Opinion and Award

In the Matter of

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
Big Spring, Texas

&

Local 3809
American Federation of Government Employees
AFL-CIO

FMCS No. 07-02152

Patrick Halter, Arbitrator

Appearances

For FCI: Ruby Navarro, Lead Labor Relations Specialist

For AFGE: Cathy New, President, Local 3809
Jocelyn A. Stotts, Coplin & Heuer

Dates of Hearing
September 26 & 27, 2007

Post-Hearing Briefs
November 30, 2007

Date of Award
January 28, 2008

Issue
Discharge

Award Summary
Grievance is sustained in part and denied in part.

A hearing in this matter was held before the undersigned with each party afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue its contentions. The grievant was present during the transcribed hearing. There was one (1) joint exhibit, thirteen (13) Agency exhibits and fifteen (15) Union exhibits. The record closed on November 30, 2007, with the filing of timely postmarked post-hearing briefs. The parties agreed to an extension of time for the arbitrator's issuance of the award.

Stipulated Issue

Was the removal of the grievant, Joe Diaz, for falsification of employment documents taken for just and sufficient cause? If so, deny the grievance. If not, what shall be the remedy? [Tr. 10-11]

Stipulated Facts

The Agency and AFGE stipulated that grievant completed all documents and submitted them to the Agency as part of the hiring process. [Tr. 82-83]

Joint Exhibit

Master Agreement

Relevant Contract Language

Article 30 - Disciplinary and Adverse Actions, states in relevant part:

> Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.
>
> Section c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.
>
> Section e.
>
> 1. any notice of proposed disciplinary or adverse action will advise the employee of his/her right to receive the material which is relied upon to support the reasons for the action given in the notice.

Background

On June 8, 2003, Joe J. Diaz (the grievant) submitted an application for the position of correctional officer at FCI-Big Spring. On that date he signed a "Notice to Applicant" that contained the following statements.

He would be interviewed "about...your past and current behavior to help this agency determine your suitability and qualifications for the position" and "it is very important that you be truthful and honest in the interview." The "veracity of many of your responses will be checked...through a detailed background investigation" and "failure to disclose facts or concealment of information

sought is often more serious...than would be the disclosure of possibly derogatory information." Information obtained from the interview is used "primarily to determine your fitness for Federal employment...includ[ing]...obtaining a security clearance, evaluating qualifications, suitability and loyalty to the U.S. Government." Grievant "read the...statements [in the Notice to Applicant] and...received clarification on any of the items [he] did not understand. [Ag. Exh. 11]

On June 16, 2003, the grievant participated in a pre-employment interview and answered "no" to the following questions:

> B. MILITARY HISTORY
>
> 3. Has the applicant ever received a non-judicial punishment, such as, article 15, company punishment, Captain's Mast, etc.?
>
> E. CRIMINAL AND DRIVING HISTORY
>
> 6. Has the applicant ever committed a misdemeanor or felony?
>
> [Ag. Exh. 4 at 4, 10]

The Agency's representative recorded grievant's answers to the questions in the "Summary of Findings of the Pre-Employment Interview." Section H., Applicant Signature Block, informs grievant that "a false answer to any question on this form or portion thereof may be grounds for not employing you, or for dismissing you after you begin" and "all the information you give will be considered in reviewing your answers and is subject to investigation (18 USC Sec. 1001)." Grievant reviewed the Summary, initialed each page, and signed a certification that "all of the answers and statements made on this form are true, complete and correct to the best of my knowledge and belief, and are made in good faith." [Ag. Exh. 4]

On July 17, 2003, grievant completed a supplemental questionnaire and authorized the Agency to conduct a search in the database of the National Crime Information Center; the database showed that, during the past ten years, grievant had not "received a DWI, a speeding ticket, things like that." [Tr. 98]

On July 23 FCI initiated a request with the Office of Personnel Management (OPM) for a background investigation of grievant; OPM received the Agency's request on July 29 and contracted-out the work to the U.S. Investigative Services (USIS), a private-sector firm.

On August 1, Employee Services Manager (ESM) Michael Cross certified to Warden Haro that grievant had "been selected for employment based upon satisfactory pre-employment screening" and a background investigation had been initiated. [Un. Exh. 13] On August 10 grievant entered on duty as a correctional officer, GS-06, at FCI-Big Spring.

On September 16, 2003, information "obtained by investigator" from the National Personnel Records Center showed that grievant had received a "non-judicial punishment at Camp Pendleton, CA, on 6/5/91 for operating a passenger car while intoxicated on 5/18/91. Punishment was seven days restriction and extra duty." [Un. Exh. 3]

On June 1, 2004, the USIS investigator interviewed grievant at FCI-Big Spring as part of the background investigation. A second interview occurred on October 4, 2004. The investigator prepared unsworn declarations of grievant's interviews; the non-judicial punishment is not memorialized in these interviews.

On October 26, 2004, OPM forwarded a partial investigative report to the Bureau of Prison's (BOP) Security Bureau Investigative Service (SBIS) which is organizationally attached to Personnel. A partial report means that several items remain outstanding for the investigator "to get information on." [Tr. 291] In May 2005 SBIS received the final report.

