IN THE MATTER OF ARBITRATION

BETWEEN

COUNCIL OF PRISONS LOCAL (AFL-CIO) AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 922, FORREST CITY, ARKANSAS (Union)

FMCS No. 04-04133

-and-

Lawrence Edmonds, Jr. Removal

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONS INSTITUTION, FORREST CITY, ARKANSAS (Agency/Employer)

Arbitrator: Diane Dunham Massey selected through the procedures of the Federal Mediation and Conciliation Service.

HEARING

Hearings were held in the above matter on December 1 and 2, 2004, in Forrest City, Arkansas. The witnesses were sworn and excluded from the Hearing, other than those witnesses who were present at the commencement of the Hearings. The proceedings were transcribed and the transcript was provided to the Arbitrator. Post-hearing briefs were received by the Arbitrator by March 2, 2005. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

FOR THE AGENCY

William E. Branch	Advocate, Labor Relations Specialist
John W. Weeks	Employee Services Specialist, Witness
Katie Bozeman	Human Resource Manager, Witness
Cole Jeter	Warden, Witness

FOR THE UNION

Roger Payne	Co-Advocate, Union Representative, Witness
Cindy Wright	Co-Advocate, Union Representative, Witness
Lawrence Edmonds	Grievant, Witness
Jeff Rogers	Technical Advisor

APPEARANCES (CONTINUED)

FOR THE UNION

Marvin Morrison	Former Warden, Witness
Ora Mosby	Senior Officer Specialist, Witness
Ricky Martin	GS-8 Correctional Officer, Witness
Shon Foreman	Local Second Vice President, Witness
Bryan Lowry	Council of Prison Locals Vice President, Witness
Jimmy Arellano	Supervisor, Witness

ISSUE

At the beginning of the Hearing, the Parties stipulated to the following statement of the issue:

Was the removal dated October 31, 2003, of the Grievant, Lawrence Edmonds, Jr. taken for just and sufficient cause or, if not, what shall the remedy be?

BACKGROUND

The Grievant, a Cook Supervisor at the Forrest City Federal Corrections Institution in Forrest City, Arkansas, was issued a removal letter dated October 31, 2003, which stated as follows:

> On June 18, 2003, you were issued a notice which proposed that you be removed from your position for Falsification of Employment Documents and Security Investigation Forms and Failure to Provide Updated Information. In making my decision, I have given full consideration to the proposal, to your written response documents of varying dates, which were submitted on August 5, 2003, to your oral response of August 5, 2003, and to the relevant evidence contained in the adverse action file which has been made available to you.
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> During your oral and written responses, you acknowledged that you were aware that you were terminated from USIS and that you thought that the General Release would reflect resignation, rather than termination. The General Release states that you were originally terminated but that the records would be changed to reflect a resignation upon completion of the General Release. The existence of the General Release does not negate the fact that you were terminated from USIS, that you were aware you were terminated from that employment at the time of the pre-employment interview, and that during the pre-employment interview you responded "no" to the question that asked "has the applicant been dismissed or resigned in lieu of dismissal from any job." During the oral response, you also admitted that you failed to accurately answer questions asked during the pre-employment interview which pertained to prior discipline. In your written response, you also indicate that you failed to answer "yes" to the

questions regarding prior discipline and that these omissions were an oversight on your part. Your lack of candor during the pre-employment interview cannot be excused by the term "honest oversight." You were provided an opportunity to review the pre-employment interview form and signed it, thereby certifying that the answers were true, complete and correct. After careful consideration, I find the charges sustained and fully supported by the evidence in the adverse action file. Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker. Your removal is in the best interest of the efficiency of the service. It is my decision that you be removed from your position effective midnight October 31, 2003.

When considering what penalty was appropriate, I considered, among other factors:

(a) Charges of Falsification of Employment Documents and Security Investigation Forms and Failure to Provide Updated Information are very serious charges in light of your position as a law enforcement officer and the fact you knowingly provided false statements.

(b) Your position as a federal law enforcement officer requires your word be above reproach and that the general public expects the highest standards from its law enforcement officers.

(c) While your past performance has been acceptable, it does not outweigh your very serious breach of trust and the fact that you did not provide honest and truthful information during the pre-employment process.

(d) While you have no prior disciplinary records, your misconduct is so serious as to warrant a substantial penalty. Had this information been available to the Bureau of Prisons, you would not have been offered a position at the Federal Correctional Institution, Forrest City.

(e) Your misconduct has caused your superiors to lose confidence in your ability to do your job.

(f) The penalty is in line with sanctions I have imposed on others for substantially similar misconduct.

(g) The penalty is consistent with the agency's table of penalties.

(h) You were aware of the policy as we train, and annually reinforce, the Standards of Employee Conduct to all staff immediately upon entrance on duty and thereafter. You were provided an opportunity to review the information you had provided and signed the pre-employment interview form indicating that the answers were correct and true.

(i) While you have been employed with the Bureau of Prisons for more than four years, that experience does not mitigate the seriousness of your actions or the fact that had you provided information about your termination and past disciplinary actions, you would not have been rehired by this agency. ***

The Union filed a grievance on the basis that the discipline was not for just cause and otherwise did not comport with the CBA. The grievance was appropriately processed and remains unresolved. The Parties stipulate that the matter is arbitrable, and properly before this Arbitrator for Opinion and Award. The Parties also agree that the Arbitrator may retain jurisdiction for the purposes of interpreting and implementing the remedy if one is so ordered. The Parties did not object to the Arbitrator's request for an extension beyond the contractual time limits for rendering this Award.

RELEVANT PROVISIONS OF THE AGREEMENT

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:

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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.

ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS

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.

