IN THE MATTER OF ARBITRATION BETWEEN THE	)	
DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL COMPLEX, BEAUMONT, TEXAS,	)	**FMCS CASE NO: 12-54698**
AGENCY	)	**ISSUE: REMOVAL**
AND	)	**GRIEVANT: AARON WICKLIFF**
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1010,	)	
UNION	)	

ARBITRATOR'S DECISION AND AWARD

Date of Grievance	October 31, 2011
Date of Filing Grievance:	February 13, 2012
Date of Arbitration:	June 25, 2013
Date of Closing of the Record:	August 30, 2013
Date of Decision:	October 7, 2013
Appearances:	
Agency:	Elisa Mason, Esq.
Union:	Patrick M. Flynn, Esq.
Arbitrator:	Thomas A. Cipolla, Esq.

I. BACKGROUND

The Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Beaumont, Texas (hereinafter "Agency" or "BOP") and the American Federation of Government Employees, Local 1010 (hereinafter "Union") are parties to a Master Labor Agreement at all time relevant herein.

The Union filed a response on or about October 31, 2011 to a Proposal Letter regarding the removal of Aaron Wickliff (hereinafter, "Grievant") from his position of Correctional Officer, (GS-0007-05). The Union addressed the charges and specifications in the Grievant's proposed removal notice issued by the Agency on September 21, 2011. The Union requested that the Grievant receive further consideration and a waiver to the standards of acceptability; that the Grievant not be removed from his position; and, that the Grievant be issued a letter of reprimand in lieu of removal. The Grievant also responded by letter dated October 31, 2011. The Agency, the Union and the Grievant then met on November 1, 2011. The Agency issued a decision letter on January 5, 2012 terminating the employment of the Grievant.

Following attempts at informal resolution of the matter, the Union filed a grievance contending that the BOP did not have just and sufficient cause to remove the Grievant from his position of Correctional Officer. On March 14, 2012, the Agency denied the grievance. On April 2, 2012, the Union invoked the arbitration procedure per the CBA.

An arbitration hearing was held on June 25, 2013 in the conference room at the Agency's Beaumont facility. The parties represented as indicated on the cover sheet. They made argument, examined and cross-examined witnesses, introduced documentary evidence, filed post-hearing briefs and otherwise presented their cases in full. A certified court reporter made a transcript of the hearing. Finally, the Grievant was present during the entire hearing

II. ISSUE

Was the removal of the Grievant taken for just and sufficient cause, or, if not, what shall the remedy be?

III. RELEVANT PROVISIONS OF THE MASTER LABOR 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:

* * * * *

in accordance with applicable laws:

a. to hire, assign, direct, layoff, and retain in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employee.

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 c. The parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

ARTICLE 31 – GRIEVANCE PROCEDURE

* * * * *

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. . . . . .

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 action will be considered as the final response in the grievance procedure. The parties are then free to contest the action

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, of if not, what shall be the remedy/"

* * * * *

ARTICLE 32 – ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to the expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations and the remedy requested in the written grievance may be modified only by mutual agreement.

* * * * *

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and by the Union. . . . . .

* * * * *

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of the Prisons policies and regulations.

IV. SUMMARY POSITIONS OF THE PARTIES

A. AGENCY

1. Aaron Wickliff, the Grievant, was given conditional employment with the Federal Bureau of Prisons pending a background investigation by the Office of Personnel Management.

2. In the course of investigating the Grievant's background, it was discovered that the Grievant had numerous unresolved traffic violations, as well as several unresolved citations for failure to appear in court, and issues surrounding debt.

3. The Agency recognizes that the Grievant's removal occurred outside of the probationary year and while that timeliness issue can be fatal the Agency's removal

decision, in this case, the delay in adjudicating the Grievant's case lies solely with the Grievant.

4. The Grievant did not disclose information on pre-employment documents, thus delaying adjudication of the matter and the Agency's decision to remove the Grievant should not be overturned simply because the Grievant waited to disclose the myriad of unresolved legal obligations he was facing.

5. To the contrary – the Grievant's failure to address his legal responsibilities strikes at the core of his position as a federal law officer.