SBIS's function is to adjudicate discrepancies between grievant's pre-employment responses and the background investigative report. On June 23 and August 2, 2005, Security Specialist Renee Claunch forwarded questions to grievant for a written response on matters concerning an "alleged assault" and "Chrysler Charge Off" or debt for a vehicle. Grievant addressed those matters on July 11 and August 9 and 10. During this process his request for additional time to respond was granted. [Un. Exhs. 5, 6, 7]

On August 15, 2005, Security Specialist Claunch contacted grievant about "one final issue [that] developed during the course of your investigation which must be addressed." Claunch directed grievant to explain and comment on the discrepancy between his "no" answer during the pre-employment interview to the question "has the applicant ever received a non-judicial punishment" and his military record which shows "you received an Article 15 for 'operating a passenger car while intoxicated on 5/18/91.'" [Un. Exh. 8]

The next day (August 16) grievant discussed the issue with Claunch by telephone. Claunch reported grievant as stating that he "did not recall receiving an Article 15, but you did remember you were non-judicially punished by the military after a conviction for [DUI]. You indicated you received seven days restriction and extra duty for this offense." [Un. Exh. 9 at 4]

After the telephone discussion, Claunch sent an e-mail to grievant: "in reference to your request regarding a copy of the information contained within the investigative file, you may obtain the information by writing to the following [OPM] address[.]" [Un. Exh. 9 at 3] Grievant did not request a copy of the OPM investigative file.

On August 18, 2005, grievant responded to the August 15 SBIS' inquiry:

> I went through several old boxes in my garage and found a few documents in regards to my military service...I was informed by my company commander ...of seven days extra duty...for a DUI incident on 5-18-91. I recalled this being extra duty as I stated in our telephone interview, not a Non-Judicial punishment. I do not recall attending court in the matter of an Article 15 of operating a passenger car while intoxicated on 5-18-91. I did not find any document stating that I had been convicted and/or found guilty of an Article 15 for operating a passenger car while intoxicated on 5-18-91...The letter did not state that this was an Article 15...It has always been my belief that the seven days extra duty/restriction, loss of driving privileges on any military facility was a form of discipline. I was unaware I had a conviction of a DUI on my military record and/or driver's license. My driver's license was never revoked nor suspended...I did not remember the seven days of extra duty being a non-judicial punishment.
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> [Un. Exh. 9 at 1]

On August 22 Claunch inquired whether there were sanctions issued by civil law enforcement authority over the 1991 incident and grievant responded on August 26 that civil authority was not involved. [Un. Exh. 10]

In late 2006 ESM Cross received the SBIS' investigative report. [Tr. 186] The "background investigation is a report of what [the investigator] looked at, not necessarily the documents[.]" [Tr. 188-'89] The report contained the document obtained by the investigator on September 16, 2003, that grievant had received a non-judicial punishment.

On July 10, 2006, ESM Cross sent letters to the National Personnel Records Center (Military Records) and Judge Advocates Office seeking verification of grievant's non-judicial punishment. On October 18, 2006, Cross received a copy of grievant's military record "Offenses and Punishments" showing a non-judicial punishment. [Ag. Exhs. 3, 5; Tr. 111-'12, 188]

At some point ESM Cross identified issues for the executive staff to review for a determination of significance or whether the applicant (grievant) "just [forgot] to tell us about, in this case...what the motivation was for that." [Tr. 187] Cross recommended to an Associate Warden that grievant be terminated for falsification of employment documents and he prepared a notice of proposal to remove for signature by grievant's supervisor (Captain Kizziah), dated November 20, 2006, with five specifications under one charge - - "Falsification of Employment Documents." Grievant submitted a written reply dated December 04, 2006, to Warden David G. Justice, the deciding official, and made an oral presentation as well on that date. The Warden discharged the grievant on February 02, 2007. [Ag. Exhs. 7, 8, 9]

AFGE timely and properly invoked arbitration and a hearing ensued on September 26 and 27, 2007. The issue is properly before the arbitrator for a decision on the merits.

Summary of the Agency's Position

Since this grievance is a removal under Chapter 75 of Title 5, U.S. Code, the arbitrator is required to apply the same substantive rules as the Merit Systems Protection Board (MSPB). *Cornelius v. Nutt*, 472 U.S. 648 (1985)(hereinafter referred to as *Cornelius*). The arbitrator is governed by the standards at 5 U.S.C. 7701(c)(1) which includes the harmful error rule at (c)(2). Thus, AFGE must prove that a violation of the Master Agreement (MA) rises to the level of harmful error, e.g., "that it caused substantial harm or prejudice to [grievant's] rights" (5 C.F.R. § 1201.56(c)(3)).

The purpose of the pre-employment "integrity interview" is to determine whether an applicant meets the Agency's suitability guidelines and for the applicant to disclose information which, if known by the inmates, could be used by them to manipulate the correctional officer. Sorting through inmates' accusations to ascertain the truth is critical in responding to their lawsuits while sustaining the Agency's 24/7 operations.

Grievant is held to a higher standard of conduct as a law enforcement official. *Friedrick v. Department of Justice*, 52 MSPR 126 (1991). His falsification of employment documents (1) fails to uphold the Agency's core values of honesty and integrity which must be maintained at all times given FCI's mission and (2) compromises the safety of the institution and pierces the integrity of the employer-employee relationship. *Futrell v. Department of Justice*, 57 MSPR 640 (1993); *DeLessio v. U.S. Postal Service*, 33 MSPR 517, 421 *aff'd*, 837 F.2d 1096 (Fed. Cir. 1987); and *Pichot v. Department of Justice*, 29 MSPR 477 (1985).

