – (2) (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;…." The usage and subsequent placement of this erroneous information on Mr. Smith's reference check form tainted his right to be competitive in the selection process for the Senior Officer Specialist, FCC Pollock, and is a violation of the Master Agreement and statutes(s).*
>
> *The rating Supervisor's input about Mr. Smith also violates Program Statement P3000.03, Chapter 3, which states " Inquiries are to be related to the employee's job performance and knowledge, skills and abilities". It is obvious that Mr. Smith's performance evaluations were not considered, because if they had been used he would have been considered "Above Average" in all areas on the reference check form. In other words, Lt. Lee, Lt. Jones, and Capt.*

Gradiska intentionally and unfairly misconstrued the overall character of Mr. Smith's current knowledge, skills, and abilities.

The Agency's usage of this totally inaccurate Reference Check form, and the false assumption that it provides about the Grievant was a major factor for his non-consideration for promotion. The Reference Check form wasn't merit based and shouldn't have been deemed job-related criteria, because it didn't take into consideration Mr. Smith's accomplishments, as is evident by his performance evaluations. The Agency never considered the Grievant for promotion due to their falsely provided information on him. Said differently, non-selection of the Grievant from among a group of properly ranked and certified candidates never occurred; non-consideration did.

The Agency's act of disqualifying the Grievant from promotion consideration because he was falsely evaluated, clearly a promotion selection factor not permitted by the Contract or 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. Specifically, the facts presented demonstrate the Agency's unilateral act of enforcing a rule (consideration of a falsely conducted Reference Check form as a factor to disqualify an otherwise qualify a candidate for promotion) that conflicts with the Contract, without consulting/negotiating with the Union, is a practice prohibited by 5 U.S.C. (a) (5) and (7).

All of the referenced material points to the fact that Mr. Smith was not identified and ranked as a qualified candidate for promotion. The only knowledge that can be gleamed from the reference check form on Mr. Smith paints a falsely degraded picture of him, which prevented him from being properly ranked according to federal regulation (5 C.F.R. 335.103; Program Statement 300.03; and 5 U.S.C. 7106), thus eliminating him from promotion. (Jt. Exhibit 2)

On March 19, 2013, Complex Warden M. D. Carvajal denied the grievance, which he says was received on February 18. 2013. In the denial, Warden Carvajal said:

Selection procedures provide for Management's right to select or not select from among a group of best qualified candidates. Non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. Candidates are ranked based on the knowledge, skills, and abilities required to perform the duties and responsibilities of the position. Merit Promotion Ranking consists of (1) Job Element Ratings, in which various KSA's are scored by members of the rating panel; (2) Performance; and (3) Awards. As noted in the Human Resource Management Manual, selecting officials, or their designee, may elect to check the reference of Best Qualified or non-competitive applicants for a vacancy. The questions outlined on the Confidential Reference Check forms are required when references are checked and follow-up questions for

clarification purposes are permissible. Additionally, should the reference-checker determine that additional job-related questions are necessary for a specific vacancy, those questions are to be added to the form and asked of all applicants who are referenced checked for that vacancy. Care is taken in framing questions so information being solicited will not indicate an applicant's race, color, sex, religion, national origin, age, disability or sexual preference. The applicant provides a list of personal and professional references during the application process. Therefore, the cumulative input received from the references provided by Mr. Smith resulted in a rating of "Below Average to Average."(Jt. Exhibit 4)

ISSUE 1) Is this grievance arbitrable?

POSITION OF THE AGENCY ON ARBITRABILITY:

The Agency argued as a threshold issue at the beginning of this hearing that this grievance is not arbitrable because the Best Qualified list was unquestionably prepared without any improper considerations and Mr. Smith's name was among the list of employees who were properly rated, ranked and placed on a certified Best Qualified list. All the complaints in the grievance flow from Mr. Smith's non-selection from among a group of properly ranked and certified candidates. Article 5, Section c of the Master Agreement clearly says: *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, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.* The Agency argues that since there have been no complaints about how the applicants for the position were rated and ranked and placed on a certified Best Qualified list, and Mr. Smith's name was placed on this Best Qualified list, this grievance is clearly about his *nonselection from among a group of properly ranked and certified candidates,* and thus is *not an appropriate basis for a formal complaint or grievance*. Therefore, the Agency argues, this grievance is not arbitrable and the arbitrator should dismiss it in its entirety. The Agency further maintains in its brief that the same language that is included in Article 5 c is also found in the Merit Promotion Plan, which was negotiated by the parties prior to implementation and was incorporated as a part of the parties' agreement by Article 33 (see Relevant Provisions above). The Agency says that the Merit Promotion Plan, which is a part of Program Statement 3000.03, specifically states under section 18(c) that "*Formal grievances may not be based on failure to be selected for promotion when proper promotion procedures are used, that is, non-selection from properly rated, ranked and certified applicants."* (see Union X 19) The Agency argues that the inclusion of this language in so many different places in the parties' agreement provides unequivocal and unquestionable evidence of the parties intent that the non-selection of an employee from a properly ranked and rated panel may not be grieved through the negotiated grievance procedure for any reason. All the complaints in this grievance flow from Mr. Smith's non-selection from the Best Qualified list, after the list was

properly and unquestionably prepared without any improper consideration. There is no evidence in the record to indicate that there were any procedural errors or that anything improper was done in the process of Mr. Smith being rated and ranked and subsequently placed on the Certified Best Qualified list for possible selection. The Agency argues in its brief that the Union has conceded this in their opening statement. Moreover, the Union presented its version of the issue as being whether the Agency violated the Master Agreement, Statute, or Federal Regulation by its *non selection* of Adam Smith, the grievant, as a GS-08 Senior Officer Specialist. Mr. Smith said that he had spoken to the selecting official, Warden Martinez, and asked him why he wasn't selected. Therefore, the Union and the grievant have conceded that the issue being grieved is Mr. Smith's non-selection for the promotion. The reason for Mr. Smith's non-selection cannot be grieved through the negotiated grievance procedure, as laid out in Article 5 c, Article 33, the parties' Merit Promotion Plan and 5 CFR 335.103. The Agency argues that any other interpretation of the agreement in order to allow for the grievance to proceed cannot be derived from the agreement, does not represent a plausible interpretation of the agreement, and evidences a manifest disregard of the agreement.

