IN THE MATTER OF THE	)	
	)	**ARBITRATOR'S**
ARBITRATION	)	
	)	**OPINION**
BETWEEN	)	
	)	**AND**
U.S. DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	**AWARD**
FEDERAL DETENTION CENTER	)	
SEATTLE, WASHINGTON	)	
(The Employer)	)	
	)	
AND	)	
	)	
AMERICAN FEDERATION OF	)	**Robert Smith Grievance**
GOVERNMENT EMPLOYEES	)	
AFL-CIO, LOCAL 1102	)	**FMCS Case #06-56949**
(The Union)	)	

HEARING: March 13 and April 2, 2008

HEARING CLOSED: May 30, 2008

ARBITRATOR:

Sylvia Skratek, Ph.D.
3028 Western Avenue
Suite 405
Seattle, Washington 98121

REPRESENTING THE EMPLOYER:

Michael A. Markiewicz
Labor Management Relations Specialist
U.S. Department of Justice
Federal Bureau of Prisons
230 N. First Avenue, Suite 201
Phoenix, AZ 85003

REPRESENTING THE UNION:

Thomas F. Muther, Jr.
Minahan and Shapiro, PC
Attorneys at Law
165 S. Union Blvd. Suite 366
Lakewood, CO 80228

APPEARING AS WITNESSES FOR THE EMPLOYER:

Lisa Wabinga, Employee Services Manager
Larry Carlson, Special Investigative Agent
Katherine Skillestad Winans, Chief Psychologist
Robert Palmquist, Warden

APPEARING AS WITNESSES FOR THE UNION:

Calvin Johnson, Food Service Administrator
Joseph Haneke, Cook Supervisor
Laura Oudinot, Food Service Material Handler Supervisor
Don Reno, Correctional Supervisor, Lieutenant
Michelle Shadday, Cook Supervisor
Frank Balizan, Senior Officer
Robert Smith, Grievant

BACKGROUND

The U. S. Department of Justice Federal Bureau of Prisons, Federal Detention Center (FDC) in Seattle Washington (hereafter "the Employer" or "the Agency") and the American Federation of Government Employees, AFL-CIO, Local 1102 (hereafter "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Sylvia Skratek in SeaTac, Washington on March 13 and April 2, 2008. During a pre-hearing conference the parties agreed that the issue was properly before the Arbitrator and should be decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine witnesses, introduce documents, and make arguments in support of their positions. The proceedings were recorded by Marie White of Groshong-Quaintance Court Reporters of Tacoma, Washington.

The parties were provided the opportunity to submit their closing arguments in the form of post hearing briefs which were received in a timely manner. The record was closed as of May 30, 2008. The award in this case is based upon the evidence, testimony, and arguments put forward during the hearing and the arguments presented by the parties in their post hearing briefs.

STATEMENT OF THE FACTS

Robert Smith, the Grievant, was employed at the Federal Detention Center in Seattle, Washington as a Cook Supervisor for approximately nine years. His primary responsibility was to provide supervision and instruction to inmate workers who are assigned the duties of cooks, butchers, bakers, dining and dish workers, vegetable preparation workers, and pot and pan washers. As with all correctional institution employees he was charged with the responsibility for maintaining security of the institution. The duties of his position required frequent direct contact with inmates. Daily stress and exposure to potentially dangerous situations such as physical attack were an inherent part of his position and it was therefore designated as a law enforcement position. (Ex. A-2) The Grievant received numerous awards for performance during his time of employment and received performance appraisals that were more than satisfactory. (Ex. J-9) He had one prior disciplinary occurrence: by letter dated December 16, 2004, the Grievant was advised that he was being suspended for one calendar day for Inattention to Duty and Appearance of an Inappropriate Relationship with an Inmate. (Ex. A-13)

In the summer of 2005, an inmate who had been incarcerated and released in 2003, returned to the FDC. In October 2005, the inmate made several allegations of inappropriate behavior by employees of the FDC, one of whom was the Grievant. (Ex. A-14) In her affidavit the inmate claimed:

> That Ms. [sic] Smith approached me soon after I had returned to FDC SeaTac. I was working in the Food Service Warehouse. He told me he knew something about me that nobody knew about me. He said he had been to Mexico a couple of times and he had been waiting for me to e-mail him. We were supposed to go to Mexico together. He had given me his e-mail address the first time I was here. His e-mail address is I believe 51504U@yahoo.com. He also had given me a telephone number to his best friend. I had also given him a telephone number to my friend in Portland, Or. He told me that he had talked to Officer Johnson and he told me that Officer Johnson had told him some things about me. I asked him what things. He told me that I was dancing in the cell window, and that Officer Johnson and I had, had sex. He told me that he could not believe that I had been together with Officer Johnson. He said he could believe that inmate Alcocer had sex with Officer Johnson.