1. in exceptional circumstances, the President, Council of Prison Locals, may immediately request that the appropriate Regional Director or designated official consider a stay of a removal or suspension in excess of fourteen (14) days until a decision is rendered by an arbitrator under Article 32, or an initial decision of the Merit Systems Protection Board is issued. Such requests must be made prior to the effective date of the contested action. Stay of actions will not apply to:

a. probationary actions; or

b. actions taken under 5 USC 7513, where there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed.

Section b. Disciplinary actions are defined as written reprimands or suspensions of fourteen (14) days or less. Adverse actions are defined as removals, suspensions of more than fourteen (14) days, reductions in grade or pay, or furloughs of thirty (30) days or less.

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 d. Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

1. when an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and

2. employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.

Section e. When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations.

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.

Section f. Employee representational rights are addressed in Article 6.

Section g. The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations.

Section h. When an employee exercises his/her right to orally respond to a proposed disciplinary or adverse action, the reply official will allow ample time for the employee to respond at this meeting. Although the reply official may ask follow-up questions, nothing requires the employee to answer such questions during this meeting.

Section I. Supervisors are not required to annotate oral counseling sessions in an employee's performance log.

Section j. When disciplinary action is proposed against an employee, the employee will have ten (10) working days to respond orally or in writing. When adverse action is proposed, he/she will have fifteen (15) working days to respond orally or in writing. Approval or denial of extension requests must be provided within two (2) working days. These time frames do not apply to probationary employees or actions taken under the crime provision.

Section k. Employees making false complaints and\or statements against other staff may be subject to disciplinary action.

ARTICLE 31 - GRIEVANCE PROCEDURE

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

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union.

1. after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate;

2. if an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing;

3. the Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and

4. the Union has the right to file a grievance on behalf of any employee or group of employees.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

1. if a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

Section e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

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Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

2. a grievance may only be pursued to arbitration by the Employer or the Union.

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

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

2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

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OTHER RELEVANT PROVISIONS

PROGRAM STATEMENT 3000.02 Human Resource Manual - supplied by email.

Sec. 7114. - Representation rights and duties (a)(1)
A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.(2)
An exclusive representative of an appropriate unit in an agency shall be given The opportunity to be represented at - (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if –
(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and (ii) the employee requests representation. (3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection. (4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques,

Sec. 7116. - Unfair labor practices (a) For the purpose of this chapter, it shall be an unfair labor practice for an Agency - (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; (2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; (3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status; (4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter; (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; (6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter; (7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or (8) to otherwise fail or refuse to comply with any provision of this chapter.

POSITION OF THE AGENCY

The Agency makes the following arguments and contentions in support of its position:

The Arbitrator is required to follow Merit System Protection Board ("MSPB") law in this matter, per 5 U.S.C. § 7121(e)(2). The evidentiary standard used by the MSPB in adverse actions, such as removal, is preponderance of the evidence. To sustain the charge of falsification of official documents, the Agency must prove by a preponderance of the evidence that the Grievant knowingly provided incorrect information to the Agency and did so with the intent to deceive or mislead the Agency. Intentional falsification of a government employment document raises serious doubts about a person's honesty and fitness for employment. There is no requirement that the Agency show reliance on the falsified document or that the employee stood to benefit from the falsification.

The Grievant had worked as an investigator for the United States Investigative Services ("USIS") and was terminated for cause by USIS on April 8, 2002 and did not resign prior to being terminated. The evidence showed that the termination was later changed to show resignation, and the Grievant admitted his resignation was in lieu of termination. However, the Grievant did not disclose this during his pre-employment interview on May 22, 2002 and answered "no" when asked if he had been dismissed or resigned in lieu of dismissal from any job. The Grievant, as an investigator for USIS, was specially trained to review employment documents and to interview employees to find any discrepancies between their paperwork and disclosures made during their interviews. Under the circumstances, the Grievant's explanations about why he failed to disclose his prior negative employment history with USIS are not credible. The testimony of John Weeks, who conducted the Grievant's pre-employment interview, is credible.

The Grievant also failed to disclose his prior suspension and verbal and written reprimands during his USIS employment. During his pre-employment interview, the Grievant was asked if he had been disciplined or reprimanded in former or current civilian employment; he answered "no." The Grievant implied that he forgot these events, yet he testified they were significant events. The Grievant's testimony about why he did not include this information on his application or disclose it to Mr. Weeks is not credible.

The Grievant did not disclose his USIS termination or prior discipline until nine months later, when he spoke with a USIS investigator. The evidence shows that the Grievant did not give the Agency any updated information.

The nexus requirement for showing that the Agency's action promotes the efficiency of the Service is self evident. The nexus in this case is obvious: Any federal agency, but particularly a law enforcement agency, cannot employ people who falsify employment and security documents. MSPB has found that a nexus exists between the falsification of documents and the efficiency of the Service.

The Agency's penalty – removal – is reasonable. Falsification is a serious offense that warrants a serious penalty. The Grievant had a relatively short work history with the Agency. The Warden considered and applied the Douglas factors in determining that the Grievant should be removed. The MSPB reviews Agency-imposed penalties only to determine whether the Agency considered all relevant factors and exercises management discretion within tolerable limits of reasonableness. When all charges have been sustained the MSPB limits its review to the penalty imposed, recognizing that the Agency's exercise of discretion must be afforded proper deference in managing its workforce.