The Agency points out that the Authority has upheld an arbitrator's determination to deny jurisdiction where the arbitrator would have to review interview scores "*received subsequent to the ranking and certification of candidates*" because doing so would involve looking at the reasons for non-selection and therefore was excluded from the grievance procedure (*AFGE Local 1658 and U.S. Department of the Army, 61 FLRA 80, July 8, 2005)*. The Agency has attached this FLRA decision to its brief. The decision essentially states that the arbitrator's decision did not fail to draw its essence from the collective bargaining agreement, nor was it contrary to law. The FLRA said that an arbitrator's determination of substantive arbitrability is subject to the deferential essence standard. The union in this case contended that the interview scores received by one candidate were so different from the scores of others as to prove the non-selection was unfair. The arbitrator determined that she would be required to examine the circumstances of those selected and not selected. She concluded this would amount to ruling on the decision to select from properly ranked and certified candidates. She found the matter non-grievable. The FLRA concluded that the arbitrator's finding that she would have to rule on non-selection from properly certified candidates was not implausible, citing in particular the union's claim regarding the unfair interview that occurred after the rating and ranking of candidates was accomplished. The arbitrator found that the grievance was not substantively arbitrable because it was barred by Article 33. C (11) of the parties' agreement. The Authority stated that for an arbitrator's award to be found deficient as failing to draw its essence from a collective bargaining agreement, it must be established that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purpose of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. The Authority and the courts defer to

arbitrators in this context "*because it is the arbitrator's constructions of the agreement for which the parties have bargained*." The grievance here alleged that the disputed promotions were "*unfair*" and in particular, according to the arbitrator, the Union argued that "*the scoring of the candidates in the selection process was unfair.*" The arbitrator found that in order to determine if the promotions were "*unfair*", she would have to investigate the circumstances involving those selected and not selected for promotion. This would result in an examination of the personnel action that led to the non-selection "*from a group of properly ranked and certified candidates*" within the context of the grievance procedure. The arbitrator's finding in this regard is supported by the Union's contention concerning the interview scores, which would have been received subsequent to the ranking and certification of candidates. Based on this, the arbitrator concluded that the grievance was excluded from the scope of the parties' grievance procedure pursuant to Article 33 C (11). The Authority concluded that the Union has not demonstrated that the arbitrator's conclusion that the particular grievance involved in this case is not substantively arbitrable manifests a disregard of the parties' agreement or is implausible, irrational, or unfounded. Nothing in the award indicates that the arbitrator, as the Union asserts, interpreted the phrase "*non-selection for promotion*" as excluding all grievances over promotion actions. The Authority found that the Union has not shown that the award fails to draw its essence from the parties' agreement and denied the Union's exception to the award.

POSITION OF THE UNION ON ARBITRABILITY:

The Union argues that this grievance is arbitrable. The grievance was based on the actions of management officials inappropriately poisoning the "*best qualified list*" by using criteria in violation of 5 CFR 335.103, 5 U.S.C., the Master Agreement, and the Bureau of Prisons Program Statements. The Agency is utilizing information that resulted in Mr. Smith being improperly ranked and improperly considered in the applicant selection process.

Pursuant to 5 U.S.C. 2302, Prohibited Personnel Practices, and 7106 Section (D) (b) (2) is Program Statement 3000.03, which limits the Agency's job selection criteria to two areas: job performance and knowledge; skills and abilities. Program Statement 3000.02 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*." In this case, the Agency considered ratings of supervisors who were unfamiliar with Mr. Smith. This resulted in violations of 5 U.S.C. 2302, Prohibited Personnel Practices which requires that each candidate for selection will be given the opportunity to compete against other candidates on a level playing field, no candidate having an advantage over another. This undeniably did not happen with Mr. Smith in this selection process. By including inaccurate information about Mr. Smith on his reference check sheet, the Agency effectively removed him from the pool of properly ranked and certified candidates. Although Mr. Smith was considered among the best-qualified applicants for this job announcement when ranked by the OPM, he was never

competitive in the selection process due to poisoning information being included when the selection process returned to the FCC Pollock that caused him to be improperly rated, ranked and certified.

The Union cites in support of its position a decision by Arbitrator Sidney Moreland IV in FMCS Case No. 11-00286-3, *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*. The Union has included this decision in the Attachments to its brief. The arbitrator has read and considered carefully the full arbitration award and finds it applicable to the case before us here. The Union quotes from p. 19 of this decision in its brief. We quote the full paragraph here, from Arbitrator Moreland's decision:

> *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.*

This is the portion of Arbitrator Moreland's award that the Union quotes in its brief. Arbitrator Moreland's discussion continues as follows:

> *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 positions. 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. 7016, 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 prohibited personnel practice (5 U.S.C. 2302 (b) (4) and (6) are the inevitable results.

DECISION ON ARBITRABILITY:

In Arbitrator Moreland's case, the Agency considered an open investigation erroneously instituted against Grievant Bashaw, based on a complaint against another correctional officer with a similar name, Bradshaw. Even when apprised of this error, the Agency did not suspend the investigation. The still open investigation was then used against the selection of Grievant Bashaw for promotion. It was considered after Grievant Bashaw's name was placed on the Best Qualified list. The Agency in that case argued that Article 5, Section c barred the consideration of this grievance. Arbitrator Moreland rejected that argument because of the poisoning of the Best Qualified list by the improper consideration later on in the process.

