In the Matter of the Arbitration Between	)	
	)	
	)	
DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	
FCC BEAUMONT, TEXAS (Agency)	)	
	)	
AND	)	FMCS CASE NO. 12-56222
	)	Issue: Chris Massey -
	)	Termination
AMERICAN FEDERATION OF	)	
GOVERNMENT EMPLOYEES	)	
LOCAL 1010 (Union)	)	
	)	

BEFORE: Barbara J. Wood, Arbitrator

FOR THE AGENCY: Elisa Mason, Esq., Assistant General Counsel
U. S. Department of Justice
Federal Bureau of Prisons
320 First St., NW, Room 252 – LMR
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FOR THE UNION: Patrick M. Flynn, Esq.
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1225 North Loop West
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Houston, Texas 77008

ALSO PRESENT FOR THE HEARING:

Bridgette Chretien, Lead H. R. Specialist, Beaumont, TX
James Bettis, SBIS, Dallas, TX
Alice Schindehette, H. R. Specialist, Dallas/Gran Prairie, TX
Mark S. Martin, Complex Warden, Yazoo City, MS
Miranda Begelton, Union Vice President, Beaumont, TX
Clifton J. Buchanan, Union South Central Regional VP
Jason VanDeHoef, Union President
Christopher B. Massey, Grievant

The hearing in the arbitration between Federal Bureau of Prisons, herein after referred to as Agency, and Council of Prison Locals, American Federation of Government Employees Local 1010, herein after referred to as Union, was held on May 30, 2013 at the FCC, Central Administration Building, 5430 Knauth Road, Beaumont, Texas. The Agency was represented by Elisa Mason, Attorney. The Union was represented by Patrick M. Flynn, Attorney. The Arbitrator was Barbara J. Wood. The Union and Agency stipulated that the grievance was properly before the Arbitrator. Testimony of witnesses was taken under oath. Representatives of the Agency and Union were provided full opportunity to present evidence, examine and cross-examine all witnesses. The arbitration hearing transcript was provided by Reliable Court Reporting, Beaumont, Texas. Post Hearing Briefs were prepared by the Union and Agency Representatives then submitted to the Arbitrator.

ISSUE

The parties did not stipulate to the issue. The Arbitrator has defined the issue as follows:

Whether the Grievant, Christopher B. Massey, was discharged for just and sufficient cause? If not, what shall the remedy be?

EXHIBITS

Joint Exhibits (JX):

JX1 Invocation documents - 18 pages

JX2 Discipline file - 42 pages

JX3 Douglas Factors

JX4 Master Agreement (CBA) between Federal Bureau of Prisons and Council of Prisons, AFGE dated March 9, 1998 – March 8, 2001. The Master Agreement was still in effect as of the date of the hearing.

Agency Exhibits (AX):

AX1 Pre-Employment Interview – complete pages 57-69

Union Exhibits (UX):

UX1 Special Investigator Lakita V. Oliver identification

UX2 Christopher B. Massey's Performance Appraisals

UX3 Program Statement

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Preamble

(D) recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be reasonably assisted, to develop their potential as Bureau of Prisons employees to the fullest extent practicable.

Article 5 Rights of the Employer

Section a(2) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

Article 6 Rights of the Employee §b (2) (6)

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

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

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

Article 30 §c & d Disciplinary and Adverse Actions

(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 actions for the first offense up to and including removal.

(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.

Article 31 Grievance Procedure

Article 32 Arbitration

Article 36 Human Resource Management

The Union and the employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and the Employer to fulfill the mission of the organization. This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in the daily routine, or during extraordinary conditions. In a spirit of mutual cooperation the Union the Employer commit to these principles.

BACKGROUND AND FACTS

Federal Corrections Complex (FCC) Beaumont, TX is a part of the Bureau of Prisons which is a part of the United States Department of Justice. The Agency's mission is to confine offenders and to control the environments of prisons that are safe, humane and appropriately secure. Correctional officers and all correctional workers employed by the Department of Justice in institutions such as this one can include secretaries, teachers, facilities departments, electricians all of them are also considered federal law enforcement officers. Because of the nature of their duties, all correctional workers in the Bureau have arrest authority within the federal facility. They oftentimes are witnesses to crimes which occur within these grounds and may be called upon to testify under oath in criminal and other proceedings related to their duties. The law enforcement officers are held to a higher standard of conduct and their integrity must be above reproach.

This case involves the Agency's removal of Grievant Christopher B. Massey, herein after referred to as "Grievant", as a Correctional Officer. Grievant was hired by the Federal Bureau of Prisons at FCC Beaumont, Texas on April 25, 2010 as a Federal Corrections Officer. Grievant was employed at FCC Beaumont previous to this rehire. On October 6, 2011, Grievant was removed from the federal services for providing inaccurate information during the pre-employment process. On March 1, 2012, the Grievant was issued a decision letter

terminating his employment with the Agency. On June 1, 2012, the Union filed an invocation to arbitrate. (JX1) A hearing was held at FCC Beaumont on May 30, 2013.