Grievant's falsification of information was motivated by his intentional non-disclosure on questions 3 and 6 which enabled him to gain employment. By a preponderance of evidence FCI can prove that grievant knowingly submitted incorrect information with the intent to defraud the Agency. *Naekel v. Department of Transportation*, 782 F.2d 975 (Fed. Cir. 1986) and *Dogar v. Department of Defense*, 95 MSPR 52 (2003), *aff'd*, 128 Fed. Appx. 156 (Fed. Cir. 2005). His intent can be shown by circumstantial or direct evidence based on the totality of circumstances. *Deskin v. U.S. Postal Service*, 76 MSPR 505 (1977).

In grievant's oral reply to the notice of proposal to remove, he acknowledged the Article 15 and DUI but claimed he did not intentionally falsify his responses because he forgot about the non-judicial punishment. In his written reply grievant acknowledges the DUI: "At the time of my interview on June 2003, I did not remember having received a DUI in the military back in 1991, of which I received seven days of extra duty, which was considered a non-judicial punishment." [Tr. 120-'21, 184-'85; Ag. Exhs. 8, 12]

During his oral presentation to the Warden, grievant did not claim he misunderstood or failed to comprehend the question about non-judicial punishment or that he forgot about the Article 15. He testified, however, that he did not understand the question about the DUI, Article 15, non-judicial punishment and Captain's Mast. Notwithstanding his testimony, grievant never sought clarification of the interview question prior to (i) answering it, (ii) reviewing the interview document for completeness and accuracy, (iii) initialing each page of that document, and (iv) attesting to the truthfulness of his answer with his signature. [Tr. 164-'65]

Grievant's claim that he forgot or could not remember the military discipline (extra duty) and DUI is not persuasive. The incident occurred when a 22-year old grievant was beginning his employment history. The Agency's expert witness Steven Simon and ESM Cross testified that standing before your commanding officer is not readily forgotten. The military process provided grievant, if he chose, legal counsel to adjudicate the DUI through the court martial process but grievant declined to adjudicate the issue and accepted the discipline. Given this military context, grievant's testimony is indicative of his intent to conceal derogatory information.

His explanation is not plausible. For example, grievant testified that he told the investigator about the DUI during his June 2004 interview but the OPM report does not mention it. In subsequent testimony he backtracks by stating "maybe I didn't [mention it]." [Tr. 159-'60, 179; Ag. Exh. 10] Grievant also testified that he forgot about the DUI when Security Specialist Claunch asked him about it in August 2005. Thus, in June 2004 he remembered the DUI but by August 2005 he forgot about it. Not only does grievant claim to recall in June 2004 but forget in August 2005, he offers a farfetched explanation of the details of the May 1991 incident leading to the DUI citation.

As motive of revenge or punishment to grievant, he claims that the woman in the vehicle was the spouse of the military police officer who issued the DUI citation. In response to how he obtained possession of the citation, grievant testified initially that it was given to him by the military police officer and grievant gave the citation to his company commander. Then he testified that it was mailed to him and, later on in testimony, asserted it was mailed to his company commander who gave it to the grievant. [Tr. 123-'29, 173] None of these details were provided to the Warden by grievant in his responses to the notice of removal.

Although the Union asserts that grievant cooperated fully during the background investigation and SBIS adjudication, the record does not support that assertion. The first time Security Specialist Claunch saw a copy of the DUI citation was at the arbitration hearing; grievant did not disclose the memorandum on "extra duties result[ing] from non-judicial proceedings" until the

hearing. AFGE notes that Claunch did not request documents in her August 15, 2005, e-mail about non-judicial punishment; however, the citation and memorandum were in his possession and failure to disclose them shows intent to conceal and deceive. [Un. Exhs. 1, 15] If grievant had disclosed the memorandum, then ESM Cross would not have sent the letters to the records center and military on July 10, 2006. [Tr. 147, 205-'07, 282-'95]

As for the Union's request for the entire OPM file, BOP states that AFGE would have to request it from OPM under the Freedom of Information Act or file a grievance or unfair labor practice charge. In this regard, grievant was notified by SBIS in August 2005 of his right to obtain a copy of the investigative file from OPM but he did not request it. [Tr. 196, 263-'64, 284] AFGE "didn't get [the background file] because that wasn't relevant to the document that he lied on." [Tr. 69] As for the SBIS file, those documents were not included in the disciplinary file which is the file with documents relied upon by the Agency in its termination of grievant.

In response to the Union's argument that the Agency's decision to pursue only two of the five specifications in the notice of proposal to remove shows that the Agency has insufficient evidence of falsification, the Agency is not required to prove all the facts that it alleges in support of its charge. "[W]here more than one event or factual specification is set out to support a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge." *Burroughs v. Department of the Army,* 918 F.2d 170, 172 (Fed. Cir. 1990).

Once the Agency concluded that grievant falsified employment documents, it considered relevant factors in determining a reasonable penalty. *Douglas v. Veterans Administration*, 5 MSPR 280 (1981)(hereinafter referred to as *Douglas*). The Warden considered the (i) seriousness of the situation, (ii) type of position held, (iii) need for integrity, (iv) time with the Agency, (v) good work record, (vi) consistency of penalty for similar misconduct and (vii) adverse action within the Agency's table of penalties in the Employee Code of Conduct. Since an agency is permitted wide discretion in controlling work-related conduct of employees charged with maintaining the integrity of the prison system, the Warden exercised his discretion and selected discharge as the penalty. *Todd v. Department of Justice*, 71 MSPR 326 (1996).