We have the same situation here. Adam Smith's name was properly placed on the Agency's OPM Best Qualified list. Then there was an addition to the process, a call for Reference Checks. Reference Checks are governed by P3000.03 (Union X 18). *The Purpose and Scope of Reference Checking, as defined by the policy, is: To establish procedures to enable selecting officials to check the references of candidates in the best qualified and/or non-competitive group. The selecting official or designee is authorized to conduct reference checking. Three categories of references may be checked: individuals in the applicant's current or post chain of command; for technical positions, individuals expected to have knowledge of the applicant's technical*

skills (i.e., institutional, regional and/or Central Office counterparts); and; personal and professional references provided by the applicant.
Candidates whose applications will be forwarded to the selecting official (i.e., best qualified candidates and those in the non-competitive group) may be reference checked. For bargaining unit positions, the decision to reference check candidates on one list j(e.g., the best qualified list or non-competitive list) requires that all of the candidates on that list be checked. Once the decision is made to reference check anyone on a list, all candidates on that list must be checked. A Reference Check form is filled out is used to record the results of the reference checking, ensuring that specific ratings are not directly linked to specific references. Each applicant is rated on the following factors of Current Skill/Ability Level:

Administrative Skills (e.g., establishes plans, develops systems and processes, prioritizes and organizes work)
Oral Communication Skills (e.g. fosters open communications, listens, delivers presentations, interpersonal skills, builds relationships, diplomacy)
Written Communication Skills
Technical Expertise
Responsiveness (e.g., commitment to quality, meets expectations and deadlines)
Analytical Ability (e.g., problem solving abilities, sound judgement, ability to analyze issues)
Additional Job Related Questions/comments

The rating categories are:
Not Observed
Below Average
Average
Above Average

For bargaining unit positions, the applicant's reference check form is accessible to the applicant after a selection has been made or the Merit Promotion File is otherwise closed. The reference check forms are maintained in the Merit Promotion File in accordance with established procedures for file retention.

Adam Smith's Reference Check form shows Below Average ratings for Administrative Skills and Oral Communication Skills and Average ratings for Technical Expertise, Responsiveness and Analytical Ability.

Adam Smith's Employee Performance Appraisal for the rating period 04/01/2011 to 03/31/2012 shows an Overall Performance Rating of Excellent. Possible ratings are Unsatisfactory; Minimally Successful; Successful; Excellent; and Outstanding. The inconsistency gives rise to the suspicion that Mr. Smith's Reference Checks were done improperly. We will deal with that question later.

We have included this discussion to draw the analogy between Mr. Brashaw's selection being poisoned during the selection process after he was included on the Best Qualified list, leading to contamination of the entire Best Qualified list as not properly ranked and certified after the contaminating inclusion and Mr. Smith's selection being poisoned by consideration of an erroneous Reference Check rating after he was included on the Best Qualified list. Both of these erroneous inclusions contaminated the entire list, as found by Arbitrator Moreland. Therefore, the grievance is no longer about *nonselection from among a group of properly ranked and certified candidates* because the group is not a group of *properly ranked and certified candidates.* The ranking and certification have been contaminated by the inclusion of improper considerations. Therefore, Article 5, Section c does not apply and this grievance is not excluded from consideration.

Applying Arbitrator Moreland's reasoning to the first question before us, whether or not this grievance is arbitrable. we must find that the inclusion of reference ratings for Mr. Smith that clearly were not properly based on his performance, knowledge, skills and abilities poisoned the ranking of the candidate pool so that the candidates were no longer a group of properly ranked and certified candidates. His reference rating of "Below Average to Average", when Mr. Smith's last yearly rating was "Outstanding", and his quarterly ratings for rating year 2013 were "Excellent to Outstanding", without any defense of this reference rating from the management officials who testified at this hearing or from the selecting official, Warden Martinez, who did not testify, made the selection no longer from a group of properly ranked and certified candidates. So we are not dealing with *nonselection from among a group of properly ranked and certified candidates*, when this was no longer a group of *properly ranked and certified candidates*, because that ranking was contaminated later on in the process. Therefore, the language of Article 5 (c) of the parties' Master Agreement does not apply to this case and this grievance is arbitable.

For the reasons articulated above, we find that this grievance is arbitrable.

ISSUE 2) Did the Agency violate the Collective Bargaining Agreement known as the Master Agreement, statute, or federal regulation, by its non-selection of Adam Smith, the grievant, as a GS-8 Senior Officer Specialist, and if so, what is the remedy?

POSITION OF THE UNION:

The Union argues that Senior Officer Adam Smith would have been promoted to Senior Officer Specialist had the Agency not relied on poisoning reference checks from supervisors that were unfamiliar with his work performance for at least the year prior to the selection of Merit Promotion Certificate POL-2012-0044. Mr. Smith asked Warden Martinez about his non-selection. Mr. Smith testified that the warden told him that he gets his recommendations from Captain Cartrette. Captain Cartrette told him that he gives his recommendations to the Warden based on the reference

checks that are done and that he did not know why Mr. Smith was not selected. Mr. Smith found out that he could get access to his reference check forms. Mr. Smith claims that the Agency relied on reference checks from supervisors that were not familiar with him, which effectively poisoned any chance of his ability to compete for any of the 20 available positions. The Union argues that the Agency is in violation of the Contract and federal regulations when it considered information that poisoned the grievant's ability to properly compete for a promotion. The testimony of Lieutenant Craig Lee and Lieutenant Curtis Jones at the arbitration hearing. supports this argument. Three supervisors were responsible for Mr. Smth's Reference Check: Craig Lee, Captain; Curtis Jones Senior, Lieutenant; and John Gradiska, Captain. They were called by the union to testify at the arbitration hearing. The discussion below is taken from the relevant sections of the transcript of the hearing. (We note that Craig Lee was a Lieutenant at the time of this grievance and is now a Captain. We intend no confusion by using both titles.)