POSITION OF THE AGENCY

ACCORDING TO THE AGENCY on October 6, 2011, the Agency proposed to remove the Grievant from the federal service for Providing Inaccurate Information during the Pre-Employment Process. On November 14, 2011, the Union requested a ten day extension, on behalf of the Grievant, in providing a response to the proposal. On November 26, 2011, the Union requested a second extension of time to respond to the proposed removal. On December 8, 2011, the Grievant and the Union provided written responses to the deciding official, Chief Executive Officer "Warden" Marcus Martin. Also on that date, the Grievant provided an oral response.

According to the Agency the Grievant was given conditional employment with the Federal Bureau of Prisons pending a background investigation by the Office of Personnel Management. On February 16, 2010, during a pre-employment interview with the Agency, the Grievant was asked the following question: has the applicant been disciplined (suspended or reprimanded) in former or current employment? (JX2) The Grievant disclosed two prior reprimands during a prior period of Bureau of Prison employment. However, he failed to disclose a demotion with the South Louisiana Correctional Center just months prior to the interview. In the course of investigating the Grievants background, it was discovered that the Grievant was demoted during his last position as a correctional officer with South Louisiana Correctional Center. The

Grievant had several opportunities to provide that information to the Bureau of Prisons, but he neglected to do. The Grievant alleges that he did provide the information, but the Human Resource Specialist failed to record it. The Grievant asserts that he did not have an obligation to report the circumstances surrounding his departure from his last position. The Agency asserts that the Grievant did have a duty and obligation to report the demotion. His failure to do so was a material inaccuracy.

While the Grievant was removed from employment after his probationary period, the delay in his removal was caused solely by the Grievant. The Grievant was given an opportunity to respond to the discrepant information in his background, and he took five months to do so. The Grievant and Union requested extensions of time to respond to the proposed removal. The Agency did not cause the delay.

The Grievant was investigated by Office of Personnel Management (OPM). Once OPM completes its investigation, the file is sent to the Agency's Security Background Investigation Section (SBIS). Once SBIS receives the file, it is sent to a Security Specialist, in the Grievant's case the Security Specialist was James Bettis. Bettis received the Grievant's file from OPM in October 2010, and he noted that the Grievant's case had discrepancies. OPM's investigation revealed that the Grievant had been fired from the South Carolina Correctional Center, and the Grievant had not disclosed that information. (JX2) In December 2010, Bettis sent the Grievant interrogatories to learn more about the issues of inconsistency. Through the interrogatory responses Bettis learned that the

Grievant quit his position at the South Louisiana Correctional Center after a demotion. Those interrogatory responses were returned to Bettis in February 2011. Based on the demotion information contained in the first set of interrogatories, Bettis determined that the Agency needed to learn more about the demotion, as that information had not been revealed in the pre-employment interview process. Bettis sent the Grievant a second set of interrogatories on February 25, 2011. (JX2) The interrogatory letter instructs the Grievant to provide responses to the Human Resource Manager within five business days. The Grievant was asked about the demotion. The Grievant asserted that he reported the demotion on his USAJobs initial application, as well as during the interview with the FCC Beaumont personnel department. The Grievant signed the interrogatory responses on July 13, 2011, approximately five months after he received the form.

After the institution received the Grievant's interrogatory responses, in October 2011, he was proposed removal for providing inaccurate information during the pre-employment process. (JX2) In Complainant's written response to the proposal, the Grievant states that he is more than aware that any false or omitted statements would have developed unfavorable results. He states that he told Human Resource Specialist Schindehette about the demotion, but he signed the form without reading it to ensure it was included. The Grievant also submitted an oral response to the proposal. (JX2)

Alice Schindehette, former Employee Services Specialist, testified that she conducted the Grievants pre-employment interview and has conducted hundreds

of such interviews. Schindehette credibly stated that she provides an overview of the interview to the applicant and informs the applicant that they may review their responses and may make any changes to it. Schindehette reported that she has never, prior to this case, been accused of failing to record reported information on a pre-employment document.

Warden Mark Steven Martin and CEO operated the medium security facility within the complex at that time and was the deciding official. Warden Martin has over twenty-six years of service with the Agency. Warden Martin testified the Grievant provided an oral and written response to the termination proposal. The Warden testified that in addition to the pre-employment interview form, there would have been another opportunity to divulge the information regarding the demotion. Applicants are required to fill out an on-line application, and the Grievant failed to report the demotion on that form, as well. The Grievant reported that he did report the demotion to Ms. Schindehette, and he reported that he did divulge it on the on-line application but the information disappeared. The Warden found the Grievant's position to be inconsistent and troubling.

The Warden testified he considered the Douglas factors in making his decision. He testified that as a law enforcement officer, a correctional officer is held to a higher standard of conduct. The Warden further testified that the Grievant's penalty was consistent with previous cases at FCC Beaumont involving pre-employment issues. Specifically, there have been five cases, and in four of the cases, the applicant resigned, and in the fifth, the applicant was

removed.