The arbitrator stands in lieu of MSPB to determine only if the Agency considered all relevant factors and exercised its management discretion within the tolerable limits of reasonableness rather than deciding what the penalty should be. *LaChance v. Devall*, 178 F.3d 1246 (Fed. Cir. 1999). Discharge does not exceed the maximum limits of reasonableness.

As for the Union's contention that FCI intentionally delayed the investigation such that three years between the integrity interview and discharge is too long and shows bad faith, that length of time was consumed by the OPM investigation (which the Agency cannot control) and the SBIS' adjudication. Once SBIS received OPM's final report in June 2005, it sorted through the issues with grievant and extended, at grievant's request, the time period for his responses.

When ESM Cross received the SBIS report, he sought confirmation of the statement in the report that grievant had received an Article 15. Verification was obtained in October 2006; the military record was needed as evidence because grievant was no longer in a probationary status. There was no intentional delay and the extended time for the investigation benefited grievant in that he remained gainfully employed. If grievant had provided a copy of the citation and memorandum on non-judicial proceedings in August 2005, then he would have been terminated prior to February 2007. [Br. at 14]

An applicant who discloses during the pre-employment process that he or she had a DUI or committed a misdemeanor is not automatically excluded from consideration for employment with the Agency. The important item is disclosure during the integrity interview which grievant intentionally failed to do and, as a result, the Agency lost trust in grievant and the employer-employee relationship was severed. The Agency complied with the MA and law; there is just and sufficient cause to remove the grievant. The grievance should be denied and the removal upheld.

Summary of the Union's Position

There is no just cause to discharge the grievant because he did not intentionally provide false information or show a reckless disregard for the truth. The 1991 DUI citation occurred 12 years prior to his applying for a job with FCI. When he signed the military document "Offenses and Punishments" in June 1991, grievant did not know or understand its terms and he did not recall the citation as non-judicial punishment during his pre-employment interview in June 2003. Following his honorable discharge in 1994, he had no reason to review military records in his possession.

Grievant testified that he understood non-judicial punishment to be a "reduction in rank, loss of pay" but not extra duty. [Tr. 70, 74, 126-'27] Grievant answered "no" to the question because he did not know what a non-judicial punishment was or Captain's Mast or Article 15; he never asked for clarification. [Tr. 164-'65] OPM investigated this issue between June and October 2004; the case was cleared when OPM reported there was nothing in grievant's "background, conduct or lifestyle that would raise questions about his overall suitability to hold a position of public trust." [Tr. 193-'94]

Not until August 15, 2005, did SBIS inquire about the non-judicial punishment and it did not request any documents on this issue although it had on other issues. Grievant complied with SBIS' request for an explanation. After Security Specialist Claunch contacted him on August 15, grievant and Claunch discussed the issue by telephone the next day. Grievant stated he did not recall receiving an Article 15 but he did recall seven extra duty days. Grievant followed that discussion with a written memorandum on August 18 to "clarify any misunderstanding." By that date grievant had uncovered military documents in his possession and provided copies of the citation and memorandum showing extra duties resulting from non-judicial punishment. [Tr. 131, 178-'79, 282; Un. Exhs. 1, 9, 15]

SBIS never contacted grievant after August 26, 2005, and no one from human resources ever contacted him. Thus grievant had no reason to believe that further action was forthcoming yet he received the notice of proposal to remove in November 2006. By the time grievant was notified of his discharge on February 2, 2007, he had successfully completed his probationary period and was a career federal employee with an exceptional performance record and recipient of awards.

Not every minor, unintentional or distant in time falsification of an application justifies removal. *Klein v. Department of Labor*, 6 MSPR 292 (1981). Incorrect information standing alone does not establish intent; grievant's plausible explanations must be considered within the totality of circumstances. *Blake v. Department of Justice*, 81 MSPR 394 (1999). He answered "no" to question 3 under Military History because he did not think he had a non-judicial punishment, company punishment, Captain's Mast or Article 15 on his military record. Grievant thought he had been disciplined; he did not know that extra duty and restriction to barracks was an Article 15. [Tr. 125, 132-34]

Besides having no evidence to support its discharge of grievant, the Agency committed harmful error in its procedures and engaged in prohibited personnel practices. Pursuant to *Cornelius*, the Agency's decision cannot be sustained where harmful error is shown in the application of the procedures used in the decision to remove.

Under 5 U.S.C. § 7121, a grievance procedure must be "fair and simple" and the Preamble in the MA provides that the Agency "will develop and maintain constructive and cooperative relationships with its employees, through their exclusive representative" and the parties agreed "to focus on problems and ways to deal with them" such that, under Article 6, Rights of the Employee, at § b.2, an employee is "to be treated fairly and equitably in all aspects of personnel management." [Jt. Exh. 1]

Under Article 17, Employee Personnel Files, § b, grievant's "personnel records will be made available to the employee [or employee representative], upon request...except for those matters prohibited by applicable laws and regulations." AFGE received grievant's local personnel and evaluation files as well as four pages from OPM's report and the military record obtained by the Agency in October 2006 about the non-judicial punishment.