The penalty assessed to the Grievant does not reflect disparate treatment. The Union attempts to compare the Grievant's case to one that was settled and, therefore, unlike the Grievant's situation. No weight should be given to the Union's disparate penalty claim. To do otherwise would have a chilling effect on other settlement agreements. Likewise, the fact that the Grievant's supervisors testified that they had not lost confidence in the Grievant and would be willing to work with him again should not be given any weight. The decision is the Agency's, not that of the Grievant's supervisors. The Agency has proven its charges and shown a nexus. The Agency has also proven that the penalty assessed is well within the bounds of reasonableness. The grievance should be denied, and the Agency's removal of the Grievant should be sustained unaltered.

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

The Agency has not shown just cause for the discipline. The Agency subjected the Grievant to disparate treatment, committed an unfair labor practice and withheld

documents that the Union requested, and otherwise violated the Collective Bargaining Agreement. Warden Jeter testified that he decided to remove the Grievant because he did not meet certain Agency guidelines. The Agency never produced the guidelines, not even *in camera* to the Arbitrator and a negative inference should be taken. The Agency also failed to produce the background investigation which could have contained exculpatory evidence. This also gives rise to a negative inference.

The Grievant was subjected to disparate treatment. The evidence showed that other employees (Cano, Barrera and Williams) were all retained and not disciplined, although they had falsified documents. They did not have mitigating factors, as does the Grievant, such as a five-year work history with the Agency or a settlement agreement. The Grievant was an excellent employee.

The Grievant did not mislead the Agency. The Grievant was told to say he had not been terminated because the termination was going to be overturned. In fact, the Grievant's record shows a resignation from USIS. The Grievant provided a copy of the General Release to the Agency which reflected that he had been terminated but that the termination was changed to a resignation. The evidence showed that the Grievant did not intentionally falsify his background documentation and that he did not lie.

The Agency does not have clean hands. By withholding discovery documents, it prevented the Union from properly representing the Grievant.

The Agency did not prove its case. The Agency did not prove that the discipline was imposed for just cause or that it treated the Grievant in a fair and equitable manner as it is contractually required to do. The Grievant's removal was unjust.

The grievance should be sustained. The Arbitrator should order the Agency to:

1. Reverse the Grievant's termination and expunge his records.
2. Make the Grievant whole in every way including, but not limited to, lost wages, salary, benefits, seniority and leave as well as moving expenses incurred.
3. All remedies requested in the grievance that the Grievant would have otherwise earned and been entitled to, but for the Agency's unwarranted and unjustified personnel action.

OPINION

THE FACTS

Much of the background evidence is not disputed. It indicates:

In January 2002, the Grievant began applying for positions with the Bureau of Prisons, for whom he had worked from January 1994 to June 1998. At the time he started applying, the Grievant had been working for the United States Investigative Services ("USIS") since January 2001.

The Grievant's Form 612 noted that he had been employed by USIS from January 2001 to "present." The Grievant signed the Form 612 on May 6, 2002 as indicated by his signature on that document and certified as follows:

> I certify that, to the best of my knowledge and belief, all of the information on and attached to this application is true, correct, complete and made in good faith. I understand that false or fraudulent information on or attached to this application may be grounds for not hiring me or for firing me after I begin work, and may be punishable by fine or imprisonment. I understand that any information I give may be investigated.

The Grievant also filled out a Form 85 ("Public Trust Positions" questionnaire) in which he noted that he was employed to "present" with USIS and indicated that within the past seven (7) years he had not been

- fired from a job
- quit a job after being told he'd be fired
- left a job by mutual agreement following allegations of misconduct
- left a job by mutual agreement following allegations of unsatisfactory performance
- left a job for other reasons under unfavorable circumstances

The Grievant signed that document on May 22, 2002, the same date he was interviewed for the Cook Supervisor position for which he was subsequently hired. The Grievant signed a separate section entitled, "Certification That My Answers Are True," which provided:

> My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

The Grievant also submitted a Declaration for Federal Employment ("Optional Form 306"), which he also signed on May 22, 2002. On his Declaration for Federal Employment, the Grievant checked "no" in response to the question,

> During the last 5 years, were you fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management?

The Grievant certified the document as follows:

> I certify that, to the best of my knowledge and belief, all of the information on and attached to this Declaration for Federal Employment, including any attached application materials, is true, correct, complete and made in good faith. **I understand** that a false or fraudulent answer to any question on any part of this declaration or its attachments may be grounds for not hiring me, or for firing me after I begin work, and may be punishable by fine or imprisonment. **I understand** that any information I give may be investigated ***

The Grievant was terminated for cause from USIS on April 8, 2002. The Grievant hired an attorney and began negotiating a settlement agreement which ultimately resulted in the Grievant's termination being changed to a resignation. On May 10, 2002, while settlement negotiations were still going on, the Grievant wrote a letter to Joe LoBue, USIS' Manager of Compliance, in which he stated, in part, as follows:

> I recently left employment with USIS effective on 04/08/02. I was working as a SPIN Investigator for the Norfolk District Office under the direction of William G. O'Conner. I am requesting to be released from my non-compete and non-solicitation agreement with USIS. ***

The Grievant prepared the letter because he understood it would assist in the settlement negotiation process.

On May 22, 2002 the Grievant was interviewed by Employee Services Specialist John Weeks. During the interview, Specialist Weeks went over the paperwork the Grievant had submitted and asked additional questions. One of those was,

"Has the applicant been dismissed or resigned in lieu of dismissal from any job?"

Specialist Weeks checked "No" based on the Grievant's response to the question. In response to the questions,

> "Has the applicant been counseled, warned, reprimanded or disciplined for absence, tardiness or leave abuse?" and
>
> "Has the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment?"

the Grievant answered, and Specialist Weeks checked, "No." The Grievant gave Specialist Weeks a copy of his May 10, 2002 letter to USIS Compliance Manager LoBue.