The first to testify was Captain Craig Lee. Captain Lee said that the policy states that you can use somebody as a Reference check in the current chain of command or in the past chain of command. Captain Lee said he did not recall doing a reference check form for Adam Smith for a vacancy announcement in the early part of 2012. When shown the form, Captain Lee identified his name on Adam Smith's reference check form and also the names of John Gradiska and Curtis Jones. Captain Lee testified that he did not recall reviewing Mr. Smith's performance evaluations before he signed the ratings. He does not recall reviewing his knowledge, skills and abilities, although he knows that they are attached in the packet. He said he did not recall how the *below average* rating on administrative skills was determined. He does not recall if it was Captain Gradiska or Lieutenant Lee that provided the information that caused Mr. Smith to be rated *below average* in administrative skills. He did not recall who provided the information to be rated *below average* in oral communication. He did not recall who rated the written communication, technical expertise, responsiveness or analytical ability. Captain Lee recognized the performance log he conducted on Mr. Smith for the first quarter of 2012 in the rating period. He acknowledged that his overall rating of Mr. Smith was *Excellent.* In the category inspects, operates and controls equipment, he rated Mr. Smith *outstanding*. In communication, he rated Mr. Smith *outstanding*. In controls contraband, he rated Mr. Smith *excellent*. In follows security procedures, he rated Mr. Smith *excellent.* Captain Lee said that his hours as Administrative Lieutenant were generally 7:30 to 4. He was on maybe 30 minutes of the morning watch shift. He said that as the Admin Lieutenant, he collected all the paperwork that is generated from the morning watch. Other than that, he did not directly supervise morning watch. Captain Lee acknowledged that he could ask other supervisors what the performance is of an employee, anybody in their chain of command, current or past. Captain Lee said that he had known Mr. Smith for a few years when he did the reference check form on April 25th, 2012. Captain Lee said that he had worked on morning watch seven times total during the relevant period. Captain Lee acknowledged that from March 20, 2011 through June 16, 2012, he only worked on the same shift as Mr. Smith on four days. Lieutenant Draves would have been very

familiar with Mr. Smith since he directly supervised him on a daily basis. Lieutenant Ventura would also be very familiar with Mr. Smith since he worked directly with him on the same shift. Lieutenant Lee acknowledged that he did not supervise any shifts between 7/17/2012 and 12/14/2013.

On cross examination, Lieutenant Lee said that he was in Mr. Smith's current chain of command at the time that he completed the reference check form. Lieutenant Lee also said that the questions on the reference check form are related to the employee's job performance and knowledge, skills and abilities.

On redirect examination, Lieutenant Lee said that he could have put *not observed* in all six of the reference check spots because he only supervised Mr. Smith four times. Lieutenant Lee acknowledged that on the performance log entry he did for the same quarter on Mr. Smith, he gave him three *Excellents* and two *Outstandings*. Lieutenant Lee said that there was not anything that Mr. Smith did earlier that would have made him change those performance evaluation ratings.

On recross examination, Lieutenant Lee said that the quarterly performance ratings do not correspond with the questions asked on the reference check form. The quarterly performance ratings were given August 31st and the assessment confidential reference check was conducted on 4/24/2012. An employee's job performance can vary throughout the quarter. Lieutenant Lee said that he did in fact recommend Mr. Smith for the promotion position.

The second to testify was Lieutenant Curtis Wayne Jones, Senior. Lieutenant Jones said that Lieutenant Lee contacted him and discussed Mr. Smith's current skill abilities level. He does not remember the conversation he had with Lieutenant Lee. He agrees that his name is on the document. He does not recall reviewing Mr. Smith's yearly performance evaluation before he gave any ratings. He does not recall reviewing any performance log entries. He did not have a chance to review any of Mr. Smith's knowledge, skills and abilities. He does not recall giving a rating for Mr. Smith on administrative skills. He does not recall having worked with Mr. Smith so he could say if he concurs or does not concur with the rating. He does not recall working with Mr. Smith enough to say if any of the ratings are accurate or inaccurate. He said that he would see Mr. Smith in Control every now and then when coming in to work. He cannot recall being his first line supervisor where he directly supervised him. The Attendance rosters show that Mr. Smith was working all morning watch. He does not see anywhere where he supervised Mr. Smith.

On cross examination, Lieutenant Jones said that he did in fact recommend Mr. Smith for the promotion position.

On redirect examination, Lieutenant Jones acknowledged that he didn't supervise Mr. Smith for a relatively long period of time and that he didn't base any of his knowledge off of review of performance evaluations. He didn't review any of Mr. Ssmith's KSA's in relation to the vacancy announcement. He didn't just put *not*

observed in all of the columns because he didn't do this form alone. It was a collaborative effort. He could have put *not observed* in all the columns if he did the form alone.

On cross examination, Lieutenant Jones said that there were 36 applicants on the Best Qualified list for the position. He was a Lieutenant at the time, so that would have placed Mr. Smith in his chain of command.

On redirect examination, Lieutenant Jones acknowledged that he could have recused himself from doing the reference check.

The third witness to testify was Captain John Gradiska. Captain Gradiska said that the rating official in performance evaluations is typically the first line supervisor, who would be a Lieutenant. The reviewing official would be the rating official's supervisor, a Captain. If an employee is not performing at an acceptable level, a supervisor would address the performance as it happened. It would be documented as a log entry, a SIL. At the end of the rating period, the rating Lieutenant would take all the quarterly log entries and assign an employee an overall rating for each element of the performance evaluation. Then the reviewing official, the Captain, would look at the 5 elements and either agree with or adjust them. Then they would assign an overall rating to the 5 elements, which would produce the yearly performance evaluation. An *outstanding* employee must be referred to the approving official, who is the warden, to review and approve the rating. They also have to put the *outstanding* employee in for a performance award. An employee rated as *exceeds* can also be put in for performance awards. An employee rated as *successful* can receive performance based awards, but it doesn't happen. Captain Gradiska acknowledged his electronic signature on an evaluation of Mr. Smith by the rating official, Lieutenant Justesen. He rated Mr. Smith overall *exceeds*. According to the performance appraisal, Captain Gradiska acknowledged that he agreed with that rating. He approved the rating. He agreed with Lieutenant Justesen that Mr. Smith be rated *exceeds* in the job element, *supervises inmates*; the job element *inspects, operates, controls equipment*; the job element *controls contraband*; the job element *follows security procedures*; and the job element , *communicates*. The rater made the comment saying, *keep up the solid work*. Captain Gradiska said, *good job* on the rating. So as of March 31, 2012, which is the end of the performance evaluation period, Captain Gradiska acknowledged that he agreed that Mr. Smith was performing at an exceptional level. Captain Gradiska agreed that a reference check form is to provide additional information to the selecting official for a promotion. He agreed that a reference check form should be from a supervisor that is familiar with the employee's current performance level. He agreed that it should be based on the employee's job performance or knowledge, skills and abilities. There can be more than one supervisor providing information on the reference check form. Captain Gradiska said that he can't recall if Lieutenant Lee contacted him for a reference check on Mr. Smith. He can't recall providing information that would cause Mr. Smith to be rated on a reference check form. He can't recall if he had a chance to review any of Mr. Smith's performance evaluations