The Agency argues the removal of Grievant was for just and sufficient cause. The Agency bears the burden of proving its charges by a preponderance of the evidence. 5 U.S.C. § 7701c (1)(B). The Arbitrator is held to the same standards as applied by the Board in reviewing adverse actions. Thus, "in determining the penalty, arbitrators are required to apply the same rules that the Board applies." Cirella v. Dep't of Treasury, 108 M.S.P.R. 474, 482-83 (M. S. P. B. 2008). "When an arbitrator fails to apply those rules, his penalty determination is not entitled to deference and the Board will conduct its own analysis." Pinnegar v. Fed. Election Comm'n, 105 M.S.P.R. 677, 698 (M.S.P.B. 2007). The Board, in well-established precedent, reviews an Agency-imposed penalty to determine whether it is within the tolerable limits of reasonableness. Douglas v. Veterans Administration, 5 M.S.P.R. 280, 302 (M.S. P.B. 1981). In Douglas, the Board listed potential factors to consider in determining the reasonableness of an Agency-imposed penalty. Id. at 305.

The Agency argues the penalty of removal was within the tolerable limits of reasonableness. Warden Martin testified that he considered the Douglas factors in making his decision. He testified that he considered that nature and seriousness of the charge of providing inaccurate information during the pre-employment process. And while the Grievant maintained that he performed in an acceptable manner, his provision of inaccurate information, destroyed the confidence of Grievant's supervisors in Grievant's ability to perform his job. (JX2) The Warden testified that the penalty of removal for the charge was

consistent that imposed on others for the same type of misconduct and it was consistent with Agency's table of penalties. Due to the seriousness of the charge and the Grievant's response, the Warden concluded that alternative sanctions would not be effective. The Grievant's testimony throughout the hearing reinforces the Warden's credibility determination.

The Agency maintains the removal of Grievant complied with due process. And further argues, the Union has failed to meet its burden of proving harmful procedural error. 5 C.F.R. 1201.56 (c)(3) (2009). Harmful error cannot be presumed. Hidalgo v. Dep't of Justice, 93 M.S.P.R. 645, 653 (M.S.P.B. 2005).

The Agency argues the Union has failed to prove there was a violation of the CBA in the disposition of the investigation and imposition of the penalty. Even assuming, *arguendo,* there was a violation, the Union has failed to prove the violation was harmful procedural error. According to the Agency the Union contends the Agency's disposition of both the investigation and the imposition of the penalty was untimely, in violation of Article 30 of the parties CBA. However, here the delay in processing this adverse action lies solely with the Grievant and the Union. By all accounts, had the Grievant returned the interrogatory responses in a timely manner, and had the Union not sought two extensions of time to respond to the proposed termination, the Grievant's removal would have occurred within the one-year probationary period. In adverse actions, such as the instant one, an allegation of untimely disposition is an allegation of harmful procedural error. Also, in reviewing an adverse action in which the Grievant has alleged a violation of a CBA, the arbitrator should determine whether harmful

procedural error occurred. See Pleasant v. Dep't Housing and Urban Dev., 98 M.S.P.R. 602, 608 (M.S.P.B. 2005), Pinegar v. Federal Election Comm'n, 105 M.S.P.R. 677, 697 (M.S.P.B. 2007). The Agency maintains they did not violate the terms of the CBA. Here, Article 30 of the parties' CBA unambiguously states that the parties recognize investigations may be lengthy based on the circumstances and complexities of the case. (JX4) Therefore, no time frame requirement is therein defined for either the completion of the investigation or the adjudication of any warranted discipline. An arbitrator may not ignore the plain language of a collective bargaining agreement. See United Paperworks Int'l v. Misco, 484 U.S. 29, 38 (1987). A finding by the Arbitrator that there is fixed time requirement for disposition of the investigation and/or the disposition of discipline would be tantamount to the Arbitrator's modification of the parties' bargained for agreement in violation of Article 31, Section h.

According to the Agency there was no violation of policy with regard to the timeliness issue. There was testimony by Bettis that he initiated interrogatories within two months of receiving the file from OPM. When he initiated the second set of interrogatories, he did so within two weeks of receipt of the first set of interrogatories (the first set signed by the Grievant on February 10, 2011 and second set delivered on February 25, 2011). The Grievant signed the second set of interrogatories on July 13, 2011. (JX2) Accordingly, the Grievant caused an over five month delay in the processing of his case. The Union failed to show how the alleged lack of timely disposition was harmful to the Grievant, i.e., how it substantially harmed or prejudiced his rights. To the contrary, the Union sought

extensions on their response in part due to the Grievant's scheduled holiday leave. (JX2) The Union has failed to meet its burden of proving that in the absence or cure of the error, the Warden would have likely reached a different decision than the instant one.

The Agency insists the Union has failed to prove the equitable defense of laches. The Union's allegation of untimely disposition of the Grievant's investigation and imposition of the penalty is aimed at raising the equitable defense of laches has failed to meet its burden of proof. To establish this defense, the Grievant must show unreasonable delay and that he was materially prejudiced by the delay. Hidalgo, 93 M.S.P.R. at 654. In light of the expediency with which Mr. Bettis initiated action, as well as the time between the Grievant's interrogatory responses and the proposed removal (3 months), the Agency moved in a reasonably speedy fashion. (JX2) The Union has not met its burden of proof showing that the Grievant was materially prejudiced by the delay. If anything, it was the Grievant who was benefitted during the disposition of this matter in that he was gainfully employed and received pay and benefits throughout the entire period. Had the Grievant provided accurate information during the pre-employment process, it is possible that he would not have been hired at all.