6. It is well-established that in reviewing adverse action appeals, the arbitrator is to apply the same substantive rule or standards as those applied by the Merit Systems Protection Board.

7. In evaluating alleged Agency violations of a collective bargaining agreement, the Board, and thus the arbitrator, will determine whether harmful procedural error occurred.

8. The Board, in well-established precedent, reviews an Agency-imposed penalty to determine whether it is within the tolerable limits of reasonableness.

9. Herein, the Grievant provided inaccurate information during the pre-employment process, particularly as to whether he was under charges for any violations of the law, whether he had ever failed to fulfill a rental or contractual agreement and whether he had ever been arrested during the previous seven years.

10. The Warden, who made the decision to remove the Grievant, found these discrepancies disturbing.

11. Had the Grievant been more forthcoming, the Grievant's traffic violations would have been processed differently and the Grievant would have had a chance to explain them.

12. Nevertheless, eight traffic violations within two years poses conflicts with the Grievant's position as a law enforcement officer; likewise the Grievant's substantial debt - between traffic violations and the breached rental agreement (over $6,000.00) – would have disqualified the Grievant from employment if revealed initially.

13. The underlying behavior, which lead to the inaccurate information strikes at the core of a law enforcement officer's duties and in turn constitutes just and sufficient cause for removal.

14. The penalty of removal was within the tolerable limits of reasonableness considering

the nature and seriousness of the charges and the nature of the Grievant's work as a law enforcement officer.

15. The Agency's removal of the Grievant complied with due process.

16. The Grievant was on notice that he was required to answer the pre-employment questions accurately.

17. The Grievant had the opportunity to respond to the discrepancies and the Proposal for Removal.

18. The Union has failed to meet its burden of proving harmful procedural error.

19. The Union has failed to prove there was a violation of the CBA in the disposition of the investigation and the imposition of the penalty: even assuming, *arguendo*, there was a violation, the Union has failed to prove the violation was harmful procedural error.

20. The Union's claim that the Agency was required to notify the Office of Internal Affairs is without merit.

21. Pursuant to 5 U.S.C. §7106 and Article 5 of the Master Agreement, Agency managers have the right and responsibility to use discipline to control the conduct of employees; while the Agency must have just and sufficient cause for taking the disciplinary action, the record amply demonstrates there was just and sufficient cause to remove the Grievant and that his removal was in the interest of the efficiency of the service; moreover, the Union did nor meet its burden of proof with respect to the issues it raised in its grievance.

22. Based upon the foregoing, the Agency respectfully request the Union's grievance be denied.

B. UNION

1. The burden of proof is on the Agency.

2. To ensure that just cause exists, and that the rights of grievants, such as Wickliff, are protected, in BOP cases, the imposition of discipline, including termination in this matter, is circumscribed by the so-called ***Douglas*** factors, set out in ***Douglas v. Veterans Admin***. 5 M.S.P.R. 380, 305-06 (1981).

3. Moreover, management decisions must not be arbitrary, capricious, or taken in bad faith.

4. A penalty that flows from incomplete analysis of both the misconduct and the individual employee is arbitrary.

5. Finally, it has always been axiomatic that the degree of penalty should be in keeping with the seriousness of the offense; thus, in disciplinary matters, a penalty that is markedly too harsh for the offense is unreasonable and an abuse of managerial discretion.

6. BOP's application of the ***Douglas*** factors was at best incomplete, to the extent that BOP's analysis of the Grievant's situation even comported with ***Douglas*** at all.

7. BOP's treatment of the Grievant was thus an abuse of managerial discretion, and not tempered by application of the facts to reasonable judgment, and the Grievant's termination should be set aside.

8. The Grievant tried to answer the Agency's questions honestly.

9. Alleged falsification of a pre-employment application is an area that is not without reported cases - among the factors, which may be considered, are: (1) was the misrepresentation willful? (2) was it material to the hiring? (3) was it material to the employment at the time of discharge? and, (4) has the employer acted promptly and in good faith?