or performance log entries in relation to the reference check form. He can't recall even though he approved it, the *excellent* rating days earlier from the previous yearly evaluation. He can't recall reviewing Mr. Smith's knowledge, skills and abilities in his promotion packet. The form indicates that Lieutenant Lee contacted him for a reference check form dated April 25, 2012. That is 25 days after the yearly performance evaluation rating period. When asked why, after agreeing on Mr. Smith's yearly evaluation that he was *exceeding expectations* in all categories, 25 days later he would rate him *below average* or *average* in every category, Captain Gradiska responded, *I don't know*. Captain Gradiska said that he didn't fill out the form.

On cross examination, Captain Gradiska said that he approved Mr. Smith's overall rating of *exceeds* for the rating year on May 16, 2012. Lieutenant Justesen completed his overall rating of Mr. Smith on May 16, 2012. Mr. Smith received an overall rating of *exceeds.* The yearly rating is for the entire year. Captain Gradiska said that he recommended Mr. Smith for the promotion position.

On redirect examination, Captain Gradiska said that if he has a Lieutenant that's not necessarily familiar with the employee and he is asked to give a reference on a reference check form, he does not believe that he is qualified to give the information provided to rate somebody.

The testimony reported above is taken directly from the transcript of the hearing.

We turn now to the Union's brief. The Union argues that its allegation that the Agency relied on reference checks from supervisors that were unfamiliar with Mr. Smith, which effectively poisoned any chance of his ability to compete for any of the 20 available positions, absolutely hold merit considering the testimony of both Lieutenant Craig Lee and Lieutenant Curtis Jones. Lieutenant Lee alleges that he had some contact with the grievant as the Administrative Lieutenant by collecting his paperwork. This supposition proves to be false as it was discovered after the fact that the Evening Watch Lieutenant collects all of the daily paperwork within Correctional Services and then forwards it to the Captain's Secretary for retention and disbursement. Once having established that the first line supervisors involved in the reference checking process had extremely limited to zero familiarity at all with the grievant during the previous 12 month period, the Union relies on the Contract, policy and statutes to further its claim of wrongdoing by the Agency for non-selection of the grievant. Taking the relevant parts of 5 U.S. Code 2302 (see Relevant Provisions, above, pages 3 and 4) and the Contract language of Article 5, Section c (see Relevant Provisions, above, page 2, and Program Statement 3000.03 in pertinent part (see Relevant Provisions, above, pages 4 and 5), the Union argues that it is clear that the Agency willfully chose to ignore its statutory obligation to conduct reference checking in a fair and unbiased manner. The Agency chose to take into consideration only supervisors that were unfamiliar with the grievant's performance and K.SA's.

In its brief, the Union reiterates that Lieutenant Craig Lee had only been on the same shift with the grievant 4 times during the previous year. The Union says that a rational individual would rely on other means of information to provide a fair reference check. Lieutenant Lee did not. He did not review the grievant's performance evaluations. Lieutenant Lee could have obtained the information necessary to provide a fair reference check if he had asked the supervisors that had worked with and were familiar with the grievant. He needed only to send a quick email or make a phone call. He did not. Lieutenant Lee admitted during testimony that the supervisor that knew the grievant the best should have been providing the reference. While the Agency is technically correct that Lieutenant Lee was in the applicant's current or past chain of command, Lieutenant Lee was so unfamiliar with the grievant that he could not remember the last time that he actually supervised him.

Lieutenant Curtis Jones' inclusion in the people providing a reference for the grievant is even more odd. Lieutenant Jones did not recall having provided information on the grievant's reference check forms. Lieutenant Jones did not recall working with the grievant at all. He did remember recommending the grievant for the position. The Union says that he should not have provided any information on the reference check form because he was unfamiliar with the grievant. Lieutenant Jones did not review either the grievant's performance evaluation or his KSA's. Instead of putting the appropriate *not observed* comment on the form, he was fine with the *average* and *below average* ratings. He could have stopped his involvement in the reference checking process at any point due to his unfamiliarity with the grievant, but he chose not to do so.

Captain John Gradiska also did not recall much of his involvement in rating the grievant. He does admit that 25 days before the reference check was conducted, he agreed that the grievant was an *excellent* employee as indicated by the 2011/2012 yearly performance evaluation. He further said that only supervisors that are familiar with the employee should do the reference check and that the information should be based on the employee's performance and KSA's. He further believes that supervisors who are unfamiliar with an employee should not be included in the reference checking process. Captain Gradiska could not explain why he would rate the grievant *average to below average* on the reference check form even though he had agreed that the grievant was an excellent employee 25 days earlier.

Warden Ricardo Martinez was recognized by the Union as the selecting official at the time of the grievant's non-selection. Warden Martinez has been a witness for the Agency after his retirement from the Bureau of Prisons when it was beneficial to the Agency. He testified in FMCS 13-51552 on May 16/17, 2013, after his retirement. The Agency failed to make an effort to contact Warden Martinez. The Union feels that the arbitrator should draw a negative inference against the Agency for failing to contact Warden Martinez. Moreover, without the deciding official's testimony, any argument presented by the Agency is speculation and must be viewed as an after-the-fact justification (see *Amora v.Postmaster General*, 01994367, 2002). Nobody but

the selecting official, Warden Martinez, can draw a comparison between the applicants or give reasoning as to why he selected the employees for promotion or not. Any information provided by the Agency or the Union is strictly conjecture.

The Union contends that the grievant's performance rating has not been applied to the reference check form. A rating of *Excellent* in his performance ratings 25 days prior to the reference checking clearly means that he would be *above average*.