Although the Union requested the entire OPM and SBIS files in its capacity as exclusive representative set forth at § a of Article 1, Recognition, FCI did not provide them because it claimed the SBIS file was part of the OPM file and could not be disclosed. [Tr. 264-'66] FCI's action served to deny the Union relevant documents necessary for it to fully develop its representation of grievant. Without the entire OPM and SBIS files, the Union cannot ascertain steps initiated by the Agency, OPM and\or SBIS after they became aware on September 16, 2003, of grievant's non-judicial punishment. [Un. Exh. 3]

The Union also "believes the Agency did not provide a memorandum" by Security Specialist Claunch that contains "the conclusion of her investigation." [Br. at 9] In a MSPB proceeding involving the termination of a probationary employee investigated by SBIS, the tab file contains a memorandum from the SBIS' investigator summarizing the derogatory information with findings. No such memorandum or similar document was provided to the Union in this case and, without it, the Union cannot determine its relevancy. AFGE asserts that the document does not support the Agency's case and is supportive of the Union's position; it seeks an adverse inference against BOP for failure to provide documents and for the arbitrator to find harmful error.

In addition to harmful error caused by the Agency's failure to disclose documents, harmful error arises with the Agency's failure to investigate whether grievant was intoxicated in May 1991. The Agency concluded he was intoxicated based on the citation and, from that conclusion, it determined he had committed a misdemeanor. SBIS' Claunch did not inquire about this item with grievant; the reasonable conclusion is that she did not consider it significant. The Agency's failure to investigate the DUI prior to charging him with falsification violated grievant's right to due process under the Fifth Amendment.

In this regard, grievant testified that military discipline was not a criminal proceeding and not a misdemeanor. He never committed a misdemeanor because he was not found guilty of a DUI and never admitted to the DUI because he was not intoxicated. [Tr. 128, 178] The Agency's expert witness (Steven R. Simon) acknowledged that grievant's non-judicial punishment was not an admission of guilt and not a federal conviction. [Tr. 31, 34, 59]

Other acts rising to harmful error are (1) denying repeated requests for a complete copy of the investigative file; (2) failure to mitigate the penalty by not including grievant's performance appraisals and awards in the disciplinary file thereby negating the possibility of progressive discipline as required under the MA; (3) arbitrarily imposing discipline by the Warden who controlled the investigative process by directing a new captain to execute the notice of proposal to remove without seeking the captain's recommendation and directing ESM Cross to seek additional information after the SBIS and OPM investigations were completed; (4) "causing the initial pre-employment interview questions to continually undergo a metamorphous process"; and (5) delaying grievant's removal for over three years. [Br. at 10-11]

The Agency failed to show that grievant's intent was to deceive or mislead the Agency. *Forma v. Department of Justice*, 57 MSPR 97 (1993). To prove intent, the Agency relies on the testimony of ESM Cross who concluded, based on his assumptions derived from his military experience, that the DUI incident could not be readily or easily forgotten by grievant who was a 22-year old corporal in his "first big job...before the company commander...Article 15 is a big thing in the military...everybody knows that driving under the influence is against the law...[DUI] happens to be a misdemeanor, so he did commit a misdemeanor by driving under the influence. [Tr. 213-'14]

Warden Justice received an Article 15 while in the military. Based on his military experience, the Warden assumed, in reaching his decision to discharge grievant, that everyone remembers a non-judicial punishment although he did not know the term for it in the Marine Corps. During the termination meeting, Warden Justice could not explain how he concluded that grievant had intentionally falsified information and referred to unspecified documents in the file as proof that grievant had lied. [Tr. 222, 234]

The totality of testimony and documents shows that grievant did not conceal his background. He answered one question incorrectly among the hundreds posed to him in writing and orally; grievant has not damaged the Agency's integrity. Pursuant to 5 C.F.R. § 752.203, the Agency is limited to materials it relied upon to terminate grievant in establishing its proof. BOP's case is based on assumptions and flowery language but it lacks evidence of intent to deceive. BOP's failure to consider progressive discipline as required under the MA reflects an inflexible position as summarized by its advocate:

> What we took action on, we took the action on. And it was because he lied during pre-employment interview. That's the document. We're not saying that he told us anything wrong in here. But when you tell the Bureau of Prisons a lie on one document, it gets you fired, and that's why we tell them it's important to be truthful.
>
> [Tr. 69]

Discharge is an extreme and unreasonable penalty; it can be mitigated. *Brown v. Department of the Treasury*, 61 MSPR 484 (1994)(hereinafter *Brown*). Relevant factors to apply in determining a reasonable penalty for falsification are set forth in *Brown*: (1) nature and seriousness of the offense and its relation to the grievant's duties, (2) grievant's disciplinary record, (3) effect of the offense upon grievant's ability to perform at a satisfactory level, and (4) mitigating factors surrounding the offense.

The Agency did not follow the balancing test in *Brown* in determining a penalty for grievant. The Agency acknowledged in the removal letter that grievant's work history was "exceptional" and he had received no other discipline. Although the letter stated there were no mitigating factors, the

Warden testified to mitigating factors. Despite these findings about grievant's performance, lack of discipline and mitigating factors, the Agency issued an unreasonable penalty - - discharge.