On June 12, 2002 the Grievant returned to Forrest City FCI for a pre-employment physical and urinalysis. At that time, the Grievant testified, he gave Specialist Weeks a copy of the General Release he signed on May 29, 2002 relating to his separation from USIS. The General Release states, in part, as follows:

> WHEREAS, (the Grievant) was originally terminated from employment from USIS for Cause, but wishes to resign from employment instead by submitting a letter of resignation;
>
> WHEREAS, USIS has accepted the (Grievant's) letter of resignation and changed its Records to reflect that (the Grievant) resigned his position;
>
> ***
>
> 1. COMPENSATION: in consideration for (the Grievant's) release of all claims and covenant not to sue as provided in paragraphs 2 and 3 below and for the other promises made by (the Grievant) in this Agreement, USIS shall change its records to reflect that (the Grievant) resigned his position with USIS.
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> 2. RELEASE: (a) For and in consideration of the promises and obligations set forth in this Agreement, (the Grievant) releases any and all claims of any kind which he/she has, had, or may have against USIS *** , including without limitation, claims relating to, connected with, or arising out of (the Grievant's) employment with USIS.
>
> ***
>
> 8. CONFIDENTIALITY: (a) (The Grievant) agrees that this Agreement and its Substance are to remain strictly confidential and shall not be disclosed by (the Grievant) or his/her attorneys to any other person or entity except pursuant to a subpoena or as is required by law except that (the Grievant) may disclose the terms of this Agreement to his/her spouse or significant family partner, tax advisor, and/or accounts, provided that such persons are advised in advance of the confidential nature of this Agreement and, in turn, promise to maintain its confidentiality. (The Grievant) agrees that, in the event a formal request is made of him/her or his/her attorney by any person or entity for a disclosure, in whole or in part, covered by this Agreement, he/she will give prompt notice of such request to USIS. ***
>
> **TAKE THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE HOME, READ IT, CONSULT WITH YOUR ATTORNEY, AND CAREFULLY CONSIDER ALL OF ITS PROVISIONS BEFORE SIGNING IT. THIS AGREEMENT INCLUDES**

A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS. ***

By letter dated June 17, 2002 the Grievant was advised he had been selected to join the staff of the Forrest City FCI, that he had been given a Career Conditional appointment as a Cook Supervisor, effective as of July 14, 2002 and that he would be required to attend a three-week training course. The letter further stated:

> As part of the process of obtaining a position with the Federal Bureau of Prisons, your background investigation has begun and you were given a physical examination. Any change to the information you provided during the pre-employment process, prior to your entry on duty, must be reported to this office immediately.

On March 21, 2003, six (6) months after he was hired, the Grievant had a personal subject interview with a USIS Investigator. During that interview, which was conducted under unsworn declaration, the Grievant disclosed that he had been terminated by USIS on April 8, 2002 but that the matter was settled with a General Release and USIS then accepted his resignation. The Grievant told the USIS Investigator that he felt that the General Release resulted in him resigning not under unfavorable circumstances. The Grievant also told the USIS investigator that he had:

- received a verbal reprimand and a five (5) day suspension without pay for a performance issue (asking improper questions)
- received a written reprimand
- been reassigned and placed on probation for a performance issue (failing to show up for an interview)
- been advised by his supervisor that an additional violation of policy would result in disciplinary action, including termination

The Grievant stated that, during his Panel Review at the Forrest City FCI he had mentioned he "was awaiting a general release from USIS which negated (his) termination and acceptance of resignation" and that his failure to disclose his prior discipline at USIS was an oversight. The Grievant also said that:

> It was my belief at the time of completing my Questionnaire for Public Trust Position [SF 85P] that my resignation had been accepted by Mr. Joe LoBue, Manager of Compliance with USIS before my integrity review at FCI Forrest City. I had no intent to falsify any government document. I did provide a General Release from USIS, who did accept my resignation.

The Grievant requested that, in addition to his responses to the USIS investigator, his General Release of USIS, his letter to Compliance Manager LoBue and his job evaluations also be considered. The Grievant certified his answers and explanations on May 5, 2003.

By letter dated June 18, 2003, one year after the Grievant was hired, Food Service Administrator Gary Schmidt notified the Grievant that he had proposed the Grievant's removal from his position of Cook Supervisor no more than thirty (30) calendar days from the date the Grievant received the letter. Warden Cole Jeter[1], who was the Warden at Forrest City FCI at the time, met with the Grievant and a Union representative (Advocate Payne, who represents the Grievant in this case) on August 5, 2003 to discuss the matter. The Grievant advised Warden Jeter that he believed that the General Release, which he had submitted to the Agency when he returned to Forrest City FCI on June 12, 2002, would show a resignation from USIS rather than a termination. The Grievant attributed his negative response to the question of whether he had ever been disciplined to having gone through the pre-employment interview quickly, and not thinking through the questions posed to him. The Grievant testified that he understood the settlement agreement was to clear his records completely, and that he had no intent to deceive the Bureau of Prisons.

Warden Jeter testified that he had excellent observations of the Grievant, including the Grievant's professional demeanor and ability to interact with the inmate population as well as peers and superiors. The Grievant's superiors regarded him as an excellent employee and communicated to Warden Jeter that they wanted to continue working with the Grievant. Warden Jeter requested a waiver of the Grievant's situation, something he does in only five percent (5%) of the matters he reviews. However, Warden Jeter's superior denied the request. By letter dated October 31, 2003, the Grievant was notified that he was being removed from his position effective at midnight.