The Agency erred in its response to the grievance in Joint Exhibit 4. The Agency said: "*The applicant provides a list of personal and professional reference during the application process. Therefore, the cumulative input received from the references provided by Mr. Smith resulted in a rating of "Below Average to Average". For the above noted reasons, your grievance is substantively denied*." However, the grievant listed Lieutenant James Draves and Lieutenant Bobby Ventura as his personal and professional references. Both Lieutenants were part of the grievant's current and past chain of command and were very familiar with the grievant. For an unknown reason, the Agency decided to use the references of supervisors that had not interacted with the grievant on any significant level the prior year to selection.

The Union notes that the grievant was a GS-7 Step 6, Senior Officer with the BOP that had over 8 years of experience at the time of his non-selection. A Senior Officer is a career ladder position that is non-competitive. The progression of this position is: Correctional Officer GS-5 (1 year), Correctional Officer GS-6 (1 year), and Senior Officer GS-7. The Senior Officer position is the highest grade (GS-7) of the career ladder for a Correctional Officer. Mr. Smith remained at this position until he was promoted to a higher graded position, Senior Officer Specialist, GS-8, in December 2013.

There are 10 steps for the grades of employees. These steps allow for a higher wage for the employee as they advance through their career. Advancement through the steps is based on time within grade and performance. A highly rated employee can be considered for performance awards such as a Quality Step Increase (QSI). A QSI allows the employee to advance through the grade steps at a quicker pace.

The grievant would have been promoted to a GS-8 Step 7 in April 2012. In June of 2012, he received a QSI, which would have moved him to a GS-8 Step 8. Three years after the original promotion date of April 25, 2012, the grievant would have been due another step increase, which would have made him a GS-8 Step 9 on April 25, 2015. The grievant is currently a GS-8 Step 7. The difference between what the grievant is currently earning as a GS-8 Step 7 and what he would have been earning as a GS-8 Step 9 with the promotion is $2,922 yearly or $1.60 an hour.

The Union concludes that the facts brought forth here in testimony and evidence reveals numerous errors by the Agency, which both individually and collectively constitute a violation of 5 U.S.C. 2302, prohibited personnel practice. Specifically, the selecting official considered information concerning the grievant that was factually

incorrect, thus eliminating him from a level playing field with the other applicants in the selection process. The Agency's elimination of the grievant being competitive in the selection process violates sections (b)(2)(4) and (6) of the prohibited personnel practice statute. (see Relevant Provisions, above, page 4.) The Agency representatives also admitted during testimony to not having worked with the grievant for any significant amount of time for the prior year before the non-selection of the grievant and not having reviewed any documentation about the applicant's performance or KSA's. The Agency representative acknowledged that only familiar supervisors should have been providing reference checks on the grievant.

The Union quotes from Arbitrator Moreland's decision (FMCS 11-00286-3), substituting the relevant improper consideration in our case (false statements of the Agency's supervisors on a reference check form) for the improper consideration in Arbitrator Moreland's case (consideration of an erroneous open investigation):

> *The negotiated program statement, federal regulation, and the parallel Contract provisions cited herein mandate that "procedure for promoting employees are based on merit and are available in writing to candidates" and that "actions under a promotion plan…shall be based solely on job related criteria." (see CFR 335.103 (b) (l), 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* (in Mr. Smith's case, consideration of false statement of the Agency's supervisors on a reference check form) *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*.

REMEDY REQUESTED BY UNION:

The Union seeks as remedy that the Agency make the grievant whole in accordance with the Federal Back Pay Act. The Agency's conduct (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." Nothing in the remedy would disturb the promotions previously made by the Agency. 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. He is therefore "*entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect…an amount equal to all or any part of the pay, allowances, or differentials…which the employee normally would have earned or received during the period if the personnel action had not occurred…*" He is also entitled to statutory interest.

The Union argues that it has shown that the grievant was subjected to an unjustified or unwarranted personnel action (Prohibited Personnel Practice). A violation of the parties' agreement also constitutes an unjustified or unwarranted personnel action (*U.S. Dept. of the Treasury, Internal Revenue Service, St. Louis, Missouri, 67 FLRA 101, 105*). The grievant was subject to two violations of the Master Agreement: 1) The right to be treated fairly and equitably in all aspect of personnel management (Article 6, Section (b)(2); and 2)To be included in a pool of qualified applicants (Article 5, Section (c). In this case, a pool of "best qualified applicants."

Employees are to be treated fairly and equitably. This is an overarching concept to be applied to all actions and interaction between the Agency and bargaining unit employees. Evidence in this case indicates that the grievant was not subject to fair and equitable treatment. The record shows that the grievant was not able to compete for the position in question, as were the other applicants. Therefore, the Agency committed an unjustified and unwarranted personnel action by failing to treat the grievant fairly and equitably during the selection process.

The Union requests the following remedies:

1. The grievant receive a retroactive promotion to Senior Officer Specialist reaching back to April 25, 2012.
2. The grievant receive full back pay with interest in accordance with the Back Pay Act.
3. The Arbitrator maintain jurisdiction over this proceeding until all parties are made whole in their entirety.

POSITION OF THE AGENCY:

The Agency made an Opening Statement and submitted a brief and a citation, but called no witnesses. The Agency cross examined the witnesses called by the Union. The Agency argued adamantly that this case is not arbitrable because of the language of Article 5, Section (c). We have reported and discussed those arguments in the section on arbitrability above. We turn here to the Agency's position on the merits.