10. The BOP has alleged that, had the Grievant revealed the charges that were pending, he would not have been hired; however, the BOP has provided no specific evidence on this point, except a Security Specialist's conclusory statement made at the arbitration hearing long after the termination.

11. Similarly, the BOP has made no showing whatever that the Grievant's issues with his fiancée's apartment or his traffic tickets were material to the Grievant's employment at the time he was discharged.

12. Finally, the BOP appears, to consider traffic violations – the primary means employed to end the Grievant's employment, as a non-material issue, and has done so since at least September of 2008.

13. When all of the documents are considered – the Pre-Employment Interview Form; the OPM Investigation notes; the fact that the Grievant in effect turned himself in when he got the "Warrant Warning;" the Grievant's answers and explanations when presented with the Agency's interrogatories -- the documentary evidence, taken together with the Grievant's arbitration testimony, should leave no doubt that the Grievant was doing his best to be truthful and respond to the BOP's multiple requests for information, and so any possible misrepresentation he made was not a willful one.

14. In evaluating the Grievant's case, it should be remembered that the Grievant is not a lawyer – and he should not have been expected to interpret the questions propounded to him during the employment process as if he had legal training.

15. Finally, "no" in response to these questions was a truthful answer in May 2010 when the questions were asked since as far as the Grievant knew he had not been convicted of any traffic violations.

16. The Grievant told the BOP, and testified later, without contradiction, that he believed that "all the statements and answers that he provided were true, complete and correct to the best of his knowledge; and, the Grievant stated that he knew he had unpaid traffic tickets – but pointed out that he was not asked that particular question, and that he believed that his answers had been truthfully and accurate because he had never been to jail or declared guilty of a crime in a court of law.

17. The same analysis may be applied to the question of the Grievant's fiancée's apartment lease; to begin with, the BOP has never presented this lease; and, therefore, it was never shown that the Grievant was bound by it. (The Security Specialist - who built the case against the Grievant - testified that he never even saw a copy of the apartment lease.)

18. Further, the Grievant credibly denied – without contradiction -- any intent to deceive the BOP and stated that he was, at the time of his pre-employment interview, unaware of the broken lease or the balance; he believed that his girlfriend signed the lease and that he was an occupant, excluding him of any financial or rental responsibilities; thus, the BOP has no evidence showing that the Grievant engaged in any effort to deceive the BOP by his answer on the Pre-Employment Interview Form that he had failed to fulfill the terms of a lease – or even knew that a lease which he thought his fiancée was legally responsible for was even a problem; thus, in sum, the BOP has no evidence that the Grievant engaged in intentional misrepresentation during the Pre-Employment Process as to this matter

19. The Agency's case against the Grievant rests on an incomplete record.

20. The BOP tried to prove just and sufficient cause for its termination of the Grievant based on speculation and hearsay; and, the decision maker in this case, the Warden

concluded that the Grievant had provided inaccurate information during the pre-employment process based upon speculation and hearsay.

21. It was the Warden's understanding – based on his consideration of the file compiled by Agency's Security Specialist that the Grievant owed several amounts of money based on some traffic violations and this rental agreement and that he had accrued some debt, and therefore, the Warden believed that the responses on these matters that the Grievant had provided were inaccurate.

22. The problem is, most of the information that the Warden thought he had was mostly inaccurate and certainly incomplete.

23. The fruits of Security Specialist's and the Warden's labors cannot, by any stretch of the imagination, be characterized as persuasive as they interviewed no witnesses, had an incomplete record, and a faulty understanding of the evidence; in turn, the Warden ultimately based his judgments on his unsupported and unsubstantiated opinions, and those of the Agency's Security Specialist; since, the evidence is not persuasive, and the Grievant should not have been discharged.