THE ARGUMENTS

Merit System Protection Board ("MSPB") Law

5 U.S.C. § 7121(e)(2) indicates that cases involving review of a disciplinary action imposed by the Agency, such as this one, are to be decided by applying MSPB law. Under MSPB law, the Agency is permitted to take adverse disciplinary action "only for such cause as will promote the efficiency of the Service." 5 U.S.C. 7513(a). Although MSPB law may determine the disposition of this grievance, the Arbitrator does not consider a factual analysis under MSPB law and just cause standards to be mutually exclusive and, therefore, will analyze the evidence under both.

[1] Warden Jeter was the deciding official in the matter of the Grievant's removal.

The evidentiary standard required by the MSPB is preponderance of the evidence. In labor arbitrations, this Arbitrator generally uses preponderance of the evidence as the evidentiary standard and will apply it in this matter. To sustain its adverse action, under MSPB law, the Agency must prove (1) the misconduct charged, (2) the nexus, or connection, between the misconduct and the efficiency of the Service, and (3) that the penalty imposed is appropriate. Proof of falsification of official documents requires that the evidence establish that the Grievant knowingly supplied incorrect information to the Agency and that he did so with the intent to deceive or mislead the Agency. As will be discussed herein, the Arbitrator finds that the Agency did not meet its burden of showing that the Grievant engaged in the misconduct as charged.

Evaluating Credibility

As the Agency argues in its well-crafted Post-Hearing Brief, an applicant's intentional falsification of a government employment application raises serious doubts as to that person's honesty and fitness for employment. The need for the Bureau of Prisons, a federal law enforcement agency, to require honesty and integrity of its employees is obvious. Indeed, the MSPB has found that a nexus exists between intentional falsification of employment documents and the Service's efficiency. However, proof of an applicant's intent generally depends upon circumstantial evidence. Thus, the witnesses' first hand knowledge of the facts underlying this grievance, their possible bias, character and demeanor must be considered together with any prior inconsistent statements or other contradictions to their testimony as well as any inherent improbability of the witness' version of events.

The Charged Misconduct

In its letter dated June 18, 2003, the Agency proposed removing the Grievant based on his alleged misconduct: Falsification of Employment Documents and Security Forms, and Failure to Provide Updated Information. As to Charge I, Falsification of Employment Documents and Security Forms, the Agency asserted that the Grievant:

- Specification A: Failed to report his April 8, 2002 termination from USIS on the SF-85P he signed on May 22, 2002, and failed to disclose that he had appealed the termination and had been allowed to resign on May 29, 2002
- Specification B: Failed to disclose that he had been dismissed or resigned in lieu of termination on the Pre-Employment Interview Form he signed on May 22, 2002, and failed to disclose his termination by USIS as a result of violation of policy

- Specification C: On the Pre-Employment Interview Form, failed to disclose prior discipline on the Pre-Employment Interview Form despite having received a verbal reprimand and five (5) day suspension without pay for a performance issue in 2001
- Specification D: On the same Pre-Employment Interview Form, denied having ever been disciplined (suspended, reprimanded, etc.) in former or current employment, despite having received a written reprimand for performance in late 2001
- Specification E: On the same Pre-Employment Interview Form, denied having ever made intentional false statements or being involved in deception or fraud such as impersonation in examination, altering transcripts or other official records, falsifying reports/records including the BOP application, although he failed to disclose he was terminated from USIS when responding to Question 12 of the SF-85P and Question 11 of the OF-306, which forms were signed on May 22, 2002. Also gave his USIS employment dates as 01/01 to present despite having been terminated by USIS on April 8, 2002
- Specification F: On the Declaration for Employment, OF-306 (signed on May 22, 2002) certified that the answers were true and correct to the best of the Grievant's knowledge, although he failed to disclose his April 8, 2002 termination from USIS

Charge II, Failure to Provide Updated Information, asserts that the Appointment Letter dated June 17, 2002 informed the Grievant that prior to his entry to duty, he had to report any change to the information he provided during the pre-employment process. The Agency asserts in Charge II that the Grievant failed to disclose that he had requested permission to resign from USIS in lieu of termination by letter dated May 10, 2002, and that USIS had allowed him to resign on May 29, 2002 with a general release.

The evidence indicated that the primary basis for the Agency's charges of misconduct was its belief that the Grievant had intentionally concealed that he had been terminated for cause by USIS on April 8, 2002. The Agency offered evidence that the Grievant would not have been hired had the Agency known of the USIS termination. According to Specialist Weeks, an applicant's recent termination from another job would place that applicant outside of the Agency's hiring guidelines. Additionally, H.R. Manager Bozeman stated that the Grievant would not have been hired had he disclosed that he had been terminated and previously disciplined by USIS. Had the Grievant intentionally falsified documents submitted to the Agency while applying for the Cook Supervisor position to conceal what had occurred at USIS, removal, in fact, would be an appropriate remedy. However, due to the unique facts and unusual chronology of events in this matter, the Arbitrator determines that the Grievant did not engage in the misconduct charged.

The Status of the Grievant's USIS Separation

The Grievant testified that before he met with Specialist Weeks on May 22, 2002, he had appealed the April 8 USIS termination and, aided by his attorney, negotiated a confidential settlement agreement whereby it would be rescinded.[2] Thus, as of May 22, 2002 the Grievant had been informed that his USIS employment record would be "cleaned out" and he understood that he could truthfully answer "no" if asked if he had been "terminated." The Grievant's settlement with USIS also called for him to give USIS a General Release of any claims he might have against it.[3] The Grievant understood from his attorney that the settlement was confidential and could not be discussed. Thus, as of May 22, 2002, the Grievant knew that he was going to resign from USIS but the settlement had not yet been reduced to writing. Therefore, based on his knowledge that he was resigning pursuant to a negotiated and confidential settlement of claims, the Arbitrator does not find that the Grievant intentionally falsified his application concerning the terms of his separation from USIS.