Aside from the balancing test in *Brown*, some arbitrators apply a 4-part test: (1) willful misrepresentation; (2) material misrepresentation; (3) material misrepresentation at the time of discharge; and (4) prompt and good faith action by the employer. *Veterans Administration Medical Center, Houston, Texas and American Federation of Government Employees, Local 1633*, 91 LA 588 (Howell 1988). Other arbitrators apply a 2-part test: (1) whether the applicant's failure was willful or deliberate and (2) whether the matter involved in the question was material. *Firestone Tire and Rubber Company, Oklahoma City, Oklahoma and United Rubber Workers, Local 998*, 93 LA 381 (Cohen 1989).

Where an employee knowingly omitted material information from the employment application, an arbitrator applied both tests and found that such information was immaterial at the time of the discharge. The discharge was rescinded because the agency did not act promptly. *Federal Detention Center, Miami, Florida and Council of Prisons Local 33, Local 501*, 107 LRP 34548 (Wolfson 2007). A discharge was mitigated to an official reprimand where the arbitrator found the evidence insufficient and misconstrued coupled with a late and tardy agency investigation. *Federal Bureau of Prisons, Metropolitan Correctional Center, Chicago, Illinois and Local 3652, American Federation of Government Employees* (Larney, 2007).

FCI did not act promptly in this case. As of September 16, 2003, OPM knew that grievant had a non-judicial punishment but the Agency did not inquire about it with grievant until August 15, 2005. Grievant responded by August 18 but ESM Cross intentionally delayed the process with further inquiries in July 2006. The Agency's failure to promptly address this matter with grievant takes it beyond the reckoning period for a charge of falsification under Penalty 32, Standards of Employee Conduct. [Ag. Exh. 13]

In another arbitration, BOP was reversed where it discharged an employee for falsification of employment records three years after the employee entered on duty and exhibited exceptional work performance. *Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas and Local 919, American Federation of Government Employees*, 92 FLRR 2-1620 (Hendrix 1992). Grievant's exceptional work performance is a matter of record. [Tr. 150-'52, 248, 250; Un. Exhs. 11, 12]

Under any of these tests, grievant prevails. He was disciplined in the military with extra duty and restriction; he placed his military records in a box for storage; he did not think he had a non-judicial punishment until he reviewed his military records in August 2005. Had he answered the question about non-judicial punishment correctly - - from the Agency's view - - he would not have been disqualified from employment based on testimony from Warden Justice and ESM Cross. Prior to and after his employment with the Agency, the grievant's behavior was well-within acceptable standards. At the time of his discharge this matter was immaterial given his exceptional performance as a trusted employee who had over 13 years correctional service experience with the Agency and the Texas Department of Corrections.

The Agency acted in bad faith with unclean hands. The Warden's testimony that Captain Kizziah recommended grievant's discharge is not supported by ESM Cross' testimony. [Tr. 198-'99, 211] Warden Justice testified that he considered the five specifications in the notice of proposal to remove when he decided to discharge the grievant. [Tr. 233] At the hearing, however, FCI pursued only two of the five specifications. "There could be little fairness in a discipline proceeding that allowed a laundry list of allegations in which the Agency only has to prove two items on the list and then did not have to tell the employee or his representative which items it

took action on." [Br. at 24] By dropping three specifications, the Agency was persuaded that grievant was truthful. The three specifications not pursued are the same as the two specifications pursued - - none of them have merit.

Grievant submitted information to the investigator and security specialist addressing all derogatory information. If grievant had not, then SBIS' Claunch was required to prepare a memorandum documenting her discussions with grievant based on Program Statement 3000.02, Human Resource Manual, Chapter 7. Since the Agency refused to disclose or provide the SBIS file, the Union does not know what Claunch placed in grievant's file. Since grievant's explanations were plausible, the inquiry should have ended under the terms of Program Statement 3000.02. [Br. at 25-26]

In short the evidence shows only that grievant received a citation and, rather than adjudicate the citation, he accepted office hours as punishment. The Warden and ESM Cross acknowledged that the Agency has hired applicants with a DUI and commission of a misdemeanor. [Tr. 113-'14] Given the Agency acknowledgement that grievant would not be automatically disqualified for employment due to a DUI, removal is an excessive punishment since the guidelines for an offense of falsification range from reprimand to removal. Grievant answered all questions with "utmost honesty, good faith, and always answering everything to the best of my ability." [Tr. 136-'38, 152-'54, 280; Un. Exhs. 4, 11]

As a remedy, the Union seeks the following: (1) expunge all Agency files of the adverse action and reinstate grievant; (2) make grievant whole in all respects for wages, thrift savings plan contributions, retirement contributions, accrued annual leave, and sick leave earned dating from February 2, 2007, through the date of reinstatement; (3) removal of all negative records about grievant from all Agency personnel files; (4) the Agency pay grievant "the highest percentage of interest allowed by law for lost wages"; (5) the Agency post a list of its violations and the remedies; (6) an award of reasonable attorney fees for legal services and arbitration fees for legal representation of grievant at the hearing ($8,250.00); and (7) any and all other remedies which may be applicable or which the arbitrator deems appropriate. [Br. at 27]

Findings and Conclusions

This grievance under the Master Agreement presents the issue whether falsification of employment information is just and sufficient cause for discharge. In unadorned terms, in 1991 grievant was a 22-year old corporal in the Marine Corps who received a citation for operating a car while drunk and was penalized with extra duty and restriction to barracks. The military reference is "Article 15" and the military term is "non-judicial punishment" - - something less draconian than a court martial but more emphatic than administrative measures. A disciplinary penalty.