On November 16, 2005, a special administrative inquiry pertaining to an inappropriate relationship with an inmate, the introduction of contraband, threatening an inmate, or failure to report a violation of policy was conducted by Special Agent Denese Heuett. The Grievant

provided a sworn affidavit that was prepared by Heuett. (Ex. A-15) On November 17, 2005, Heuett conducted an additional administrative inquiry pertaining to interfering with an investigation and the Grievant again provided a sworn affidavit. (Ex. A-17) As a result of the information provided in his affidavits, the Grievant received a letter dated January 18, 2006 proposing that he be removed from his position based upon the following charges:

> Charge 1: Failure to Report
> ...you failed to report that you were told by an inmate that something physical happened between her and former Officer, Daryl Johnson, and that she felt like she had been raped....
>
> Charge 2: Unprofessional Conduct
> ...you admit to engaging in gossip with inmate Freeman about inmate Alcocer....
>
> Charge 3: Appearance of an Inappropriate Relationship with an Inmate
> ...an inmate made a sexual comment to you which you did not report...
> ...an inmate reported you gave her your e-mail address...
> ...you have told inmates releasing from custody if they need to contact you to call the institution...
> ...you had contact with a former inmate and failed to report this contact...
>
> Charge 4: Interfering with an Official Investigation
> ...you discussed an Internal Affairs investigation with a co-worker... (Ex. J-6)

The Grievant filed a written reply to the proposal letter urging the Agency to review the evidence and not sustain the proposal to remove him from employment. (Ex. J-5) By letter dated March 9, 2006, the Grievant was advised the he would be removed from his position effective midnight of that day. (Ex. J-4) A grievance was filed on behalf of Mr. Smith by the Union claiming in part that the termination was not for just cause. (Ex. J-3) The parties were unable to resolve their differences and the matter was submitted to arbitration.

STATEMENT OF THE ISSUES

The parties agreed to the following statement of the issues:

1. Whether the removal of Robert Smith from his position as Cook Supervisor was for the efficiency of the service? If not, what is the appropriate remedy?

2. Was Mr. Smith's removal from Federal Service in retaliation for protected EEO activity? If so, what is the appropriate remedy?

ANALYSIS

Position of the Employer

The Agency reminds the Arbitrator that she is required to follow Merit System Protection Board (MSPB) law in deciding this case and that she is governed by section 7701(c)(1) of the Federal statute. Under the statute an agency may take an adverse action "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513 (a). An agency must prove that misconduct has occurred, that there is a nexus, or connection, between the misconduct and the service efficiency and that the penalty administered is appropriate. The evidentiary standard in adverse actions is the preponderance of the evidence which is defined as "The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." (5 C.F.R. § 1201.56(c) (2))

In this matter the Agency maintains that it has proven its charges, has shown nexus, and has shown that the penalty is well within the bounds of reasonableness. The Grievant was interviewed by an investigator and properly notified of his right to union representation.

The Grievant claims that the inmate told him about an alleged rape on August 5, 2005 however the Grievant ignored policy as well as the specific training that he had received and failed to report the allegation. The Grievant admitted that he discussed a sexual incident with the same inmate for no legitimate business reason. He further admitted that another inmate told him to come back into a private area so she could rape him. He did not report this statement to management creating the appearance that he was showing partiality to the inmate. He also gave his email address to an inmate and told certain inmates how they could contact him after than had been released. All of these behaviors served as the basis for the charges against the Grievant: failure to report; unprofessional conduct; and appearance of an inappropriate relationship with an inmate. An additional charge was filed against the Grievant claiming that he had interfered with an official investigation. Underlying this charge were conversations that he had with two employees following his interview with the investigator.

According to the Agency, the nexus in this case is self-evident. It is totally unacceptable for any employee to fail to report an alleged rape by an inmate. Sexual comments to and from

inmates have no place in a prison. Providing contact information to inmates is unauthorized. Such actions to select inmates cause the appearance of inappropriateness which can have consequences such as manipulation and anger which in turn can jeopardize the safety and security of the institution, the inmates, the employees, and the public.