24. The Agency failed to properly apply the ***Douglas*** factors:

The ***Douglas*** Factors set out in ***Douglas v. Veterans Admin***. 5 M.S.P.R. 380, 305-06 (1981).	***Douglas*** Factors as applied to the Grievant's Situation
1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;	There is no proof that the Grievant acted intentionally or maliciously. The Grievant maintains that, at all times, he gave what he believed to be truthful and complete answers, based on the questions put to him as he understood them. (Tr. at 78-79, 87, 88; Joint Ex. 1 at pp. 12-13, 14-18).
(2) The employee's job level and type of employment, including supervisory or fiduciary Role, contacts with the public, and prominence of the position;	No evidence the Grievant has contact with the public. Wickliff is not a supervisor or prominent in the BOP.
(3) The employee's past disciplinary record;	No evidence of discipline at FCC Beaumont.
(4) The employee's past work record, including length of service, performance on the job, Ability to get along with fellow workers, and dependability;	The Grievant worked successfully for BOP at FCC Beaumont for two years, from 18 July 2010. (Joint Ex. 1, pp. 12, 19). The Grievant worked in all three facilities on the FCC Beaumont complex, including the low security compound, the high security penitentiary, specifically including the control center, the visitation area, the back gate and in inmate housing. (Tr. at 19). The Grievant also worked on mobile patrol. (Tr. at 81). The Warden graded the Grievant's employment

	performance as "acceptable." (Joint Ex. 1 at p. 6).
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;	Please see note at Factor No. 4. There is no evidence the issue at bar affected Wickliff's performance.
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;	The Warden claimed that termination of the Grievant was consistent with his decisions in other cases, but he is aware of at least one termination being overturned by an arbitrator. (Tr. at 27, 34). Moreover, termination cases processed similarly to this one have been overturned elsewhere in the system (see below). The CBA, at Article 6.b.2, provides for fair and equitable treatment for employees Agency-wide. (Joint Ex. 3, at pp. 10).[1]
(7) consistency of the penalty with any applicable agency table of penalties	The Warden had wide discretion under the applicable Table of Penalties. (Tr. at 24-25). The Warden could have given a letter of reprimand and gone up to termination. (Tr. at 24). The CBA mandates, at Article 30.c that discipline shall be progressive in nature. (Joint Ex. 3 at pp. 63). Why the Warden chose the most severe possibility on this fuzzy record is unclear.
(8) the notoriety of the offense or its impact upon the reputation of the agency;	No evidence that the Grievant's matter was publicized in the media.
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;	The record shows that the Grievant was trying to be truthful – he turned himself in as soon as he received the "Warrant Warning." (Tr. at 83-85; Joint Ex. 1 at p. 42). The evidence shows that the questions propounded to the Grievant were conflicting and unclear.
(10) the potential for the employee's rehabilitation;	The Warden addressed this factor by saying there was "not much" because he "had not been with us very long." (Tr. at 29). However, the Grievant's performance on the job had been rated as "acceptable," The Grievant revealed the problems with his traffic tickets, and lesser penalties were available to the Warden. (Tr. at 24, 83-85; Joint Ex. 1 at p. 42). Termination was not warranted.
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and,	During the period in which these events occurred, the Grievant was dealing with a person suffering from mental illness serious enough to require hospitalization on two occasions. (Union Ex. 2). Moreover, as shown, the questions propounded to the Grievant were confusing even to the Warden.
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future	Reprimand was available, even though not even justified under these facts, and the CBA enshrines

by the employee or others.	progressive discipline as a principle. See Note 7 above.

25. In another case, with the same Warden and the same principals, involving the termination of a corrections officer for allegedly failing to disclose prior disciplinary events during his Pre-Employment interview and on the associated paperwork, (in fact a case substantially identical to the matter at bar) the arbitrator found that the Agency failed to properly consider the ***Douglas*** factors and that it appeared to the arbitrator that there was no meaningful review of the ***Douglas*** factors before deciding to discharge the Grievant.

26. The Union contends that no meaningful review of the ***Douglas*** factors took place in the Grievant's case, either, and that, as happened in the other case, the Grievant's termination should be set aside, also.

27. Whether the employer has acted promptly in imposing punishment is often a consideration in disciplinary cases; herein the Agency's actions were anything but prompt.

28. The Grievant began the application process with BOP when he filed his "Declaration for Federal Employment" in April of 2010; he completed his 85-P Questionnaire on May 29, 2010, and he was interviewed by to complete the Pre-Employment Interview Form, on or about May 4, 2010; he was offered a job with the BOP on June 10, 2010; and, he began working July 18, 2010.

