

In the matter of the arbitration between

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FCC FORREST CITY, ARKANSAS

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFGE LOCAL 922

FMCS 09-02783
(Removal/McGowan)

An arbitration hearing was held December 9-10, 2009, at FCC Forrest City, Arkansas, in accordance with Article 22 of the Master Agreement between the parties. Post hearing briefs were received March 18, 2010.

Appearances

For the Agency

Jennifer Montgomery

Labor Relations Specialist

For the Union

E. Nicole Trail

Attorney

Jeffrey Roberts

President AFGE 922

Question at Issue

Was the Grievant's removal from the Agency for the efficiency of the service? If not, what shall be the remedy?

Relevant Sections of the Master Agreement

Article 8 - Governing Regulations

Section 8: Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide law, rules and regulations.

Article 6 - Rights of the Employee

Section b

2. to be treated fairly and equitably in all aspects of personnel management.
6. to have all provisions of the Collective Bargaining Agreement adhered to

Article 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.

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, reduction 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.

Relevant Federal Law

5 U.S.C. 5596(b)

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

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

- (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not

occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title 1 of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

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

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)

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

(B) Such interest

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

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

Background

On August 8, 2007, Grievant Martha McGlawn participated in an interview, referred to as a pre-employment interview, in response to her application for employment with the Federal Bureau of Prisons, Federal Correctional Complex (FCC), Forrest City, Arkansas. The Grievant signed a pre-employment interview notice informing her of the requirement to be truthful and honest. At the conclusion of the interview, the Grievant initialed each of her answers on the pre-employment interview certifying that the information was correct to the best of her knowledge.

All applicants are required to complete pre-employment documents which are used to conduct a background investigation. The background investigation is conducted by the Office of Personnel Management (OPM), another federal agency, and the agency authorized to conduct background investigations.

On August 17, 2007, Grievant McGlawn was given a conditional appointment as a correctional officer with the Federal Bureau of Prisons at the Federal Correctional Complex, Forrest City, Arkansas. Subsequently, a field background investigation was conducted by the Office of Personnel Management. This investigation included employment, law enforcement, credit checks, and interviews with individuals who had contact with Ms. McGlawn. The results of the background investigation were forwarded to the Bureau of Prisons' Security and Background Investigation Section (SBIS) located in Dallas, Texas. SBIS is responsible for resolving any issues arising from the investigations.

Several questions arose concerning whether Grievant McGlawn had been disciplined during her prior employment with Consolidated Youth Services (CYS) in Jonesboro, Arkansas, where she was employed from July 17, 1996, until September 16, 2007. There was a question whether she received discipline in the form of written reprimand on January 29, 2007. There was

also a question whether she had received a disciplinary action resulting in a change of position and loss of pay.

Since these issues had not been mentioned in her pre-employment interview, she was asked to respond to these questions through written interrogatories. SBIS forwarded the results of their investigation to Employee Services at FCC Forrest City. The Grievant was issued a proposed removal letter on November 21, 2008. The warden decided to remove the Grievant from employment effective March 11, 2009. The Union grieved on April 2, 2009, alleging violation of Article 6 (Rights of Employee), Article 7 (Rights of Union), and Article 30 (Disciplinary & Adverse Actions). The removal of the Grievant constitutes an adverse action, and the Grievant chose the grievance procedure and invoked arbitration. The parties agree this matter is properly before this arbitrator.

The Agency's Position

The Agency contends that the Grievant failed to provide accurate information on employment documents. The Agency avers that prior to the interview the Grievant signed a pre-employment interview notice form which advised her of the importance of being truthful and honest during the interview. The Grievant reviewed her answers, initialed each answer, and certified that her answers were true and complete.

The Agency contends that the Grievant failed to disclose that she had been disciplined in January 2007 in the form of a written warning for poor attendance and excessive tardiness while employed at Consolidated Youth Services. The Agency argues that the Grievant failed to disclose that she had also been demoted while employed at CYS. The Agency contends that while employed at CYS, she was issued a disciplinary action in the form of a transfer of position

as a result of her job performance. The Grievant's pay had been reduced from \$12.81 to \$11.50 an hour.

During the OPM investigation, it was determined that the Consolidated Youth Services personnel file revealed that there was discipline because of the Grievant's poor job performance (billing errors, incomplete case files, and missing case documents from her caseload). The Agency avers that the Grievant failed to disclose a disciplinary action that came in the form of a transfer and demotion. The Agency avers that a change in position or loss of money is "easily rememberable." The Agency contends that documentation supplied by the Grievant does not substantiate the claim that the transfer was not a demotion and was not disciplinary.

The Agency concluded that Grievant falsified her employment application which is a very serious offense that usually results in the penalty of removal because falsification affects the employee's reliability, veracity, and trustworthiness. The Agency avers that omission of information can be regarded as falsification. The Grievant signed numerous certifications that her answers were true, complete, and correct. The Agency concludes that the penalty of removal was proper and well within the bounds of reasonableness.

The Union's Position

The Union contends that during her pre-employment interview, Ms. McGilawn was questioned as to whether she had been counseled, warned, reprimanded, or disciplined for absences, tardiness, or any other reason in her previous employment. The Union avers that Ms. McGilawn admitted she had been reprimanded for attendance issues at her previous employment in 2006. She also mentioned she thought she had been subject to another disciplinary action but could not recall the exact date, mainly because she was the object of an inmate's attack and had

sustained a head injury - a concussion, while on the job at Consolidated Youth Services. She also explained that while at CYS she voluntarily moved to a different position at a lower pay scale until another position at an equal pay scale became available.