The Union, in their formal grievance, alleges that the Agency was obligated to notify the Office of Internal Affairs (OIA) and initiate an official investigation into this matter before terminating the Grievant, because the Grievant was not a probationary employee. Nothing in the Agency's policy

requires this. (JX1) (UX3) As James Bettis testified, the Office of Internal Affairs only handles cases involving incidents that happen while an individual is on duty with the Agency. The information relied upon to remove the Grievant was all pre-employment related. Accordingly, OPM has jurisdiction to investigate the matter. The Office of Internal Affairs did not have jurisdiction to investigate this matter. The Agency insists the Union's claim that the Agency was required to notify OIA is without merit.

According to the Agency the Arbitrator is to apply the same substantive rules as the Merit Systems Protection Board (Board) in reviewing an Agency's Adverse Action. 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. See Cornelius v. Nutt, 472 U.S. 648, 660-61 (1985); Elkouri & Elkouri, How Arbitration Works at 1303 (6th ed. 2003). In Cornelius v. Nutt, the Supreme Court examined the legislative history of the harmful error provision and concluded, "Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision" to promote consistency in the resolution of these issues and to avoid forum shopping. 472 U.S. at 660-61

This is consistent with the statutory framework established for review of arbitrators' awards. Decisions by arbitrators involving adverse actions, such as the termination in the instant matter, which do not include claims of discrimination, may be appealed directly to the U.S. Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. § 7121 (f). See also, Elkouri & Elkouri, How Arbitration Works, at 1300 (6th ed.

2003), Schafer v. Dep't of Interior, 88 F.3d 981, 984-45 (FC 1996). However, for adverse actions involving claims of discrimination, the Board has jurisdiction to review an arbitrator's decision. 5 U.S.C. § 7121(d). The Federal Circuit reviews an arbitrator's decision under the same standard of review as the Board. 5 U.S.C. § 7121 (f). In evaluating alleged Agency violations of a collective bargaining agreement, the Board, and thus the arbitrator, will determine whether harmful procedural error occurred. Pleasant v. Dep't of Housing and Urban Dev., 98 M.S.P.R. 602, 608 (M.S.P.B. 2005). The Board, in well-established precedent, reviews an Agency-imposed penalty to determine whether it is within the tolerable limits of reasonableness.

Douglas v. Veterans Administration, 5 M.S.P.R. 280, 302 (M.S. P.B. 1981). The applicable Board standards and regulation are explained in more detail in the Argument section of this brief.

In conclusion, the Agency cites 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. In addition, the Union did not meet its burden of proof with respect to the issues it raised in its grievance. Based upon the foregoing, the Agency respectfully requests the Union's grievance be denied.

POSITION OF THE UNION

ACCORDING TO THE UNION the Grievant is 45 years old and married. Grievant was in the United States Marine Corps from 1989 to 1995, serving as a field radio operator and in an infantry unit. During his last three years of service, Grievant was an instructor teaching communications, and then honorably discharged. Following his military discharge, Grievant was a police officer in Lafayette, Louisiana. Grievant relocated to Dallas to take a non-law enforcement related position. In 1999, Grievant returned to law enforcement when he began working for the BOP at FCI Seagoville in Dallas as a Correctional Officer. Grievant was at FCI Seagoville for 7 ½ years and during that time received numerous awards; saving the lives of two inmates; finding large quantities of alcohol and drugs that had been smuggled into the facility; BOP recruiter for area high schools; working on a Special Operations Response Team; and, working on a disturbance control team. Following Seagoville, Grievant transferred to FCC Oakdale, a detention center and low-security prison located in Oakdale, Louisiana. This position involved some hardship and expense requiring a 75-80 mile driving commute to Oakdale from his home in Lafayette, Louisiana. Grievant left BOP employment for a time and went to work for a Louisiana state prison (Elayn Hunt) just outside of Baton Rough. Following a mass layoff, Grievant was hired on at the South Louisiana Correction Center (SLCC) in Basile, Louisiana.

SLCC is not a state facility but a “contract” prison, described by Grievant as a very dangerous place to work and very poorly run. Grievant testified that

SLCC was a wrenching and difficult change for Grievant who was used to the very professional background of BOP employment. Further, Grievant testified that management was poor as was the security. Shortly after a major incident at SLCC involving Haitian inmates, Grievant as a lieutenant was assigned to supervision of a particular housing unit with approximately six correctional staff reporting to him. During the night Grievant caught two inmates tattooing each other, and sent them to Special Housing Unit, and had begun the paperwork on this incident when staff arrived to feed the inmates. Grievant realizing that he was not going to be able to complete his assignments before the shift change asked a sergeant to feed the lockdown inmates. The sergeant did so but did not complete the associated paperwork; resulting in Grievant being demoted from lieutenant to sergeant. In the chaotic atmosphere of the SLCC demotions were commonplace. Three to four weeks after this incident Grievant disliking the chaos of working at SLCC and looking to rejoin the BOP, he had already submitted the requisite paperwork and was confident he would receive an offer of a position at FCC Beaumont, hand-delivered his resignation letter to SLCC. The Grievant further testified this letter was preserved in the files.