30. The Grievant turned himself in when he received the traffic ticket "Warrant Warning" on or about September 7, 2010; the Security Specialist was initially contacted about the case on or about September 28, 2010; yet, despite the fact that the revelation of the traffic tickets in September 2010 that allegedly made the case a high priority case; and, despite the fact that the Grievant was already employed by the BOP, the Agency's Security Specialist did not forward interrogatories to the Grievant until March 21, 2011.

31. The Proposal Letter suggesting that the Grievant was going to be terminated was not issued until September 21, 2011 – almost exactly a year after the Agency's Security Specialist got the case; the Warden did not act on the proposal to terminate Wickliff until January 5, 2012 – after the /Grievant had been working for the BOP for a year and a half

years; and, the hearing in this case was June 25, 2013 – two and a half years after the Agency's began its investigation and over a year after the Grievant's termination.

32. By no stretch of the imagination can the Agency have been said to have acted promptly and promptitude is important.

33. The BOP has known about issues with the Grievant's employment application since at least September of 2010 – but if traffic tickets and a lease that the BOP could never produce were so important, why did it take a year and a half to fire the Grievant?

34. In any case, using hearsay and stale evidence to support a termination is clearly unfair, and arbitrators have recognized the basic unfairness of such an approach in the past.

35. The Agency also used improper procedure to remove the Grievant, treating him as a probationary employee when he was in fact a non-probationary employee by not reporting the matter to the Office of Internal Affairs (or, "OIA") (which handles alleged misconduct by non-probationary employees) and for not following the OIA investigation protocol.

36. The Grievant is entitled to back pay and an award of attorney's fees pursuant to 5 U.S.C. § 5596 (back pay due to unjustified personnel action).

37. Amounts payable under § 5596(b)(1)(A)(i) are payable with interest, 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. *See* 5 U.S.C. §5596(b)(2).

38. Requests for an award of attorney's fees are considered in relation to several factors: (1) the employee must be the prevailing party; (2) the fees must be related to the personnel action; and, (3) the payment of fees must be warranted in the interest of justice.

39. For the reasons set out above, the Grievant should be restored to his position, and thus he will be in the position of a prevailing party.

40. The Grievant's demand for reasonable attorney's fees is clearly related to the personnel action.

41. In conclusion, the termination of the Grievant was not for just and sufficient cause to promote the efficiency of the service, as required by CBA Article 30.a; the record

evidence shows that the Grievant had no intent to deceive the BOP, and that he tried to be truthful and complete with his answers.

42. The Warden failed to properly apply the ***Douglas*** factors, and he appears to have accepted, uncritically, the results of a slip-shod investigation by Agency's Security Specialist, built totally on that Specialist's biased review of an incomplete file, which was not informed by any original research or interviews and was itself frequently based uncritically on paperwork, without any attempt to interview the compilers of it.

43. Given the defects in the BOP's record, and the weakness of its case, termination of the Grievant was an egregiously extreme disciplinary measure; moreover, the final decision to punish the Grievant was grossly untimely; and, the BOP applied improper procedure to the Grievant's termination since the Grievant was not a probationary employee, but a regular employee.

44. Since the BOP clearly lacked just and sufficient cause to terminate the Grievant, and since its adverse actions as to him was clearly not for the purpose of the efficiency of the service and since the Arden did not comply with the Douglas factors, the Grievant's grievance should be granted, and his termination deemed to be unjust and without cause.

45. The Grievant should be made whole, with back pay, interest, accrued annual leave and accrued sick leave that he would have received from the time of his termination in January of 2012 until he returns to work; and, the Union should be awarded reasonable attorney's fees.

46. The Union grievance should be granted, and the Grievant's termination deemed to be unjust and without cause; the Grievant should be made whole, with back pay, interest, accrued annual leave and accrued sick leave that he would have received from the time of his termination in January of 2012 until he returns to work; the Union should be awarded reasonable attorney's fees; and, the Arbitrator should retain jurisdiction of the case in the event the parties cannot agree as to the appropriate remedy with the Union having 30 days from the date of the award to reach agreement with the BOP concerning attorney's fees before submitting this issue to the Arbitrator for determination.