When grievant applied for a job with FCI on June 8, 2003, he did not disclose this incident during the pre-employment interview on June 16. The Agency asserts that he intentionally failed to disclose it which enabled him to obtain employment at FCI-Big Spring. In his written response and oral presentation to the notice of proposal to remove, the grievant stated that he did not remember receiving a DUI while in the military "for which I received 7 days of extra duty, which was considered a non-judicial punishment."

Grievant's "no" answer is incorrect because he stated in his written reply to the notice of proposal to remove and in his oral presentation to the Warden that he had received a non-judicial punishment. This was subsequently confirmed during investigations by USIS\OPM in September

in August 2005, and ESM Cross in October 2006. The evidence of grievant's non-judicial punishment is a document obtained by the USIS investigator from a government database, the military document "Offenses and Punishments" and the memorandum in grievant's personal files identifying extra duties resulting from non-judicial proceedings.

Grievant's "no" answer to question 3 is considered in the overall context of the pre-employment interview. The questions concerned employment history, personal finances and obligations and military service among other matters. On June 16 grievant recalls a written reprimand for reporting late to work (June 1987), child support and wage garnishment (October 1995), a speeding ticket violation (1998 - '99), breach of a lease (December 2000), and itemizes several consumer payments that were overdue.

When the question turns to the topic of military service, he recalls the dates of his duty in the Marine Corps, his honorable discharge, and that he never received a court-martial. The question following the court-martial inquiry concerns "non-judicial punishment such as article 15, company punishment, Captain's Mast, etc."

Through its expert witness (Mr. Simon) and ESM Cross, the Agency asserts that grievant could not readily forget about an Article 15 non-judicial punishment. Grievant may not readily recall an "Article 15" as the Agency's expert witness could readily recall and understand that term given Mr. Simon's military and legal background. [Ag. Exh. 1] The same reasoning applies to Mr. Cross who reviews pre-employment interviews and background investigation reports in his capacity as Employee Services Manager and, therefore, is more readily acquainted with the terms in question 3 and their usage.

The grievant, nine years after his military discharge, may not have readily recognized "Article 15" but the import, focus and bent of question 3 is not so narrowly worded that failure to recognize Article 15, itself, makes the question meaningless or misunderstood to the reader. Questions 2 and 3 deal with military regimen; question 2 concerned severe military punishment (court martial); question 3 continues the penalty theme by using the word "punishment" twice such that the recipient of the question would recognize that penalty is the focus.

A penalty or "punishment" is not an esoteric word, foreign in concept or application to grievant. He has the ability to understand the focus behind question 3; he never told any official that question 3 was not understandable. At the time he answered question 3 he was employed at a penal institution. His workday was immersed in the world of confinement and restriction as penalty and punishment. He recalled particulars of events pre-dating 1991 and post-dating 1991. There is no plausible explanation by grievant to distinguish between his ready recall of events on June 16 for employment, finances, and other matters and his lack of ready recall for military disciplinary punishment in question 3. His claim that he did not recall the 1991 DUI in June 2003 is not credited. Grievant intentionally provided an incorrect answer to question 3, a false response.

Under Criminal and Driving History, grievant answered "no" to question 6 whether he had "ever committed a misdemeanor or felony?" This question is all-encompassing; any applicant would be well-served to probably answer affirmatively as a self-protective measure. When grievant's driving history is considered in his capacity as a civilian, his "no" response is accurate. The Agency claims he falsified this answer because grievant's driving history in his military capacity shows a DUI. The military recognizes it as non-judicial punishment and not a misdemeanor. [Ag. Exh. 2] Unlike question 3 where the Agency witness testified that she used the phrase "extra duty" when reading the question to grievant, there is no indication that question 6 was expanded upon

in a similar manner for grievant. The claim of falsification for question 6, moreover, is tethered to question 3. Question 6 is an "aggravating" factor, as described by the deciding official. In a narrow sense, grievant accurately responded to question 6. When coupled with question 6, he inaccurately answered it for he stated in his written response to the notice of proposal to remove that "I did have a DUI."

In sum, the FCI established its charge that grievant falsified his answer to question 3 during the pre-employment interview and, in doing so, the Agency established a derivative falsification for question 6. FCI states that discharge is a reasonable penalty. The Union presents various arguments that (1) the Agency refused to disclose relevant documents necessary for the Union to fulfill its representation of grievant and (2) discharge is too severe and unreasonable in relation to the infraction and it should be mitigated.

The Union reviewed, during the hearing, a file described by the Agency witness as an internal security checklist file that contained forms sent and received and documents completed. FCI did not divulge that file since, it argued, the Agency did not rely upon it for the discharge. One of the Union's arguments is that the investigative process was too long such that it shows the Agency unduly delayed the investigation and acted in bad faith. The Union asserts that the file may have relevant documents for this argument.

An exclusive representative's statutory right to information extends not only to information necessary to process a pending grievance but to information necessary to determine whether to file a grievance at all. *Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Omaha District, Omaha, Nebraska and National Treasury Employees Union and NTEU, Chapter 3*, 25 FLRA 181 (1987). Documents in the security file may not be relevant to FCI's case but are relevant to the Union's. The information assists the Union in assessing the strength or weakness of the grievance. Not disclosing the security checklist file until the hearing day undermines the Union's ability to represent grievant. Documentation not relied upon by FCI would be relevant to the Union's representation of grievant such as exculpatory information obtained during the investigative process. The Agency's determination of relevant documents based on a distinction between the investigative file and the disciplinary file is not a sufficient basis for denying information to the Union. *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas and American Federation of Government Employees, Local 0922*, 57 FLRA 808, 813 (2002).