The Agency says in its brief that the Union alleges that Mr. Smith's non-selection was the result of a Prohibited Personnel Practice under 5 U.S.C. 2302 (b) (2) and (4) (see Relevant Provisions, above, page 4). The Agency argues that Section 2302(b)(2) prohibits solicitation or consideration of recommendations based on political considerations, and was intended to prevent the use of improper influence to obtain a position or promotion (*Acting Special Counsel v. Sullivan, 6 M.S.P.R. 526 (1981*). Therefore, under Section 2302(b) (2), recommendations for any personnel action must be based on "*the personal knowledge or records of the person furnishing it*", and consist of either "*an evaluation of the work, performance, ability, aptitude, or qualifications of such individual*" or "*an evaluation of the character, loyalty, or suitability of such individual*." The Union infers that Mr. Smith's responses to the knowledge, skills, and abilities (KSA) questions and/or his performance evaluation should have been reviewed and considered as part of the reference checking process. However, as stated in the Merit Promotion Plan and confirmed by Mr. Logan during his testimony, applicants' KSA responses and their performance evaluation are reviewed and considered during the rating and ranking process to determine the Best Qualified list. The categories and their descriptions listed on the reference check form do not necessarily correlate to the job elements and their descriptions used for performance evaluations. The categories and questions listed on the reference check form are not necessarily intended to be a review of an applicant's overall performance but are rather an assessment of, in the opinion of the references contacted, the employee's ability and/or aptitude for the position to which they have applied, based upon their experience. Lieutenant Lee testified he had known Mr. Smith for a few years and had worked the same shift as him on occasion. Though unable to recall how the assessment of Mr. Smith was determined during the reference checking process, Lieutenant Lee indicated that as the Administrative Lieutenant working the day watch shift, he could assess the work of employees assigned to the morning watch shift, such as Mr. Smith, based upon a review of paperwork completed by such employees in the performance of their duties. Furthermore, while Lieutenant Jones was unable to accurately recall working with Mr. Smith, the Union conceded that he had at least a limited knowledge of Mr. Smith. Lieutenant Lee, Lieutenant Jones and Captain Gradiska all testified that they could not recall whether they had reviewed Mr. Smith's performance evaluation nor how the assessments on Mr. Smith's reference check form were determined. Yet, the Union has failed to prove that the assessment of Mr. Smith conducted by Lieutenant Lee, Lieutenant Jones, and Captain Gradiska during the reference checking process was based on anything other than the criteria established in 5 U.S.C 2302 (b) (2).

Under Section 2302 (b) (4),it is a prohibited personnel practice to deceive or willfully obstruct any person with respect to such person's right to compete for employment. As indicated by Lieutenant Lee and confirmed by Lieutenant Jones, the reference checking process was a collaborative effort. In accordance with Program Statement 3000.03, Chapter 3, page 50, the reference check form records the summary of the reference checking results; thus the assessment provided under each category cannot be directly linked to any specific supervisor. Lieutenant Lee,

Lieutenant Jones and Captain Gradiska all testified that they could not recall which supervisors provided the information nor how the assessments on Mr. Smith's reference check form were determined. However, both Lieutenant Lee and Lieutenant Jones testified that Mr. Smith was, in fact, recommended for promotion. Both Lieutenant Jones and Captain Gradiska denied any willful intent to deceive the Agency in an effort to obstruct Mr. Smith from being promoted. The Union has failed to prove that the supervisors, either individually or collectively, intentionally misconstrued Mr. Smith's ability or aptitude during the reference checking process in an effort to prevent him from being considered for promotion.

The Union claims that the information on Mr. Smith's reference check form wasn't job-related criteria, and that it was used as a major factor for his non-selection, in violation of 5 U.S.C.7116 (a) (5 & 7). The Agency's negotiated written policy, PS 3000.03, Section 335.7 – Reference checking, defining APPROPRIATE AREAS OF INQUIRY is available in writing to all Merit Promotion candidates within the Bureau of Prisons via the intranet portal. The inclusion of this attachment as part of the parties' negotiated written policy clearly supports the Union's tacit acknowledgement, agreement, and approval that the categories/questions contained therein are appropriate job-related areas of inquiry, and thus may be considered during the selection process. Even assuming arguendo that the information was erroneous, there is no evidence in the record to support that Warden Martinez, the selecting official, was aware of such nor that the reference check form was improperly considered by the selecting official. No negative inference should be taken due to Warden Martinez' absence from the hearing, as there is nothing in the parties' Master Agreement that requires the Agency to produce retired staff nor can the Agency compel retirees to attend arbitration hearings. Management has broad discretion under 5 U.S.C. 7106 to select or not select from a group of qualified applicants.

The Agency further argues that the Union's request for a retroactive promotion with backpay is not a proper remedy. As indicated in the Merit Promotion Plan, ranking of applicants occurs prior to the creation of the Best Qualified list. The Union has offered nothing more than conclusory statements that the Agency reopened the ranking system by conducting reference checks, and that Mr. Smith's non-selection was based on the information provided on his reference check form. The evidence does not support these claims. There is one applicant who was assessed by the same three supervisors as Mr. Smith during the reference checking process. A review of that applicant's reference check form shows that he was assessed as Below Average in four categories and Average in two and was not recommended for the position. According to the Union's assertions, the information provided on that applicant's reference check form would have resulted in him being re-ranked to the bottom of the BQ list and disqualified from consideration for the position. However, that applicant was among the first group of applicants selected for promotion by Warden Martinez. Seven other applicants were listed as Average across the board on their respective reference check forms, yet were selected for promotion over five other applicants who were listed as Average to Above-Average

on their respective reference check forms. (Please note that to preserve the confidentiality of the reference check process, the arbitrator has not identified these applicants by name, but the Agency does so in its brief.) This evidence would indicate that, contrary to the Union's assertions, the information provided on the reference check forms did not result in a re-ranking of the applicants and did not play a significant factor in the selecting official's decision. Therefore, there is no evidence that Mr. Smith would have been promoted absent the Agency's alleged action.

The Agency concludes that all the complaints in this grievance flow from Mr. Smith's non-selection from among a group of properly ranked and certified candidates, in violation of Article 5 (c), Article 33, the parties' Merit Promotion Plan, and 5 C.F.R. 335.103. The arbitrator should dismiss the grievance as substantively defective.

As for the merits, Mr. Smith was not obstructed from competing because he did in fact apply for the promotion and was properly rated, ranked, and placed on the certified BQ list. Mr. Smith was able to compete on the same playing field as everyone else and because of this he made the BQ list. Reference checking was conducted on all candidates on the BQ list in a consistent manner in accordance with negotiated policy. Mr. Smith was then considered for a promotion, as everyone else on the BQ list was, but was ultimately not selected for the promotion. The evidence indicates that Mr. Smith's reference check form was not a major factor for his non-selection for promotion, and that the Agency did not violate relevant statutes or the Master Agreement during the selection process. If not dismissed, the Agency requests that the grievance be denied.