Under case law it is well established that an employee in a law enforcement position is held to a higher standard of conduct than other employees. In this matter the Grievant's actions created a situation which could have resulted in various detrimental consequences. Warden Palmquist testified about the seriousness of the Grievant's actions and in his decision letter, he outlined his consideration of the various Douglas factors. He considered the seriousness of the Grievant's conduct and the loss of confidence in the Grievant's integrity. The Grievant's satisfactory work record did not outweigh the seriousness of the Grievant's actions. Furthermore another employee who also did not report alleged sexual issues between staff and inmates was terminated. The Grievant had been employed for approximately nine years when he was terminated and therefore he knew the importance of: reporting allegations of inmate rape, unauthorized sexual discussions with inmates, not providing inmates with personal e-mail, not instructing inmates to call him after release, and not discussing official investigations with other employees.

The Agency responds to the Union's contention that the Grievant was the subject of retaliation for EEO activities by emphasizing that the Grievant himself never actually filed an EEO complaint but rather served as a witness to another employee's EEO complaint. The Agency notes that the employee who had filed an EEO complaint had never been disciplined or terminated from employment by Warden Palmquist.

The Agency concludes that the Grievant's actions did rise to the level of misconduct and the Agency would have taken the same measures regardless of any EEO involvement by the Grievant.

The Agency requests that the Arbitrator deny the Union's grievance.

Position of the Union

The Union contends that the charges against the Grievant cannot be sustained and, even if any of them could be sustained, the penalty of removal from federal employment is clearly excessive.

The Union agrees with the Agency's emphasis that the Arbitrator must apply the same substantive rules as the Merit Systems Protection Board in reviewing an Agency disciplinary decision however an arbitrator does not necessarily have to reach the same result in every case that the MSPB would reach on the same set of facts.

In this case, the Union maintains that the Agency has bootstrapped its whole case against the Grievant on his own affidavit. Inmate Freeman's affidavit which preceded the Grievant's contains a string of allegations against current and former FDC employees but the only allegations that were taken seriously or even investigated were those involving the Grievant. Every admission that the Grievant made in his affidavit that the Agency could try to characterize as misconduct was seized upon as grounds for his termination. There was no investigation or follow-up questioning of the Grievant to determine the context of his statements before removing him.

According to the Union some of the charges are not only unsupported by the evidence, but frivolous. A sexual comment by an inmate years ago that was followed up by the Grievant counseling her and advising her that she was out of line was handled appropriately by the Grievant. A statement by an inmate that the Grievant gave her his email address was deemed credible by the Agency without any consideration being given to the numerous ways an inmate could obtain an email address other than directly from the Grievant. The fact that the Grievant told inmates that if they had a need to contact him after they are released that they can call the institution and ask for him is nothing more than what anyone would already know. The Agency failed to demonstrate that the Grievant's brief casual conversations with any individuals who were once incarcerated at the FDC fell within the Agency's former inmate policy definition and that even if they did, that these conversations created the appearance of an inappropriate relationship.

The charge of interfering with an official investigation warrants no consideration. There is nothing in the charge or specifications that even alleges some sort of interference with the Agency investigation in which the Grievant participated. He simply told two co-workers that he had been subjected to a lengthy interrogation about an inmate's complaint against another Officer. This does not demonstrate interference with an investigation in any way. Furthermore the Grievant has the right to consult with a Union representative in private after a meeting of this nature and his discussion with Ms. Shadday properly fell within the protection of that right regardless of whether or not Shadday was a Union steward at the time of the investigation. Shadday had served in that capacity and testified that she was a Union steward at the time even if the Agency questions whether or not the proper notifications or procedures had been followed.

The remaining two charges relating to the Grievant's brief conversations with two inmates are the last remnants of the Agency's justification for removing him from federal employment. While the Grievant may have engaged in gossip, he did not engage in unprofessional conduct. Gossip on the inmate work crews is common in the food service department. While cook supervisors would prefer not to get caught up in it, it is too much to expect them to say nothing to the inmates or to respond with silence to every inmate question or comment that is not strictly work related. Furthermore, the inmate who stated that something had happened between her and Officer Johnson and that she felt like she had been raped did so in a matter of fact way, without seeming to be upset, and when asked by the Grievant if she was going to report her claim, assured him that she would. It is important to note that the inmate's claimed rape had occurred nearly two years earlier, if at all, and the officer was no longer at the FDC. The purpose of a prompt report is to ensure that immediate safeguards can be taken to protect the inmate from the alleged perpetrator which in this case was not even remotely necessary. The Grievant left on a five week medical leave and upon his return learned that the inmate had indeed made a report as he had advised her to do. To discipline the Grievant for a failure to report is purely punitive and is not for just cause.