According to the Union on or about February 16, 2010, Grievant engaged in a pre-employment interview with H. R. Specialist Alice Schindehette which resulted in the preparation of a Summary of Findings of the Pre-Employment Interview. (JX3) This form involved some 80 questions. Question #3 asked "[h]as the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment?" Grievant answered "yes" and in part 3a, asked

Grievant to specify the cause, degree and type of behavior…, Schindehette's handwritten entry that the Grievant stated that he'd gotten written reprimands from BOP Seagoville in 2005 for using foul language with an inmate and for breach of security. (JX2) Grievant maintains that during his pre-employment interview he told Schindehette about both of the incidents at Seagoville, and his demotion at SLCC. Grievant testified that he was "truthful about …every single thing. I never tried to hide anything, and I never tried to mislead anybody."

Grievant also executed an SF85P or "Questionnaire for Public Trust Position." At Question #12, Grievant answered "no", indicating that he had not been fired, quit or left employment under unfavorable circumstances; also answered "no" to the question "did you quit after being told that you would be fired." (JX2) The Grievant maintains all of his answers were honest and correct.

According to the Union between May and September 2010, Grievant was interviewed by Lakita V. Oliver, a USIS "Special Investigator" hired to conduct background investigations for OPM. (UX1) According to the Grievant, he and Oliver had five or six interviews in person and three or four phone interviews. Grievant had some difficulty communicating with Oliver testifying, "I understood her pretty well but she apparently had trouble understanding me" because she would ask the same questions over and over for which Grievant would provide the same answers. Grievant told Oliver he had been demoted while working for SLCC and that it had been a dangerous place to work. Apparently, Oliver understood Grievant to say "promoted" rather than "demoted." (JX2)

In October 2010, Grievant's file was forwarded by OPM to James Bettis at the SBIS who was responsible for the adjudication of background investigations completed by OPM in which discrepancies had been identified. Bettis interviewed Massey via paper interrogatories only, did not talk to him personally and only considered the paper file. Grievant's answers to interrogatories denied that he had been fired, or that he had in any way attempted to deceive the BOP during the pre-employment background assessment process. Grievant explained that he had been demoted from Lieutenant to Sergeant and assigned to a different shift. Later, he resigned. Grievant testified that Warden Riley at SLCC agreed to clarify this matter. (JX2) After receiving Bettis's interrogatories, Grievant had visited SLCC on his own time, and talked to Warden Riley personally. Riley remembered the Grievant, searched the files, found Grievant's resignation letter; and, after Grievant provided Bettis's phone number, agreed to forward the letter to Bettis and that it be no problem to do so. Grievant never heard anything further about it. Bettis received Grievant's answers about February 18, 2011. (JX2) Bettis was unsatisfied with Grievant's responses. Grievant had denied being fired, but Bettis now believed the reason Grievant had quit his position was because of his demotion and that Grievant had not revealed this during his pre-employment interview with Schindehette. Bettis sent Grievant an "addendum interrogatory, actually several interrogatories. The cover letter accompany the addendum interrogatories noted that Grievant had disclosed being demoted and that the matter had covered the issue of inmates refusing

food at SLCC but "the paperwork was not signed." Bettis testified that Grievant had always contended he was truthful.

On or about October 26, 2011, BOP Deputy Captain Derric Wilson forwarded a letter proposing that "you be removed from your position of Correctional Offer" based on the alleged provision of "Inaccurate Information during Pre-Employment Process." Specifically, the proposal alleged that during this process with Schindehette, Grievant failed to report that he was "demoted in 2009" while employed at the SLCC. (JX2) On March 1, 2012, Warden Martin removed Grievant from his employment. (JX2) Warden Martin's letter while noting that Grievant's past work had been acceptable alleged that Grievant's actions "had destroyed his credibility and effectiveness as a correction worker."

Grievant began his employment as a Correctional Officer at FCC Beaumont on April 25, 2010 and worked all critical post including Control Center Compound I, the Visitation Center and the Special Housing Unit I. Grievant was unsure if he was considered a probationary employee and would get a different answer from different people every time, but the Agency did give Grievant credit for previous service. The Union points out that had Grievant really been considered a probationary employee he would have not been permitted to work critical posts. Grievant's performance appraisals were positive. (UX2) Grievant's September 1, 2011 performance appraisal notes that he was doing "great job!" and rated Grievant as "satisfactory" ("S") or "exceeding expectations" ("EX") in every rated category. In October 2010 and January 2011, Grievants performance appraisals state "although re-hired as a GL-5, he functions/performs

at a GL-7 or above level". In fact the Union points out on every occasion on which Grievant was rated he was given an "S" or an "EX." (UX2)

The Union argues that "[D]ischarge is the most severe penalty an employer can impose upon an employee and the evidence supporting such a penalty should be persuasive." Alton Packing Corp., 83 LA 1318, 1321 (Talent, 1984). Bettis interviewed no witnesses, and based his judgments and the interrogatories he propounded to Grievant on his own unsupported and unsubstantiated opinions of what really happened at SLCC. However, Bettis's work was the primary weapon in the destruction of Grievant's employment. The Warden believed the Grievant had quit his position under unfavorable circumstances, making his responses on the SF-85-P a lie. The Union states even if the allegations against the Grievant are true, they did not amount to just and sufficient cause to terminate Grievant after his two years of good service, as shown by his performance appraisals.