V. DISCUSSION AND DECISION

(Some of the facts and arguments made may not be set forth or discussed where they are not necessary for the disposition of the case.)

The Grievant was offered employment by the BOP on June 10, 2010 and began conditional employment on or about July 18, 2010. The Grievant had previously worked as a correctional officer at the Texas Department of Criminal Justice where he began his career as a correctional officer in early 2008. After applying for this position with BOP but prior to be given "conditional employment" by BOP, the Grievant was interviewed by BOP on or about May 4, 2010 this resulted in a "Summary of Findings of the Pre-Employment Interview." He completed his 85-P questionnaire on May 26, 2010.

During his pre-employment time frame the Grievant indicated that he had not been arrested for, charged with, or convicted of any offense(s) in the last seven (7) years, not to include traffic fines of less that $150.00 (from 85-P); that he had not been convicted of any moving violation in the last three (3) years nor had he failed to fulfill a rental or contractual arrangement (from his Pre-Employment interview); and, that he was not under charges for any violation of law (from OF-306).

On or about September 4, 2010, the Grievant received a traffic ticket "Warrant Warning" showing an amount owed of $2457.00. On September 7th he notified BOP's Human Resources department of the "Warrant Warning" and gave a Specialist there a copy of the warning. That Specialist advised the Grievant on or about September 10, 2010 that he needed to provide a detailed account of the circumstances surrounding the warrant(s).

Thereafter, a BOP Security Specialist located in Grand Prairie, Texas was contacted about this matter on or about September 28, 2010. However, this Security Specialist did not forward written questions to the Grievant until March 21, 2011. The Grievant answered the questions regarding his traffic tickets, warrants and unpaid rent. (It appears from the evidence that the warrant issues were resolved in September of 2010 after the Grievant sought and obtained legal counsel for the matter on September 9, 2010.) The Agency issued a Proposal Letter to terminate the Grievant on September 21, 2011 and terminated him on January 5, 2012. In his letter of termination the Agency rated the Grievant's job performance as "acceptable."

Other evidence adduced at the hearing shows that since September 18, 2008, the Agency no longer requires its staff to report traffic citations regardless of the dollar amount of any fines received or paid. Employees are required though to report DWI/DUI violations and arrests. Also, the Grievant became a non-probationary employee a year after he began conditional employment on July 18, 2010.

What is at hand is a 2- month probationary employee who turned himself in when he received a "Warrant Warning" from the City of Houston and was not proposed for termination until after he became a non-probationary employee and over twelve (12) months after he notified the Agency of this "Written Warning;" and, then, he was not actually removed for another three (3) plus months. An additional ground for termination/removal, the breach of a lease, was known to the Agency at least by March 21, 2011 because the Agency's Security Specialist asked about it in the written questions he submitted to the Grievant at that time.

The Agency has based its action on seven (7) traffic tickets issued to the Grievant from January 11, 2008 through May 3, 2009 and three (3) failures to appear (in court) from February 6, 2008 through August 19, 2008 and the Grievant's failure to disclose any of these anytime during his pre-employment interviews or on his pre-employment forms. Moreover, it also cites the Grievant's failure to disclose an alleged breach of a lease on an apartment and his failure to disclose it at during this same pre-employment period.

In his defense, the Grievant has stated that he answered truthfully at the time and as he understood the questions being asked of him. He did not consider himself to "convicted" of any of these tickets and these tickets did not constitute a "police record" or "charges for any violation of law" in his mind.

After reviewing the entire record I suppose it is possible that the Grievant did not make the connection with the questions asked and his traffic tickets and his failure to appear. There certainly is no evidence whatsoever that the Grievant was arrested or convicted of any offense in the last seven years. As to being "charged with" any offenses not to include traffic fines of less that $150.00, it is common experience that most tickets have fines written or printed on them, however, unless one chooses to pay without going to court, the ultimate fine is determined by court and it is normally divided between a fine

and court costs. In any event, these tickets are not tantamount to an indictment or even an information and are citations at best.