The Union suggests that even if the Arbitrator concludes that there is just cause to discipline the Grievant, the Agency's decision to remove him from employment must be modified. The Union contends that the penalty is too harsh and unreasonable under the

circumstances. The Union contends that the Grievant would not have been fired but for his participation in the EEO process. There is no doubt that the Warden knew of the Grievant's participation in the protected EEO activity. The Warden was openly hostile toward Oudinot's EEO complaint and engaged in overt efforts to shield the person she accused of harassment and the person who proposed the Grievant's removal from serious discipline. The Agency's proffered reasons for firing the Grievant are without merit and when all legitimate reasons for an employer's actions have been eliminated, "it is more likely than not that the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration." *Furnoc Construction Co. v. Waters,* 438 U.S. 567, 577 (1978)

The Union asks that the Arbitrator grant the grievance and order the Agency to reinstate Smith and make him whole for his lost salary and benefits. The Union also urges the Arbitrator to find that the Grievant's removal from federal employment amounted to reprisal for his participation in the EEO process and, upon this finding, retain jurisdiction in order to allow him to submit evidence of compensatory damages for this violation of Title VII of the Civil Rights Act of 1964, as amended.

Discussion

The Employer contends that the Grievant's termination was for the efficiency of the service and that his removal from Federal Service was not in retaliation for protected EEO activity. The Union argues to the contrary.

In making a final determination in this case the Arbitrator must review the facts of the case against the applicable cited provisions of the Agreement.

ARTICLE 3—GOVERNING REGULATIONS

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section 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:

1. To bring any matters of personal concern to the attention of any Management official, any other officials of the executive branch of government, the congress, and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level; however this does not preclude the employee from exercising the above-stated rights;
2. To be treated fairly and equitably in all aspects of personnel management;
3. To be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity;
4. To direct and pursue their private lives without interference by the Employer or the Union, except in situations where there is a nexus between the employee's conduct and their position. This does not preclude a representative of the Employer or the Union from contacting bargaining unit staff for legitimate work-related matters;
5. To become or remain a member of a labor organization; and
6. To have all provisions of the Collective Bargaining Agreement adhered to.

ARTICLE 22 – EQUAL EMPLOYMENT OPPORTUNITY

Section 2. The Employer and the Union agree to cooperate in providing equal opportunity for all qualified persons; to prohibit unlawful discrimination because of age, sex, race, relation, color, national origin or physical handicap; and to promote full realization of equal opportunity through a positive and continuing effort. The Union agrees to become a positive force in this endeavor and to become a partner with the Employer in the exploration and implementation of ideas and programs whereby equal employment opportunities will be achieved.

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 are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal.

It is well established that there are two areas of proof involved in the arbitration of discharge and discipline cases. The first such area concerns proof of wrongdoing; a responsibility that is allocated to the employer. The second such area of proof concerns the issue of whether the penalty assessed by management should be upheld or modified. The discharge of Robert Smith will be discussed within this analytical framework.

Proof of Wrongdoing

The official notification of removal from service (Ex. J-4) states the four charges that the Warden found to be "sustained and fully supported by the evidence in the adverse action file":

1. Failure to Report;
2. Unprofessional Conduct;
3. Appearance of an Inappropriate Relationship with an Inmate;
4. Interfering with an Official Investigation.

The Warden concluded that the Grievant's actions had destroyed his credibility and effectiveness as a correctional worker and that his removal was in the interest of the efficiency of the service.

The Arbitrator reviewed each of the findings that served as the basis for the Grievant's discharge and concluded that the evidence and testimony provided at the hearing did not support the charges.

Charge 1: Failure to Report

In the proposal letter dated January 18, 2006, Administrator Michael Williams states that the Grievant failed to report that he was told by an inmate that something physical had happened between her and former Officer Johnson and that the inmate felt like she had been raped. He goes on to say that the Grievant failed to report this information to anyone in his chain of command and also failed to advise the inmate of available medical and/or psychological care. The Arbitrator does not disagree with the Agency's emphasis upon the requirement to report any violation, or apparent violation of the standards of conduct to the Chief Executive Officer or another appropriate authority. What is unclear to the Arbitrator however is how the Agency determined what statements had been made to the Grievant that in turn he should have reported. A review of the transcript finds that the inmate supposedly stated something to some unnamed intern. There is no written report by the intern or by the supervisor to whom the intern supposedly reported the inmate's statement. There is no indication of time and date of any report to the intern or the supervisor. There is simply a claim that this is what triggered the interview with the inmate resulting in a five page affidavit that in turn led to the investigation of the Grievant. As the Warden testified on cross-examination:

Q. I'm sorry, Ms. Freeman reported it. Again, if OIG was that interested, why weren't better steps taken to document how it was reported to who and when?