The Union points out that on August 17, 2007, the Agency issued Ms. McGlawn a conditional offer of employment as a correctional officer, and on August 30, 2007, issued a "firm offer of employment," establishing an official starting date and a starting salary. Ms. McGlawn's first day of work with the Agency was September 15, 2007.

The Union contends there were no questions about her background until July 2008. At that time, she was asked to respond to Agency interrogatories. In November 2008, she was notified of a proposal to terminate her employment. On December 17, 2008, the Union attempted to clarify and support Ms. McGlawn's contention that her job change at CYS was neither a demotion nor discipline but simply a job transfer. Nevertheless, on March 11, 2009, her employment was terminated because she allegedly failed to provide accurate information about whether she had been disciplined for absence, tardiness, or leave abuse and whether she had ever been disciplined and demoted at CYS.

The Union contends that the termination of Ms. McGlawn was unwarranted and without justification. The Union avers that the Grievant never provided incorrect information nor did she ever intend to deceive or mislead the Agency. In fact, she attempted to submit additional documents from CYS that explained and supported her answers. The Union contends that her written responses provided an explanation and a confirmation that she was not disciplined or demoted at CYS. The Union contends that Grievant's responses to all questions were truthful and were made in good faith and to the best of her ability.

The Union avers that all the reports and evaluations of Ms. McGilawn's service as a correctional officer at the Forrest City facility are exemplary. She received on the spot awards. She is described as a good officer. Her supervisor, Captain Maune, testified that he never viewed Ms. McGilawn as lacking integrity or honesty.

The Union concludes that the level of penalty imposed, i.e. termination, went far beyond what could be considered appropriate. The investigation was not done in a timely manner as required in the Master Agreement. The Union requests reinstatement, expungement of her record, lost wages and benefits, and reasonable attorney's fees.

Findings

The parties agree that the background investigation of Ms. Martha McGilawn was not done in a timely manner. Ms. McGilawn's pre-employment interview began in August 2007. She received firm employment on August 30, 2007. She worked for a full year before the Agency raised questions about possible discrepancies concerning her former employment. Agency witnesses admitted that it was unusual for a background investigation to take that amount of time. "Timely disposition" called for in Article 30 of the Collective Bargaining Agreement is critical to the notion of due process. Timely disposition assures that the investigatory and disciplinary process is continuous, fair, and reasonable. In this case, there is question whether this grieving employee who had worked beyond her probationary period was given sufficient representation and opportunity to clear up what were characterized as discrepancies in her background check.

A careful examination of the record indicates Ms. McGilawn had worked for Consolidated Youth Services for eleven years. During those years, she experience physical challenges, as well as State furloughs and cutbacks. The record establishes that she agreed to temporarily accept a

lower paying job in order to preserve her employment. These Agency cutbacks were mischaracterized in the investigation as disciplinary actions. They were not. In her pre-employment screening, Grievant admitted to being overworked and overwhelmed by CYS paper work. The background investigation challenged these admissions as hidden faults, while the record indicates Grievant was open about the stress of overwork she experienced at CYS. Ms. McGlawn verbally admitted in her pre-employment interview that she had been reprimanded for attendance issues at her previous employment in 2006. Ms. McGlawn had been questioned as to whether she had ever been disciplined, reprimanded, etc., at any former employment to which she answered "no." She did explain that while at CYS she voluntarily moved to a different position at a lower scale of pay until another position at an equal pay scale opened up and became available.

Ms. McGlawn's first day of work with the Agency was September 15, 2007. No one from the Agency challenged or confirmed her background information for ten months. In July 2008, she again responded to interrogatories and was challenged four months later in November 2008. In December 2008, the Union attempted to document that the issue was a job transfer not a demotion or discipline. There is no evidence that the Agency checked this and/or sought further clarification. Ms. McGlawn was terminated on March 11, 2009.

Based on the record, we conclude that Ms. McGlawn's termination was unwarranted and without justification. The Union has provided undisputed testimony which explains the responses given by Ms. McGlawn in the pre-employment process. Ms. McGlawn did correct the questioned discrepancies from her pre-employment interview. Based on the record and the evidence introduced, we must conclude that the Agency has not met its burden in establishing

that Ms. McGlawn intentionally (or even negligently) failed or refused to answer the pre-employment inquiries truthfully.

With regard to the "nexus" between the alleged misconduct and the efficiency of the service, the testimony of those Agency officials that supervised and worked directly with the Grievant proves that Ms. McGlawn's termination did nothing to promote the efficiency of the service. Ms. McGlawn's record establishes that she was is a good employee, a "good officer." The Agency failed to present one witness to state that Grievant was anything but an excellent officer who is honest and of the highest integrity.

We conclude the investigation of Ms. McGlawn was not done in a timely manner as mandated by Article 30 of the CBA, and the Agency has not met the burden of proof in establishing misconduct on the part of Ms. Martha McGlawn. The question at issue is answered in the negative. The discipline of Ms. McGlawn was unwarranted and unjustified. She is returned to work as an officer at FCC Forrest City, Arkansas. She is to be made whole: paid compensation equal to all pay, allowances, and differentials she would have earned mitigated by the compensation she was paid by her employer(s) between her termination ad return date. The provisions of the Back Pay Act are to be applied. There is no award for attorney's fees.

The arbitrator maintains jurisdiction to assist the parties.

Award

Grievance sustained.


FRANCIS X. QUINN

March 19, 2010
Fort Worth, Texas