A review of the seven (7) tickets reveals that they are for an expired license plate; failure to wear a seatbelt; failure to notify DPS of address change; defective stop lights; transporting a child without safety seat system; and, speeding. Thus, six (6) of the tickets are for non-moving violations and only one (1) is a moving violation. With all due deference to the Agency, none of these appear to be serious enough to disqualify a person from employment with the Agency. Moreover, the evidence indicates that at least from September 2008 (Union Ex. #1), that the Agency no longer requires its employees to report traffic citations regardless of the dollar amount of any fines received or paid.

The failure to appear citations are a little more troublesome, however, the Grievant explained that because of the psychiatric hospitalization of his fiancée, the responsibility of becoming the primary caregiver of his toddler son and the financial embarrassment associated with becoming the sole income for his family, he unintentionally failed to deal with his traffic citation.

As to the breach of the lease, the evidence indicates that the Agency did not obtain a copy of the lease. Thus, it is impossible to determine if the Grievant signed the lease (which would have created the presumption of knowledge of his duties and responsibilities therein) or if his fiancée, who he testified handled the finances of the couple, added his name to the lease without his knowledge or without his understanding that he would also be responsible for payment of rent if she had done so.

The Agency's Security Specialist eventually reported to the deciding authority (the Warden) that the Grievant had accrued a considerable amount of debt based upon the money owed due to traffic citations and the unpaid amounts on the lease and that the Grievant's responses on these matters were in his opinion 'inaccurate." He based his conclusion apparently on the fine amounts, the "warrant warning" amount and what the landlord revealed about the amount owed – back rent, penalty for late rent and a penalty for breaking the lease.

An examination of the record though indicates that the "Warrant Warning" amount had been taken care of through the representation of the Grievant's Attorney as early as September 9, 2010. As for the ticket themselves, they indicate a cumulative total

of $2481.00 based upon the face amount stated thereon. The lease amount is $3947.00. These are probably not insignificant amounts where the Grievant's regular salary pays between $38,000.00 and $39,000.00. However, as stated above, no lease was obtained so there is no corroboration as to the Grievant's legal responsibility or for that matter the amount actually owed. Also as noted above, the Agency at that time was no longer concerned about the reporting of an traffic citations regardless of the amount of the fine owed or paid and so even the amount owed or paid here appears not to be relevant to a non-probationary employee.

In this case, the Warden as the deciding official in the matter of the Grievant, who is now a non-probationary employee after July of 2011 must utilize the ***Douglas*** factors in determining what discipline to mete out. I will now address those factors in relation to the Grievant

It appears to me that the actual underlying factors (the tickets and breach of lease) are not as serious as the Agency contends. In hindsight, while there is little doubt now that the Grievant provided inaccurate information to the Agency, while at the time he provided the information (pre-employment) it was not so clear. In any case, it was the Grievant who brought the matter of the "Warrant Warning" to the Agency right after he received it – just less that two months after he began working at the Agency's facility. The Agency certainly had no information of these tickets and may not have obtained any but for the Grievant coming forward. Then, the Grievant cooperated with the Agency to explain the matter, albeit six (6) months afterwards, because he did not get the list of questions from the Agency's Security Specialist until March of 2011. Taking this all in context, it does not appear to me that the Grievant's actions constituted serious offenses as it related to his duties.

There was no evidence that the Grievant had contact with the public or that he had a supervisory or fiduciary role with the Agency or was "prominent" in BOP.

There was no evidence that the Grievant had a poor disciplinary record.

The Grievant only worked for the Agency from July 18, 2010 until January 5, 2012, however, he worked in all three facilities and was graded "acceptable" by the Warden.

There appeared to be no effect upon the Grievant's ability to perform at a satisfactory level because of these matters.

The Agency has terminated other employees for providing inaccurate information but in at least one case, an arbitrator overturned that decision and returned the employee to his job.

The Warden admitted that he had wide discretion per the table of penalties (reprimand to removal) and in as many as four (4) instances employees have resigned rather than being removed.