A. I think that in this process the psychology intern reported what she had heard from the inmate immediately to her supervisor, and that supervisor immediately reported it to it was either myself or Mr. Carlson, I don't recall specifically who had brought the information to me, and immediately we had Ms. Freeman's statement taken. And then we subsequently referred that to the Office of Internal Affairs. So it is -- I mean you can make up or you can assert or manipulate however you want to do that, but this process happened very, very quickly. (Tr. Vol. 1, pp. 154-155)

The Arbitrator notes however, that once the unknown supervisor reported the inmate's claim, there was no evidence or testimony as to what constituted "very, very quickly". Carlson testified that because of the length of the inmate's affidavit he had to take some time to prepare it for her signature. There does not appear to be any urgency on the part of the Agency officials to move forward on the inmate's affidavit. Although the inmate's affidavit is dated October 7, 2005, the interview with the Grievant was not conducted until November 16, 2005. The Arbitrator was provided no evidence or testimony that would verify even the existence of an intern and a supervisor being involved in this matter leading her to question what in fact actually led to the investigation of the Grievant.

All of the activities surrounding the investigation of the Grievant occurred in October and November of 2005. During this same time period, Administrator Williams was investigated and disciplined for *Inappropriate Comments* and *Altering Government Documents.* (Exs. U-6 and U-7) Worth noting is the fact that the discipline was administered to Williams on October 19, 2005. The Grievant had participated in the EEO interviews that were conducted regarding the allegations against Williams. (Ex. U-4) Shortly thereafter, the Grievant became the subject of an investigation which led to Williams' January 18, 2006 proposal that the Grievant be removed from his position. (Ex. J-6) Neither party presented Williams as a witness at the arbitration hearing therefore the Arbitrator is left to speculate as to the motivation underlying his recommendation to remove a nine year, more than satisfactory employee based upon an unwritten report by an unknown intern that was in turn reported to an unnamed supervisor. The Arbitrator can find no sound and specific evidence or testimony to support a finding that the

circumstances leading up to the investigation of the Grievant were anything other than Mr. Williams engaging in a retaliatory act for the Grievant's participation as a witness in an EEO complaint. While the Agency has relied heavily on the Grievant's statements in the affidavit that he provided as part of the investigation, the Arbitrator finds that the Grievant's admission that the inmate told him *"something physical happened between her and Johnson. She said she felt like she had been raped"* was his response to the Agency's requirement that he cooperate fully in an investigation that he believed was being conducted on behalf of the inmate. Smith did not fully understand that he was the subject of the investigation at the time of the interview. As Smith testified:

Q. Let me ask you first of all, when you were -- how were you called in to the investigation that day? Were you given any advance notice as to what the investigation was involving?

A. No, Mr. Williams, my supervisor, called me in to the office and he said you need to go upstairs and answer some questions in the SIS Department. So I said okay, and I went upstairs. When I went in to the office, Larry Carlson was in there, Denese Heuett and I'm not sure -- I don't recall if anyone else was in there. Don Reno may have been in there. But I think he may have left. And I asked, you know, what is this pertaining to? Do I need a union representative?
And Ms. Heuett said, she goes, "That is up to you."
And I said, "Well, what do you mean?"
And she goes, "An inmate has listed you as a witness to something that has happened."

Q. Did you have any indication at that time that this was an investigation into misconduct that was alleged against you?

A. No, I didn't.

Q. How long did this investigation last or this interview last with Ms. Heuett?

A. For a while, quite a while.

Q. One hour, two hours, ten hours.

A. An hour and a half, two hours.

Q. And at the end of that two-hour period of time did you have a different opinion as to whether or not this involved you?

A. Yes, I did.

Q. What was your opinion at the end of that interview?

A. That it had gone from me being a witness as to something that happened to an inmate, which was just based on a statement that she had made, to being, you know, pursued after for failure to report an issue.

The Arbitrator concludes that Mr. Smith was attempting to assist the Agency in what he believed was an investigation being conducted on behalf of the inmate. His belief is not unreasonable given the fact that he had encouraged her to report the information that she had provided to him several weeks earlier. Although he signed the Agency's acknowledgement form the Arbitrator notes that the form does not identify Smith as the subject of the investigation nor does it indicate that he is being charged with any wrongdoing. (Ex. A-15) The form does state that if he refuses or fails to reply fully and truthfully he may be disciplined and Smith proceeds accordingly and provides the Agency with his candid review of the incidents being investigated. It is not until the end of the interview that he realizes that he is not a witness but rather a subject of the investigation. Ms. Heuett was not brought forward by the Agency to rebut Smith's view of the interview. As Carlson testified on cross examination he could not hear everything that was being said in the interview with Smith and he could not confirm that Heuett actually advised Smith that he was the subject of the interview:

Q. Where does it show that those are allegations against Mr. Smith and not another inmate that he is maybe a fact witness for?