The Union requested the entire OPM and SBIS files. The OPM file is not FCI property so the Agency argues it could not disclose the file and any OPM document in the SBIS file could not be released. There was no argument presented that the SBIS file contains management advice or guidance or that the Union failed to articulate a need. Recommendations, concurrences, or opinions of managers, supervisors or other officials which are part of management's deliberative process are not releasable; however, memoranda or documents that contain essentially a recitation of factual statements are discoverable. *Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland and National Weather Service Employees Organization, MEBA, AFL-CIO*, 30 FLRA 127, 142 (1987). Documents generated by SBIS that are a recitation of factual statements on the specifications are relevant and necessary for the Union's representation of grievant. Failure to disclose these documents undermines the Union's status as exclusive representative and interferes with its representation of grievant.

As for the Union's arguments that discharge is too severe a penalty, the Warden stated that removal was "fully supported by the evidence in the adverse action file" and he "made the decision

to terminate based on specification 'A' of the proposal letter" and that specification E was "an aggravating factor". [Tr. 221-23, 232] The Warden found progressive discipline and alternatives to discharge as insufficient penalties to the charge of falsification. He noted that the Agency must not lessen its standard of "unadulterated integrity".

After the Warden testified that specification A (question 3) and specification E (question 6) were the specifications that he considered in deciding to discharge the grievant, the Warden answered "yes" to the question "did you consider all of the specifications in the proposal letter in making your determination in determining the discipline?" [Tr. 233]

Article 30, Section e. at ¶ 1 sets forth grievant's contractual right, through his authorized representative the Union, "to receive the material which is relied upon to support the reasons for the action given in the notice." The Union requested the evidence relied upon for the discharge which was based on five specifications. The Union had a right under the MA to receive the materials relied upon by the Warden when he decided the evidence "fully support[ed]" the charge. The removal letter does not identify the specifications he relied on; initially it was two specifications but later it was all specifications. At the outset of the hearing the Agency announced that it was not pursuing three of the five specifications. Three specifications relied upon for discharge are not a basis for it or any other discipline but the Warden considered them and the Agency refused to provide the requested documents in violation of Article 30.

Under the Master Agreement, the parties recognized that discharge may be warranted for a first offense that is "egregious" which, by dictionary definition, implicates grievant's non-disclosure as conspicuously and outrageously reprehensible, remarkably bad, outstanding for undesirable qualities, notorious and outrageous, extraordinary in some bad way. To find that discharge is a reasonable penalty for a first offense under the Master Agreement means that grievant's falsification is egregious.

The only way to determine whether falsification is egregious is to place it in the context of this record. Had grievant disclosed on June 16, 2003, that he had received military discipline for a DUI in June 1991, he would not be automatically disqualified for employment since the Agency acknowledged it has hired individuals with a DUI record. Moreover, FCI's witness stated that non-disclosure of debts or financial obligations is the most common problem foreclosing employment for an applicant. Any financial matters were documented by grievant; the Agency dropped any specification(s) related to debt and financial obligations. The Agency cannot rely on them to support the discharge.

The Agency's assertion that when an applicant or employee lies on a document it gets you terminated is not entirely aligned with the table of penalties. That is, the table of penalties recognizes progressive discipline for falsification because it displays the full range of penalties - - reprimand to removal. This means that not all falsification is equal. In other words, the range of penalties implicitly shows that some falsification by a law enforcement official is not as material as other falsification.

Under the MA, discharge is an unreasonable penalty for this falsification because the Warden considered five specifications to find support for the discharge penalty and the Agency refused to comply with Article 30 on providing documents it relied upon. A penalty for falsification based on two specifications - - of which one is by and large dependent on the other - - was never considered for any measure of progressive discipline.

Based on the totality of circumstances, grievant's falsification is not an egregious offense under Article 30 that is just and sufficient cause for discharge. There is just and sufficient cause for discipline. Grievant's penalty is a suspension without pay. Agency records will be revised to show grievant as suspended without pay for not disclosing his 1991 DUI during the pre-employment interview. Accumulation of leave and retirement contributions are awarded only if an employee suspended without pay is entitled by statute to accumulated benefits and contributions. There is no interest awarded for lost wages since grievant's penalty is a suspension without pay. Attorney fees are not awarded since there is just and sufficient cause for discipline and the Union did not prove that the Agency engaged in a prohibited personnel practice or undertook this action in bad faith.

The parties stipulation to the issue for arbitration authorizes the arbitrator to fashion a remedy if discharge is not for just and sufficient cause. Because of this broad discretion, the arbitrator can mitigate the discharge to discipline and reinstate the grievant without back pay. *Cloutterbuck v. Department of Labor*, 85 MSPR 684 (2000).

The findings and conclusions are set forth in the award that follows.

Award

The grievance is sustained in part and denied in part. There is no just and sufficient cause for discharge. The discharge is rescinded. There is just and sufficient cause for discipline. The grievant is suspended without back pay commencing from the effective date of his now-rescinded discharge to the date of his reinstatement. All other requested remedies are denied.

Patrick Halter
Arbitrator

On this 28th day of January, 20 08