As for notoriety of the incident, there is no evidence that his actions were publicized or that they had an impact upon the reputation of the Agency.

The Grievant knew that he had to be truthful in his answers in the pre-employment process and that not being truthful could eliminate him from consideration for a job.

Based upon the evidence adduced at the hearing and in particular because the Grievant identified his situation to the Agency in a timely manner, I do not believe that it is likely that the Grievant would ever put himself in a similar position in the future.

The chief mitigating factors here are that the Grievant, upon receiving the "Warrant Warning" from the City of Houston immediately advised the Agency of the matter and that he fully cooperated in the investigation.

It would appear that the Grievant, rather than being a miscreant who cannot be changed, is one who when he finally recognizes a problem is upfront and frank with the Agency.

Another problem I have with the Agency's case is that it took more than six (6) months to begin to investigate the matter and another six (6) months after the investigation began to propose removal. During this entire time, the Grievant performed his regular duties in an apparent "acceptable" fashion. There is arbitral authority that discipline should be meted out promptly and if it is not, the discipline should be reduced or removed. Union counsel has also cited several arbitration cases involving the Agency where arbitrators have found discipline was untimely when it was imposed seventeen (17) months, twenty-two (22) months, three (3) years and six (6) years after the alleged

violation and that these arbitrators found these delays to be violations of the Master Agreement.

The delay in addressing the Grievant's revelation is also telling in the determination of the severity of the offense(s) alleged. If the Grievant's conduct before seeking employment and/or his "inaccurate" answers in the pre-employment process were so egregious, it begs the question as to why did the Agency waited so long to deal with it after he identified the problem(s)? The same issues of trustworthiness and possible corruption or compromise were there then and did not just arise in September of 2011 when the Proposal Letter was issued.

Moreover, the Grievant was a probationary employee when he disclosed the "Warrant Warning" and the tickets he had. Once again, if these are egregious acts or the failure to disclose accurately are egregious acts, the Agency had the opportunity then to deal with them then and I assume the Grievant would not have the same protection he has as a non-probationary employee.

I also do not agree with the Agency that it was the Grievant whose misdirection led to the untimeliness of the discipline. Even if were so, he only did so for less than two (2) months. The Grievant came forward with the "Warrant Warning" just under two months of starting work. The Agency had at least ten (10) months to address the matter and remove the Grievant as a probationary employee. Once again, the delay of the Agency undermines its argument that the Grievant's offenses are worthy of removal.

Based upon the case before me and for the reasons stated herein, I find that the Agency did not have just and sufficient cause to remove the Grievant from his employment. Among other things, the offenses alleged appear not to be that serious or egregious, the Grievant had an "acceptable" job performance during his tenure with the Agency, the deciding authority did not do a meaningful ***Douglas*** factors analysis and the lengthy delay in imposing the discipline not only undermines the Agency's position in this matter, it also appears to be the fault of the Agency and is generally unacceptable in terms arbitral authority.

Finally, based upon the foregoing and in the interest of justice, attorney's fee are awarded to the Union based upon the adverse personnel action imposed on the Grievant by the Agency and set aside herewith.

VI. AWARD

The grievance is sustained, and the Grievant's termination is deemed to be unjust and without cause. The Grievant should be made whole, with back pay, interest, accrued annual leave and accrued sick leave that he would have received from the time of his termination on January 5, 2013 until he returns to work, less interim earnings (any earned income); and, the Union should be awarded reasonable attorney's fees.

The Arbitrator will retain jurisdiction of the case in the event the parties cannot agree as to the appropriate remedy and/or attorney's fees - ordinarily, the Union would have 30 days from the date of this award to reach agreement with the BOP concerning these matters before submitting these to the Arbitrator for determination; however, the arbitrator recognizes that as of the date of this Award, the federal government is shut down due to lack of a enacted budget for fiscal year 2014 – therefore, the Union will have 30 days from the end of this shutdown to reach agreement with the BOP concerning the remedy and/or attorney's fees before submitting these to the Arbitrator.

October 7, 2013

Thomas A. Cipolla, Arbitrator