A. Well, when Ms. Heuett conducts the investigation, she would tell the staff member, in this case Mr. Smith, that this investigation involves an inappropriate relationship with an inmate, and introduction of contraband, threatening an inmate or failure to report a violation and interfering with an investigation.

Q. So she states that this is to inform you. But do you recall her saying that to Mr. Smith?

A. I'm not 100 percent, but I am sure she would. Because it is office procedure to state the charges, what the statement says.

Q. And I understand this says -- that the investigation is recorded, too, but it doesn't say that, it is not on there, and it doesn't state Mr. Smith's conduct; does it?

A. Well, not exactly, no, it does not have Mr. Smith's name on it. (Tr. Vol. 1. pp. 43-44)

"Not exactly" and "I'm not 100 percent, but I am sure she would" are not confirmation that Smith was properly informed of the charges against him and that he was the subject of the investigation.

If the Agency intended to use the information gathered in the interview with Mr. Smith to serve as the basis for his discipline, then it had an obligation to inform him fully of that intent. The Agency also had an obligation to fully advise Mr. Smith of the charges, or possible charges, against him. Their failure to do either violated not only his due process rights but also the very basic premise of fair play. The Agency's reliance on the acknowledgement form as having fulfilled its obligations is misplaced given the fact that it does not specifically identify that Mr. Smith is the subject of the investigation nor does it specifically identify any charges against Mr. Smith. While a Union representative and an Agency representative might be able to discern the language of the form as a warning that the interview might lead to the discipline of the employee about to be interviewed, an employee who does not review the form on any regular basis could naively assume that he was not the subject of the investigation. Mr. Smith was directed to participate in the interview by Mr. Williams and was advised that he was being interviewed as a witness to, not the subject of, misconduct. As Smith testified:

> Q Let me ask you first of all, when you were -- how were you called in to the investigation that day? Were you given any advance notice as to what the investigation was involving?
>
> A. No, Mr. Williams, my supervisor, called me in to the office and he said you need to go upstairs and answer some questions in the SIS Department. So I said okay, and I went upstairs. When I went in to the office, Larry Carlson was in there, Denese Heuett and I'm not sure -- I don't recall if anyone else was in there. Don Reno may have been in there. But I think he may have left. And I asked, you know, what is this pertaining to? Do I need a union representative? And Ms. Heuett said, she goes, "That is up to you." And I said, "Well, what do you mean?" And she goes, "An inmate has listed you as a witness to something that has happened."(Tr. Vol.2, pp. 113-114)

On January 16, 2006, Mr. Williams issued the proposal letter to remove Mr. Smith from his position outlining the specific charges and specifications for the proposal. (Ex. J-6) Charges 1 through 3 and their accompanying specifications clearly identified their bases as being the Grievant's "affidavit dated November 16, 2005". If Mr. Smith had been fully and fairly advised that the purpose of the interview on November 16, 2005 was to investigate charges that were being considered against him and if he had been fully and fairly advised that his answers could lead to disciplinary action against him, then the outcome of that interview may have been considerably different. To allow the individual against whom the Grievant had provided

information in an EEO complaint to not only direct the Grievant to an interview without forewarning but also to then propose him for removal based upon the information obtained at the interview violates all notions of due process and fair play.

When the Arbitrator reviews Ms. Freeman's statement she can find no indication that she had told the Grievant that she felt that she had been raped by Officer Johnson. (Ex. A-14) Her five page affidavit is a series of allegations about several staff at FDC. She claims that Officer Caldwell "...has my address and said if he wanted to reach out and touch me, he could" and "that Officer Caldwell knew about Officer Johnson raping me. They were buddies." She also claims that Lt. Ortiz "...had sex with a female inmate nick named Chinita..." and that "...Lt. Ortiz was messing around with another girl". These allegations are just a few of the claims made by Freeman in her affidavit. When the Warden was asked why he focused only on the allegations that Freeman made about Smith, he claimed that none of the other allegations were substantiated however in his lengthy testimony he could not provide any specific answers as to why the other allegations had not been substantiated. Rather the Warden in his testimony emphasized that he did not do the investigations, he did not see any other reports and could not recall seeing the Internal Affairs report. It appears that only the information regarding Smith was forwarded to the Warden for his review. The fact that only Smith was singled out by Williams for discipline should have been a red flag for the Warden as it was for the Arbitrator given the fact that Smith had provided information about Williams' behavior in an EEO proceeding.