The Grievant's Disclosures

The Grievant's testimony indicated that he believed he had disclosed sufficient information to Specialist Weeks and the Agency, during his pre-employment interview process, to apprise them of the nature and timing of his separation from USIS. The Grievant gave Specialist Weeks a copy of his May 10, 2002, letter to Mr. LoBue, in which the Grievant sought release from his non-compete with USIS. That letter states, in part, as follows:

> I recently left employment with USIS effective on 04/08/02.

The Grievant also testified that during his Pre-Employment Interview and the Panel Review, he mentioned that he anticipated getting a general release from USIS that would show the termination and subsequent settlement.[4] Specialist Weeks testified credibly that he did not

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[2] This sequence of events does not, in the Arbitrator's opinion, amount to a "resignation in lieu of termination" situation. Rather, the termination was rescinded and, thus, arguably ceased to exist, and the Grievant then resigned.

[3] The Grievant testified that his attorney told him USIS had made procedural errors in disciplining him, and that the Grievant could get his USIS job back if he wanted it. However, the Grievant had decided to leave USIS several months earlier and "wanted to move on."

[4] The Arbitrator understands the Grievant's testimony on this point to be that he brought up the settlement agreement/general release, which would provide for rescission of the termination, and not that he specifically used the word "termination" during his discussion with Specialist Weeks.

remember the Grievant mentioning the USIS termination during the Pre-Employment Interview and that any mention of a "termination" would have immediately raised a red flag. Nevertheless, Specialist Weeks testified as follows:

> Q. If somebody told you, I'm getting a general release, would you know what that is?
>
> A. No, I would not.
>
> Q. Isn't it possible that two and a half years ago (the Grievant) said he was getting a general release and you didn't know what it was?
>
> A. It is.
>
> (Transcript, pages 5-6).

Thus, the evidence suggests that the Grievant in fact mentioned the "general release" during the Pre-Employment Interview, but its significance may not have been apparent to Specialist Weeks.[5]

The Grievant also testified that he took a copy of the General Release with him on June 12, 2002 when he reported for his physical and urinalysis test. The General Release states, in part, as follows:

> WHEREAS, (the Grievant) was originally terminated from USIS for cause, but wishes to resign from employment instead by submitting a letter of resignation.

Specialist Weeks did not recall receiving the General Release, although he testified that he did become aware of it after the Grievant began working for the Agency. Nevertheless, the evidence established that the Agency indeed had a copy of the General Release in its files although neither Specialist Weeks nor H.R. Manager Bozeman knew how or when it had been received. Thus, the Grievant's version of what he disclosed during the Pre-Employment Interview and thereafter is supported by the weight of the evidence.

Intent to Deceive

The Agency argues that the Grievant intended to deceive it and intentionally provided false information during the application and interview process. In support of this contention, the Agency contends that the Grievant later told a USIS investigator that he realized that if he did not get the termination changed to a resignation, it would prevent him

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Regardless, the May 10 LoBue letter was sufficient to put the Agency on notice that the Grievant was no longer working for USIS.

[5] The Arbitrator does not suggest that Specialist Weeks should have gleaned that the existence of a "general release" indicated the possibility of a termination.

from getting a job with the Agency. The Arbitrator does not consider this contention, which is based on a statement in a later USIS Report, to be persuasive. The USIS report is not sworn testimony, and the Grievant did not sign the USIS Report or otherwise vouch for its accuracy. Additionally, the Grievant denies having made such a statement.

The Agency contends that the Grievant's former experience as a USIS investigator renders his actions even more egregious. However, this Arbitrator finds it highly unlikely that the Grievant could have believed that he could deceive the Agency concerning his former employment with USIS. The Grievant had to have been particularly aware that he could lose his job if he submitted false information or tried to mislead the Agency during the application and interview process. The Grievant had already worked for the Agency for four and a half (4 ½) years when he was rehired as a Cook Supervisor. Thus, he knew that he would soon be scheduled for a five (5) year interview with a USIS investigator, during which all of the information he had submitted would be explored. Additionally, USIS was a party to the General Release and, therefore, would have ready access to the Grievant's employment records and other information pertinent to the General Release. Under the circumstances, the Arbitrator concludes that the Grievant knew that any intentional falsification or willful provision of inaccurate information would soon be discovered and that also indicates a lack of intent on the Grievant's part.

Updating Information

The Grievant's Appointment Letter, dated June 17, 2002, notified him that any change to the information he had provided during the pre-employment process had to be reported prior to his entry to duty. The Grievant testified that because he had given Specialist Weeks a copy of the General Release on June 12, 2002, which referred to a termination and later resignation, he did not believe that there were any other changes to the information he had provided to the Agency between that date and his entry to duty on July 15, 2002. Having considered the Grievant's disclosures of information, including his giving the Agency a copy of the General Release on June 12, 2002, the Arbitrator agrees.

As to the Grievant's application inaccurately stating that his employment with USIS was "To Present", the evidence showed that the Grievant started applying for positions with the Bureau of Prisons[6] while he still worked for USIS. The Grievant testified he filled out the Form 612 (entitled Optional Application for Federal Employment, which he described as

[6] By the time he was hired as a Cook Supervisor in June 2002, the Grievant testified that he had applied for twelve (12) positions.

essentially a resume) between Christmas of 2001 and January 2002. The Grievant also testified that he filled out most of the SF-85P and OF-306 forms in January 2002, then made multiple copies to avoid having to duplicate paperwork during the application process. According to the Grievant, this saved him time because he could sign, date and otherwise customize the photocopied forms as he submitted applications. The Grievant testified that when he submitted copies of these forms to the Agency for the Cook Supervisor position, he failed to change the line indicating he was employed to "Present" simply due to oversight. This explanation is not only plausible but credible. Regardless, the Grievant's error was effectively cured when, during the pre-employment process, he gave Specialist Weeks a copy of his May 10, 2002 letter to USIS Compliance Manager LoBue which reflected that the Grievant's USIS employment had ended "effective on 04/08/02."