DISCUSSION:

There is no evidence in this record about the role that the reference checking played in the selection process. The Agency has no basis on which to claim that Mr. Smith's reference check form was not a major factor for his non-selection for promotion. The selecting official, Warden Martinez, retired, made no statement for the record and did not appear or testify by phone at the arbitration hearing. There is no information at all in the record as to how Warden Martinez made his selections or why Mr. Smith was not selected. Therefore, we cannot credit as fact that Mr. Smith's reference check form was not a major factor in his non-selection for promotion.

The Union provided ample proof that Mr. Smith's reference check was not done properly. None of the three men involved in the reference check, Lieutenant Lee, Lieutenant Jones and Captain Gradiska, could explain how they arrived at Mr. Smith's *Below Average* and *Average* scores. None of them remembered actively supervising him. None of them remembered asking those who actively supervised him for information. None of them remembered checking his performance evaluations, which Captain Gradiska had just signed as *Excellent*, or his knowledge,

skills and abilities. None of them could explain how they arrived at his scores, which were inconsistent with everything else in his record, including the just completed yearly performance evaluation and the quarterly evaluations. One can only speculate that either they assigned the scores without seriously considering the factors or that the scores were influenced by some unidentified and impermissible consideration. Either way, we find that the Union has borne its burden to prove that Mr. Smith's reference check was not done fairly. It did not consider his job performance or knowledge, skills and abilities, which are the Agency's permissible job selection criteria. The raters did not consult supervisors who were familiar with his performance. The raters themselves were not familiar with his performance. Therefore, the Agency considered information concerning the grievant that was factually incorrect. By considering this information, the grievant was made non-competitive in the selection process, in violation of sections (b) (2) (4) and (6) of the prohibited personnel practice statute, 5 U.S.C. 2302. Moreover, the Best Qualified list provided to the FCC by the OPM now no longer provided a properly ranked pool of candidates. The Best Qualified list was contaminated by clearly erroneous reference check ratings for Mr. Smith. We emphasize again that nowhere in this record has the Agency provided any defense of the *Below Average* and *Average* ratings or any explanation of why they were not erroneous. We must find that the evidence in the record does establish that they were erroneous because they were made by supervisors who had no personal knowledge of Mr. Smith's qualifications and made no attempt to question anybody who did have such knowledge. They ignored the knowledge that they should have had about his excellent performance evaluations. There is also no evidence in this record, although the Agency so asserts, that the selecting official, Warden Martinez, did not consider the erroneous reference check in not selecting Mr. Smith for one of the twenty promotion positions. We have been provided no reason to doubt that the erroneous reference check scores played a role in Mr. Smith's non-selection, in violation of 5 U.S.C. 2302 and Program Statement 3000.03, Section 335.7 and 5 C.F.R. 335.103. Moreover, Article 5, Section (c), is not relevant because the contamination of the Best Qualified list means that we are not dealing with non-selection from among a group of properly ranked and certified candidates. The candidates were not properly ranked and certified at the time that selections were made from a list including Mr. Smith's erroneous reference check. As Arbitrator Moreland said: *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.*

We want to comment briefly on why our conclusion here differs from that of Arbitrator Janet C. Goulet, whose decision in *American Federation of Government Employees, Local 1658 and U.S. Army Department of the Army, Army Tank-Automotive and Armaments Command, Warren, Michigan*, was upheld by 61 FLRA 80. The Agency proffered the FLRA decision for our consideration as an attachment to its brief. The arbitrator in that case found that the grievance concerning an allegedly unfair promotion was not arbitrable under a contract provision which excludes grievances over "*non-selection for promotion from a group of properly ranked and certified candidates*." The arbitrator determined that she would be required to examine the circumstances of those selected and not selected. She concluded this would amount to ruling on the decision to select from properly ranked and certified candidates. She had no authority to perform the functions of the selecting official. She found the matter non-grievable. The FLRA upheld her decision, finding that it was not implausible, did not manifest a disregard of the parties' agreement, and was not irrational or unfounded. Our case here differs from the case before Arbitrator C. Goulet because we have not found that we have to examine the circumstances of those selected and not selected or rule on the decision to select. In our case here we are concerned only with the non-selection of one person, Grievant Adam Smith, and have no reason to direct our attention to the other candidates or to review the selection process as a whole. We need only to concern ourselves with the circumstances of the reference check scores assigned to Adam Smith and their role in his non-selection. We need not concern ourselves with the circumstances of the other candidates. In this, our concerns are more closely aligned with the concerns of Arbitrator Moreland, who also only needed to consider the circumstances of the non-selection of one candidate and the role played in that non-selection by the improper erroneous consideration of an open investigation, which itself was based on a misunderstanding about a name and the failure to correct that misunderstanding when it was clear.

DECISION AND AWARD:

The grievance is sustained. We find that the Agency violated the Collective Bargaining Agreement known as the Master Agreement, statute, and federal regulation, by its non-selection of Adam Smith, the grievant, as a GS-8 Senior Officer Specialist, based on its improper consideration of clearly erroneous reference check scores which contaminated his consideration from the Best Qualified list and contaminated the Best Qualified list itself.

In remedy, we find that:

1) The grievant's promotion to Senior Officer Specialist shall immediately be retroactively dated back to April 25, 2012. He shall be afforded the payments and step increases that he would have received to date if he had been properly promoted as of April 25, 2012.
2) The grievant shall receive full back pay with interest for the difference between the salary he was earning and the salary he should have been

earning, including step increases, had he been properly promoted as of April 25, 2012 in accordance with the Back Pay Act.

3) The grievant shall currently be placed at the grade and step level he would have been at if he had been properly promoted as of April 25, 2012.
4) All payments to make him whole in entirety shall be made no later than the pay period closest to October 1, 2015.
5) The arbitrator retains jurisdiction to deal with any problems that arise in the carrying out of this award until all payments due Mr. Adam Smith are made.

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Louise B. Wolitz, Arbitrator
July 21, 2015