Perhaps Mr. Smith should have handled the information that the inmate gave him on August 5, 2005 in a different manner. But as the Warden acknowledged in a meeting with Smith on November 9, 2004 "...inmates are constantly manipulative". (Ex. A-13) The Arbitrator cannot recreate nor would it be appropriate for her to speculate what a proper investigation of the incident would have produced. Was it nothing more than gossip? Was it nothing more than the ongoing banter that occurs at a prison? Was it the inmate's attempt to get a reaction out of Smith? Did Smith make the proper decision when he simply told the inmate to do what she thought she should do? None of this is to say that the Arbitrator does not believe that an inmate's reference to a rape should be ignored but there is insufficient evidence for the Arbitrator

to find that Smith had received legitimate information that he was required to immediately report. As Smith's former supervisor Johnson testified:

> If we had staff members reporting every other word that came out of an inmate's mouth, we wouldn't have much time for anything else, because inmates do have a tendency to say crazy things. (Tr. Vol. 2, p. 106).

Charge 2: Unprofessional Conduct and; Charge 3: Appearance of an Inappropriate Relationship with an Inmate

Charges 2 and 3 are also the direct result of the affidavit signed by Smith on November 16, 2005. For all of the reasons that the Arbitrator stated in the discussion of Charge 1 regarding the information provided by Smith without full knowledge of the fact that he was the subject of the investigation and without full knowledge of any charges that were being considered against him, she finds that neither of these two charges can be sustained. As discussed earlier in this Analysis, if the Grievant had been fully aware at the time of the interview, his responses may have been considerably different. Furthermore, as is emphasized in the discussion of Charge 1, the proximity of these charges to the information that Smith provided about Williams in an EEO proceeding, provide legitimacy to the Union's claim that the charges were being levied in retaliation for his participation in a protected activity.

Charge 4: Interfering with an Official Investigation

At the point that the Grievant realized that he was the subject of the interview, he immediately conferred with an individual, Shadday, who he knows has at one time been a Union representative. Whether or not the Agency thought Shadday was a Union representative at the time is irrelevant. Smith believed that she was and Shadday testified that she was a Union representative from July through December of 2005. (Tr. Vol. 2, pp. 67 and 115) The Arbitrator finds that Smith's conversation with Shadday was not interference with an official investigation. The Arbitrator further finds that Smith's confirmation of a comment made by Oudinot also does not constitute interference with an official investigation. He did not engage in a conversation or discussion with Oudinot about the investigation but simply confirmed a statement that Shadday had made to Oudinot.

The Arbitrator finds that Smith was seeking assistance from an individual who had been, and still was at the time, a Union representative. That Union representative provided some information to Oudinot who then made a comment to Smith which he confirmed but took no further. Neither of these instances rises to the level of interference, impeding, frustrating, or obstruction of an investigation and therefore this charge cannot be sustained.

CONCLUSION

An arbitrator should not substitute his or/her judgment for that of an employer unless the employer has acted unfairly given the circumstances of the case. Where that has happened, the arbitrator has an obligation to modify the decision.

The Agency could not provide the names of the intern or the supervisor who originally reported the inmate's claims. Nor could the Agency provide any written, or proof of any oral, report made by either the intern or the supervisor. The inmate herself had filed a "cop-out" form but the Agency could not produce that document. Nor did the Agency produce any witnesses who could confirm if and when any such reports had been made. The Agency did not provide Mr. Smith with any forewarning or foreknowledge that he was the subject of an investigation nor did the Agency provide Mr. Smith with any specific charges prior to directing him to an interview. It was not until the end of the interview that Mr. Smith realized that he was the subject of the investigation and not simply a witness to an event. The Agency could not provide any legitimate explanation as to why the other employees named in the inmate's affidavit were not brought forward for further investigation. Only Mr. Smith was singled out by Mr. Williams for further investigation and disciplinary action. Of the employees listed in the inmate's affidavit only Mr. Smith had provided information to the EEO Counselor who was investigating Ms. Oudinot's discrimination complaint against Mr. Williams. (Ex. U-4) Warden Palmquist's claim that he had no knowledge of Smith's participation in the EEO complaint cannot be supported by the evidence. Palmquist issued the discipline to Williams in October 2005 (Ex. U-6) and it is highly improbable that he would have done so without knowledge of the EEO Counselor's Report (Ex. U-4) and the notes provided by Oudinot (Ex. U-5). Both the EEO report and the Oudinot notes mention Smith specifically as someone who has witnessed the behaviors by Williams that lead to his discipline. While the Agency attempts to diminish the Union's claim of

retaliation for EEO activities by emphasizing that the Grievant himself never actually filed an EEO complaint, the Arbitrator is not persuaded. The Union is correct that 42 U.S.C. 2000e-3 guarantees protection to an individual who "...has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [Title VII of the Civil Rights Act of 1964, as amended]". The premise underlying this protection is quite simple: employees who may witness harassment or discrimination may be unwilling to come forward if they believe that their employment status is at risk.