The Union argues that the Agency performs its background investigation from February 2010 through February 2011, to assess whether (1) Grievant had intentionally deceived the Agency; or, (2) engaged in a willful misrepresentation. The Union argues it is clear, however, because of the changing nature of BOP's positions, that the BOP, primarily in the form of Bettis, was simply looking for a "gotcha" with which to hang the Grievant. 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? Federal Bureau of Prisons and AFGE Local 501, Miami Florida No. 07-51043 (Wolfson, 2007) at 3. Clearly, the answer to all of those questions in this case is "no."

The Union maintains that the Agency certainly has not acted promptly. The Agency has alleged that had Grievant disclosed his demotion during his pre-employment interview that he would not have been hired. (JX2) However, the Agency has provided no evidence on this point, except conclusive statements made after the termination. The Union argues the Agency has made no showing whatever that either the demotion, or Grievant's alleged concealment of it, was material to Grievant's employment at the time he was discharged. Based on Grievant's performance appraisals, the opposite is clearly the case.

The Union argues that Warden Martin did not properly apply the Douglas factors. (JX3) The Union's brief contains a complete Douglas Factor analysis as applied to Grievant demonstrated in the form of a table. Summary of Union's responses to the applicable factors:

1) No proof that Grievant acted intentionally or maliciously. Grievant maintains he disclosed his demotion to Schindehette and certainly disclosed it to Oliver. No evidence the offense was repeated.
3) No evidence of discipline at FCC Beaumont.
4) During first period of employment with BOP Grievant was at FCI Seagoville for 7 ½ years and during that time received numerous awards; saving the lives of two inmates; finding large quantities of alcohol and drugs that had been smuggled into the facility. Grievant also had

collateral duties (previously outlined.) Grievants performance appraisals at FCC Beaumont were positive. (UX2)

5) See Factor 4 (UX2). There is no evidence the issue at bar affected Grievant's performance.

6) Warden Martin claimed that termination of Grievant was in line with sanctions imposed on others for substantially similar misconduct and consistent with the Agency's table of penalties. (JX2). However, Warden later testified that he did not recall if he had ever disciplined anybody else for lying.

7) Warden Martin had wide discretion under the applicable Table of Penalties. Warden could have given a letter of reprimand and gone up to termination. When he chose the most severe possibility on this fuzzy record is unclear to the Union.

9) Grievant was aware of severe penalties possible for dishonesty. BOP will work with you under almost any circumstance but lie, you don't stand a chance. (JX2)

10) Warden Martin did not address this factor. The Union submits termination was not warranted. If Grievant did make a mistake in his first interview, as he said he did, by failing to read Schindehette's transcription of his answers with sufficient care, certainly a letter of reprimand would be sufficient. (JX2)

11)Warden Martin appeared not to have considered mitigating circumstances, namely that Grievant had been a good employee for over eight years prior to coming to FCC Beaumont and two years in FCC Beaumont.

12) Warden Martin appears not to have considered the possibility of alternate sanctions. See Note 7 above.

The Union argues that the Agency's processing of this case was dilatory at best. Whether the employer has acted promptly in imposing punishment is often a consideration in disciplinary cases. See AFGE 501 at 3. Here, it is very evident that Agency's actions were anything but prompt. The Union presents a chronological order of events: Grievant filed his Declaration of Federal Employment in January 2010; Schindehette conducted her Pre-Employment Interview in February 2010; Hired and began work on April 25, 2010; Oliver conducted her investigation for OPM in June 2010; Bettis got the file from OPM in October 2010; Bettis began his bombardment of interrogatories in approximately December 2010; Bettis, or HR had all the answers to interrogatories by at least July 2011; the proposal for termination was issued on or about October 26, 2011. The arbitration hearing in this matter took place on Mary 30, 2013. The Agency argues that the Grievant was terminated one month shy of two years after hiring. By no stretch of the imagination can the Agency have been said to have acted promptly. The Union cites several cases on "timely" where the CBA was violated by the Agency*: Federal Bureau of Prisons and AFGE Local 1218, Honolulu Hawaii; Federal Bureau of Prisons and AFGE Local 3690, Miami,* (Hoffman); *Federal Bureau of Prisons and AFGE, Fairton,*

New Jersey, (Harlan 2010); *Federal Bureau of Prisons and AFGE Local 3652, Chicago IL.*, FMCS 06-58934 (Larney 2007); Glenshire Woods, 121 LA 1665 (D'Eletto, 2005)

The Union argues the Agency used improper procedure to remove Grievant. The Union insists that it is important to note that Grievant was not a probationary employee and was in fact never treated as a probationary employee at FCC Beaumont. Grievant worked in all of the critical posts in FCC Beaumont including Control Compound I, the Visitation Center and Special Housing Unit I. Grievant did receive credit for his previous service. The Union insists that had Grievant really been considered a probationary employee, he would have not been permitted to work critical posts.