The Grievant Testified Credibly

The Arbitrator notes that the Grievant's testimony at the Hearing was consistent with his Responses of May 5, 2003, and that it coincides with Warden Jeter's recollection of what the Grievant told him. In fact, the Grievant's explanation of his actions and rationale for what he did has been consistent during the course of the underlying investigation and resulting grievance proceedings. Specialist Weeks, who is trained to detect falsity and deception, testified that he believed the Grievant was credible during the Pre-Employment and Panel Interviews on May 22, 2002. Warden Jeter stated that he found the Grievant "very sincere in his explanation" when they discussed this matter on August 12, 2003. While the Arbitrator gives little or no weight to the results of a polygraph examination, she notes that the Grievant voluntarily took one and passed it. The Grievant's demeanor while testifying likewise was sincere and, while his version of what had occurred was somewhat unusual, it was not implausible. The Arbitrator finds the Grievant's explanation credible[7], and this further supports the conclusion that the Grievant did not intentionally falsify employment documents and security investigation forms, or fail to provide updated information to the Agency.

Prior Discipline

The Grievant explained his failure to disclose his prior USIS discipline, consisting of a verbal reprimand and then a written reprimand with a five (5) day suspension, as an

[7] The Agency's witnesses also were credible in explaining their role in the underlying events and their perceptions of the Grievant's actions and representations.

oversight. According to the Grievant, his prior discipline was not discussed during his settlement negotiations with USIS but he assumed that all disciplinary information in his record would be cleared and that he would have a "clean slate" when he resigned. The Grievant testified that he had no intention of concealing this information or misleading the Agency but that, although the reprimands and suspension he received had "hurt," they were not

> in the back of my mind or forefront of my mind. It was something I did forget in the sense of when I was doing my pre-employment documents. *** I realized that I know the type of individual I am, and I know I am not an individual who has a work history where I have been written up or gotten reprimands or anything of that nature. (Transcript, p. 365).

The evidence left no doubt but that the Grievant has been a conscientious, excellent employee. Warden Jeter was so impressed by the Grievant's performance and "very professional demeanor" that he requested a waiver to retain the Grievant as an employee despite the charged misconduct, something he does in only about five per cent (5%) of the disciplinary cases he reviews. Clearly, being disciplined by USIS was an unusual event for the Grievant, and one that presumably would have been remembered and identified while he was filling out employment applications. Although the Grievant may have had a basis for believing that all disciplinary information had been expunged from his USIS records, he could have done a more thorough, and conscientious job of filling out his employment application documents concerning his prior discipline. The Grievant's failure to adequately detail his disciplinary record will impact the terms of his reinstatement.

Nevertheless, even if the Grievant had knowingly concealed prior discipline, the evidence did not demonstrate that such conduct in and of itself would have prevented him from being hired, or that it would have resulted in termination. The testimony of both Specialist Weeks and H.R. Manager Bozeman indicated that failing to disclose a prior termination, rather than not disclosing prior discipline, would prevent an applicant from being hired. Furthermore, the evidence indicated that other employees who had been charged with falsifying information had not been terminated, but merely demoted or suspended. The evidence did not establish that the Grievant would have been terminated if he only had been charged with failing to disclose prior discipline.

Other Observations

The Union complains that the Agency did not turn over its hiring guidelines. Specialist Weeks testified that such guidelines would have prevented the Grievant from

being hired for a position at Forrest City FCI had the Grievant disclosed that he had been terminated from USIS less than two (2) months earlier. The Arbitrator finds that the Agency is not obligated to give its hiring guidelines to the Union as Management has the right to make pre-hiring determinations of this nature and, during the pre-employment process, job applicants are not bargaining unit members. However, had the Agency produced such guidelines, they may have been instructive in demonstrating whether an applicant's failure to disclose previous discipline precludes such applicant's hiring or, when later discovered, is a dischargeable offense, matters which were not established by the evidence presented herein.

The Union also challenges the Agency's refusal to turn over documents related to its background investigation of the Grievant. However, Human Resource Manager Bozeman made clear that she provided all documents she was authorized to release, and that she provided information to the Grievant by which he could obtain copies from the Office of Personnel Management ("OPM"). The Grievant apparently did so, as the Union had access to such information. The evidence showed that OPM has jurisdiction over cases in which falsification of pre-employment documents is alleged. Under the circumstances, the Agency acted reasonably in responding to the Union's request for documents relating to the Grievant's background investigation.

Although it appears that in some circumstances the Agency was less than fully cooperative in turning over documents that the Union had requested, such as those involving what the Union allege to be similar cases, its actions do not seem to have prejudiced the Union in presenting relevant evidence in this matter. However, had the Agency's delay or failure to produce requested information hampered the Union's representation of the Grievant, it is conceivable that such conduct could have violated the Parties' Collective Bargaining Agreement and contributed to denial of due process.

Contrary to the Union's suggestion, the evidence failed to establish that the Grievant's removal was motivated or even influenced by racial considerations. Although this matter was mentioned in the Union's post-Hearing Brief it was not argued and, therefore, should not be further addressed by the Arbitrator.

CONCLUSION

The Agency did not prove by a preponderance of the evidence, either under MSPB law or just cause standards, that the Grievant engaged in the misconduct with which he was charged.