Mr. Smith was a very good employee whose performance at the time of his termination "Exceeds" expectations. (Ex. A-18) Performance appraisals for the past several years also indicated that he "Exceeds" expectations. (Ex. J-9) He had numerous performance awards for his service over the years. Palmquist noted in his consideration of the Douglas Factors that "Mr. Smith has strained relationships with his co-workers and he has difficulties with interpersonal communications...[his] evaluations reflect his supervisor's effort to avoid confrontation and they are not reflective of his poor interpersonal communication skills and his lack of understanding for appropriate security procedures". (Ex. A-18) The Arbitrator can find nothing to support this statement by the Warden and it appears to be an attempt to bolster his determination to terminate the employment of Mr. Smith.

The Arbitrator finds that the Agency's behavior in this matter was nothing more than an effort to build a case against an employee who had participated in an EEO investigation as a witness. From the very beginning, the Agency could not provide the specifics of what the inmate had reported, to whom it had been reported, and on what date it had been reported. The inmate's affidavit contained numerous allegations against numerous staff, yet only her allegations against Mr. Smith were found to be credible—a determination that was made based upon information provided by Mr. Smith in an interview in which he believed he was a witness and not a subject of an investigation. He was provided no advance notice of the interview nor was he specifically advised of any charges or potential charges against him. The interview violated any notion of due process and fair play.

Based upon all of the foregoing, the Arbitrator therefore finds that the Agency has not met its burden of proof of wrongdoing, has not acted fairly given the circumstances of the case, and that the removal of Robert Smith from his position as Cook Supervisor was not for the efficiency of the service. She further finds that Mr. Smith's removal from Federal Service was in retaliation for protected EEO activity.

She will enter an award that is consistent with these findings.

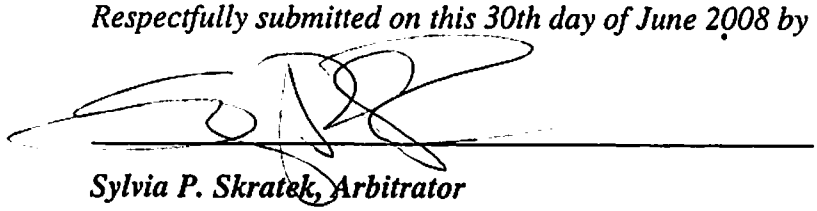
IN THE MATTER OF THE	)	
	)	**ARBITRATOR'S**
ARBITRATION	)	
	)	**OPINION**
BETWEEN	)	
	)	**AND**
U.S. DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	**AWARD**
FEDERAL DETENTION CENTER	)	
SEATTLE, WASHINGTON	)	
(The Employer)	)	
	)	
AND	)	
	)	
AMERICAN FEDERATION OF	)	**Robert Smith Grievance**
GOVERNMENT EMPLOYEES	)	
AFL-CIO, LOCAL 1102	)	**FMCS Case #06-56949**
(The Union)	)	

After careful consideration of all testimony, evidence and arguments, and for the reasons set forth in the opinion that accompanies this award, it is awarded that:

1. The removal of Mr. Smith was not for the efficiency of the service;
2. The removal of Mr. Smith was in retaliation for protected EEO activity;
3. Within fifteen days of the receipt of this award, the Agency shall reinstate Mr. Smith to the position that he held at the time of his discharge. Mr. Smith shall be made whole for any and all lost salary and benefits. Mr. Smith shall also be compensated for any monetary losses that he suffered due to the Agency's actions thereby reinstating him to the financial position he would have been in if the Agency had not acted improperly. If the parties are unable to agree upon the amount of compensatory damages within thirty days of the receipt of this award, then the matter shall be submitted to the Arbitrator for resolution.
4. All records, computer and/or paper, related to this matter shall be modified to reflect this change in Smith's employment status. All references to his discharge shall be purged from all files.

The Arbitrator retains jurisdiction of this matter for sixty calendar days for the sole purpose of resolving any dispute which may arise regarding implementation of this award.

Respectfully submitted on this 30th day of June 2008 by



Sylvia P. Skratek, Arbitrator