The Union states that Grievant is entitled to back pay and an Award of attorney's fees. Grievant seeks reinstatement, and that he be made whole with respect to lost wages, seniority, benefits with the applicability of their being retroactive as if he had never been terminated." (JX1) Grievant is entitled to such an award by law, as well as recovery of reasonable attorney's fees. See *AFGE local 3882 v. Federal Labor Relations Authority*, 994 F.2d 20 21 (DC Cir, 1993) and *5 U.S.C. § 5596*, entitled "Back pay due to unjustified personnel action".

In conclusion, the termination of Grievant was not for just and sufficient cause to promote the efficiency of the service, as required by CBA 30.a. The record evidence shows that Grievant had no intent to deceive the Agency, and that he tried to be truthful and complete with his answers. As Grievant admitted

the one thing that he could legitimately be censored for was failing to read Schindehette's transcription of the Pre-Employment Interview Form closely, and missing the fact that she had not put in his demotion at SLCC along with the two incidents from FCC Seagoville, assuming he understood that event fell within the scope of the question.

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

The Union argues the decision to punish Grievant was grossly untimely. The Agency knew at least by June of 2010, that it had questions about Grievant's pre-employment interview. However, it was March 2012 – almost a full two years later – during which Grievant had received nothing but sterling reviews on his performance appraisals before the Agency got around to terminating him.

The Union argues the Agency applied improper procedure to Grievant's termination. Grievant was not treated as a probationary employee, but as a regular employee. Consequently, questions about the truthfulness of Grievant's employment application should have been referred to the OIA, which follows different procedures and engages in oversight of such personnel evaluations. This was not done and is an independent reason supporting Grievant's reinstatement.

According to the Union the Agency clearly lacked just and sufficient cause to terminate Grievant, and its adverse actions as to him were clearly not for the sole purpose of the efficiency of the service. Had the Agency really been concerned with the efficiency of the service, it would assured itself that Warden Martin complied with the Douglas factors and carefully considered the record, the alleged infractions and Grievant's good record with the Agency.

The Grievant's grievance should be granted and his termination deemed to be unjust and without cause. 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 March 0f 2012 until he returns to work; and the Union should be awarded reasonable attorney's fees. The Arbitrator should retain jurisdiction of the case in the event the parties cannot agree as to the appropriate remedy. The Union should have 30 days from the date of the award to reach agreement with the Agency concerning attorney's fees or this question should be submitted to the Arbitrator for determination.

ARBITRATOR'S DISCUSSION

The representatives of the Company and the Union are commended for their skill and perseverance in presentation of their cases. Reference citations provided in their briefs were appropriate and helpful to the Arbitrator. The Arbitrator has reviewed all of the evidence, the Arbitrator's copious notes from testimony and various witnesses, the Company's and Union's excellent briefs including applicable case citations.

I recognize the importance of the Agency's position that as a law enforcement officer, a Correctional Officer is held to a high standard of conduct. Based on the Grievant as a rehire with no prior disciplinary problems with FCC Beaumont, would suggest the Agency surely would not have rehired the Grievant if he had not been an exceptional employee.

I am not persuaded the Grievant intentionally misrepresented by omission the demotion information from SLCC during the Pre-Employment Interview Process. If the demotion information had been documented in the Pre-Employment Interview process, it may not have precluded the Grievant from getting hired at FCC Beaumont. Neither the investigation nor the Agency produced any evidence to prove that the Grievant resigned from SLCC as a result of the demotion. In fact, the Grievant did include the two written reprimands that he received in 2005 at FCI Seagoville. Since the Grievant acknowledged these two disciplines, hence an explanation of the demotion at SLCC could have been explained as well during the Pre-Employment Interview, but inadvertedly not documented. The SLCC demotion

information had mitigating circumstances but was acknowledged and explained by the Grievant during the investigation process. I find the Grievant's testimony and documentation creditable.

In the instant case Article 30(c) discusses that 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 actions for the first offense up to and including removal. Also, 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.

In deciding whether discipline is warranted in a particular arbitration case, an approached by many arbitrators consists of application of seven tests for just cause. See *Enterprise Wire Co. v. Enterprise Independent Union,* 46, LA 359 (Daughterty, 1966). The seventh test, "was the degree of discipline administered by management reasonably related to the seriousness of the employee's offense and the record of the employee in his service with the business?" As cited in Elkouri & Elkouri, *How Arbitration Works*, page 964, i. Nature of the Offense…It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense."…Offenses are of two general classes: (1) those extremely serious offense… (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second of third offense) but for some milder penalty aimed

at correction. In those cases discipline may be considered excessive if it is disproportionate to the degree of the offense, it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored. Arbitrators are likely to set aside or reduce penalties when the employee had not previously been reprimanded and warned that his or her conduct would trigger the discipline. Trends in arbitration awards involving discharge cases found that the prior work record of the grievant was the most commonly cited factor given consideration by arbitrators, with another frequently cited consideration being the motivation or reasoning behind management's action.