- As to Specification A of Charge I (failure to report the April 8, 2002 termination from USIS on the SF-85P signed on May 22, 2002, and failure to disclose that he had appealed the termination and had been allowed to resign on May 29, 2002), the termination was rescinded by the terms of the confidential settlement, a copy of which was provided to the Agency prior to the Grievant's entry to duty and the Grievant was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Grievant provided Specialist Weeks with a copy of the May 10, 2002 letter to USIS Compliance Manager LoBue, indicating that the Grievant had ceased working for USIS as of April 8, 2002 and, prior to his entry to duty, gave the Agency a copy of the General Release which explained the circumstances of the Grievant's separation from USIS employment.
- As to Specification B of Charge I (failure to disclose that he had been dismissed or resigned in lieu of termination on the Pre-Employment Interview Form signed on May 22, 2002, and failure to disclose his termination by USIS as a result of violation of policy), the termination was rescinded by the terms of the confidential settlement, a copy of which was provided to the Agency prior to the Grievant's entry to duty and the Grievant was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Grievant provided Specialist Weeks with a copy of the May 10, 2002 letter to USIS Compliance Manager LoBue, indicating that the Grievant had ceased working for USIS as of April 8, 2002 and, prior to his entry to duty, gave the Agency a copy of the General Release which explained the circumstances of the Grievant's separation from USIS employment.
- As to Specification C of Charge I (failure to disclose prior discipline on the Pre-Employment Interview Form despite having received a verbal reprimand and five (5) day suspension without pay for a performance issue in 2001), the Grievant testified credibly that his omission of this information was due to oversight, and that he was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Agency did not establish that failing to disclose prior discipline during the application process would prevent the Grievant from being hired, or that it was a dischargeable offense.
- As to Specification D of Charge I (on the same Pre-Employment Interview Form, denying ever having been disciplined, suspended, reprimanded, etc. in former or current employment, despite having received a written reprimand for performance in late 2001), the Grievant testified credibly that his omission of this information was due to oversight, and that he was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Agency did not establish that failing

to disclose prior discipline during the application process would prevent the Grievant from being hired, or that it was a dischargeable offense.

- As to Specification E of Charge I (denying on the Pre-Employment Interview Form, having ever made intentional false statements or being involved in deception or fraud such as impersonation in examination, altering transcripts or other official records, falsifying reports/records including the Agency application, although he failed to disclose he was terminated from USIS when responding to Question 12 of the SF-85P and Question 11 of the OF-306, which forms were signed on May 22, 2002, and also giving USIS employment dates as 01/01 "to present"), the termination was rescinded by the terms of the confidential settlement, a copy of which was provided to the Agency prior to the Grievant's entry to duty and the Grievant was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Grievant provided Specialist Weeks with a copy of the May 10, 2002 letter to USIS Compliance Manager LoBue, indicating that the Grievant had ceased working for USIS as of April 8, 2002 and, prior to entry to duty, gave the Agency a copy of the General Release which explained the circumstances of the Grievant's separation from USIS employment.
- As to Specification F of Charge I (certifying that the answers on the Declaration for Employment, OF-306 signed on May 22, 2002 were true and correct to the best of the Grievant's knowledge although he failed to disclose his April 8, 2002 termination from USIS), the termination was rescinded by the terms of the confidential settlement, a copy of which was provided to the Agency prior to the Grievant's entry to duty and the Grievant was told his employment record with USIS would be cleared and that he should not discuss the settlement. Additionally, the Grievant provided Specialist Weeks with a copy of the May 10, 2002 letter to USIS Compliance Manager LoBue, indicating that the Grievant had ceased working for USIS as of April 8, 2002 and gave the Agency, prior to entry to duty, a copy of the General Release which explained the circumstances of the Grievant's separation from USIS employment.

The Agency also failed to establish by a preponderance of the evidence that the Grievant engaged in the misconduct alleged in Charge II, Failure to Provide Updated Information. As to this Charge, the evidence demonstrated that by the time the Grievant entered duty on July 15, 2002, he had given the Agency copies of the May 10, 2002 letter to USIS Compliance Manager LoBue, indicating that the Grievant had ceased working for USIS as of April 8, 2002, as well as the General Release which explained the circumstances of the Grievant's separation from USIS employment.

The evidence indicates that the Grievant honestly believed that he could state that he resigned from USIS without giving other details concerning his separation. Regardless, the Grievant could have been more conscientious and forthright in answering questions about prior discipline although it was not shown that this conduct, standing alone, would bar his hiring or justify discharge. The Arbitrator does find that the Grievant did supply the

Agency with most of the information needed before he was hired, but his methods certainly added to the confusion.[8] The Grievant's contribution to the confusion and his failure to reveal his prior USIS discipline is the basis for converting his removal to a two-week suspension.

For the reasons here and above set forth:

AWARD

The grievance is sustained, in part, and denied in part. The removal dated October 31, 2003 of the Grievant, Lawrence Edmonds, Jr. was not taken for just and sufficient cause. The Grievant's removal shall be converted to a two week suspension from October 31 until November 14, 2003, for omitting the details of his prior USIS discipline during the application process. The Grievant shall be reinstated to his former position effective within five (5) days of receipt of this Award and shall be made whole with respect to back pay (minus the two-week suspension), seniority and benefits as if he had never been terminated. All references to the instant removal shall be purged from the Grievant's and the Agency's records. The Arbitrator shall retain jurisdiction for purposes of interpreting the remedy, if necessary.

Signed this 25th day
of April, 2005, in
Houston, Texas.

Diane Dunham Massey
Arbitrator

[8] It would have been more straightforward to have accurately completed the employment application with the date of termination rather than note "present" and give the Agency a copy of a letter indicating that he had ceased working for USIS on April 8, 2002.