In the instant case this Arbitrator absolutely does not intend to minimize the seriousness of an applicant/employee's responsibility to provide accurate information. The Grievant may not have intended to provide inaccurate information during the employment process. The Agency acknowledged that since employment and for almost two years the Grievant did not cause any extremely serious offenses at FCC Beaumont and was a good employee. The progressive discipline process enables an employer and employee to learn from mistakes, develop an excellent working relationship and build credibility. The Arbitrator finds the offense charged is a less serious infraction.

The Arbitrator has carefully reviewed the twelve factors in Douglas. See *Douglas v. Veterans Administration,* 5 MSPB 313 (1981). In *Douglas* the following factors were enumerated and as such should be considered in the present case in evaluating the reasonableness of the proposed discipline:

1. The nature and seriousness of the offense, and its relation to grievant's duties,

position, and responsibilities, including whether the offense was intentional and technical or inadvertent, or was committed maliciously, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contact with the public, and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers; and dependability;

5. The effect of the offense upon grievant's ability to perform at a satisfactory level and its effect upon supervisor's confidence and grievant's ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. Consistency of the penalty with the applicable agency table of penalties;

8. The notoriety of the offense or its impact upon the reputation of the City;

9. The clarity with which the employee was on notice of any rules that was violated in committing the offense, or had been warned about the conduct in question;

10. Potential for employee's rehabilitation;

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

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by grievant or others.

In the instant case these are the more prevalent factors:

1) I find the infraction and argument whether the demotion information was or was not documented on the Pre-Employment Interview a lesser infraction and does not negatively affect the Grievants ability to perform his duties, position or responsibilities. There is no proof that Grievant acted intentionally or maliciously.

3) There has been no evidence of discipline at FCC Beaumont during the Grievant's previous employment or rehire with the Agency.

4) The Grievant's Performance Appraisals since his rehire has been "S" or " E".

The Grievant's Correctional Officer's experience and dedication has been an asset for FCC Beaumont. This was acknowledged by management in the Performance Appraisal documents. Specifically, on September 2011 performance appraisal notes: "Ready for 7 great job!); October 2010 and January 2011 stated, "[a]lthough re-hired as a GL-5, he functions/performs at a GL-7 or above level.

5) There is no evidence to suggest the Grievant would not be able to perform his duties at a satisfactory level or higher.

6) There was no convincing evidence to support there was a similar case. In fact, given the Grievant's history and performance with the Agency, the Agency did not produce a similar case or circumstance.

7)The Agency had a wide discretion under the applicable Table of Penalties. The penalty administered was quite severe for the infraction that occurred.

9) The Grievant testified he was aware if you were dishonest with the Agency the penalty would be severe.

10) The Grievant has a substantial history and experience as a Correctional Officer. Given the support of management and his continued good performance on the job he will continue to be an asset to the Agency for many years.

11) Mitigating circumstances are the disagreement between the Grievant and investigators over a possible omission on a document which was clarified. According to the evidence and testimony, Grievant has been a good employee for eight years prior to a re-hire and a good employee since the rehire.

12) The Agency did not provide any evidence that an alternative sanction was considered to deter such conduct in the future.

After review of the guidelines in *Douglas*, consideration of the evidence and testimony, the Arbitrator finds the Agency failed to properly consider the *Douglas* factors. It appears to the Arbitrator there was not any meaningful review of the Douglas factors before deciding to discharge the Grievant. In such situations, the Arbitrator possesses the authority to reverse or modify the adverse action. The Arbitrator concludes that the degree of discipline was not reasonably related to the nature of the offense or the employee's past record.

The Arbitrator is concerned that throughout the elaborate and lengthy pre-employment and investigative processes, the Agency was unable to identify any questionable discrepancies that would allow a person to become employed and remain employed at the Agency for almost two years. The probationary period is one year, after which time the Grievant was considered a career conditional employee. Although the Grievant was hired back to FCC Beaumont as a GL-5 and perhaps functioning duties of GL-7 he was a probationary employee. The

performance appraisals indicated he was a “trainee” and it is customary for a probationary employee to have quarterly performance reviews. This is the case with the Grievant. No evidence was produced by the Union to suggest otherwise.

At the time of discharge, Grievant was not a probationary employee. While employed by the Agency, Grievant received “acceptable” to “exceeds” performance evaluations and no history of any prior discipline or misconduct. The Agency was unable to provide evidence or testimony to convince the Arbitrator that the Grievant’s conduct or performance had any negative impact on the efficiency of the Service.

The Declaration for Federal Employment was filed In January 2010. The employment investigations began in February 2010. The Grievant was terminated effective March 2012. This is an enormous amount of time for an investigation of this type. The probationary period is one year. I find the Agency is in violation of the CBA Article 30 § (c) (d).

AWARD

The Arbitrator finds Grievant Christopher B. Massey was discharged without just and sufficient cause. Effective immediately, the Grievant shall be reinstated to his former position as Correctional Officer, made whole with back pay, accrued annual leave and accrued sick leave that he would have received at the time of his termination. From the back pay due to Grievant, the Agency may deduct any

Unemployment Compensation paid as a result of the Grievant's termination and interim wages earned during the discharge period. There will be no attorney fees paid in this award.

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Barbara J. Wood, Arbitrator

July 31, 2013