

WILLIAM E. RIKER
ARBITRATOR

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy)
)
 between)
)
 COUNCIL OF PRISON LOCALS (AFL - CIO),)
 AMERICAN FEDERATION OF GOVERNMENT)
 EMPLOYEES, LOCAL NO. 3969,)
 FEDERAL CORRECTIONAL COMPLEX,)
 VICTORVILLE, CALIFORNIA,)
)
 Union,)
)
 and)
)
 U.S. DEPARTMENT OF JUSTICE, FEDERAL)
 BUREAU OF PRISONS, FEDERAL)
 CORRECTIONAL COMPLEX,)
 VICTORVILLE, CALIFORNIA)
)
 Employer,)
)
 RE: Grievance of Andrea Rea)
)

William E. Riker
Arbitrator

San Francisco, California
January 21, 2009

FMCS Case No. 08-54183

This arbitration arises pursuant to the Collective Bargaining Agreement between
AFGE, Local 3969, hereinafter the "Union", and Federal Bureau of Prisons, hereinafter
the "Employer."

The arbitration was heard on Thursday, October 16, 2008 at Victorville, California before William E. Riker, who was selected from a list of arbitrators submitted by the Federal Mediation and Conciliation Service.

The parties agreed the issue is timely, properly before the arbitrator, and that the arbitrator's decision is final and binding. They were afforded full opportunity to present their respective positions on the record. This included examination and cross-examination of witnesses, acceptance of relevant exhibits, and argument.

At the conclusion of the hearing the parties elected to submit post-hearing briefs to be mailed 30 days from receipt of the transcript. They requested that the time for submitting post-hearing briefs be extended until December 16, 2008. The post-hearing briefs were received on or before December 18, 2008 and the arbitrator determined that the Employer and Union briefs had been timely filed.

APPEARANCES

ON BEHALF OF THE EMPLOYER

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ISSUE

Was the disciplinary/adverse action taken for just and sufficient cause. If not, what shall be the remedy?

**APPLICABLE PROVISION OF THE
COLLECTIVE BARGAINING AGREEMENT**

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:

2. To be treated fairly and equitably in all aspects of personnel management;

...

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

ARTICLE 22 EQUAL EMPLOYMENT OPPORTUNITY

Section a. The Employer and the Union agree to cooperate in providing equal opportunity for all qualified persons...

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.

ARTICLE 31 GRIEVANCE PROCEDURE

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

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

BACKGROUND

Andrea Rea, the Grievant in this matter, commenced her career with the Bureau of Prisons as a Correctional Worker in October 2005 and was subsequently promoted to Material Handle Supervisor, WS-6907-14. On October 26, 2007, the Grievant was notified that she would be removed from office because the information she provided during her pre-employment process was inaccurate (Joint Exhibit 8). On January 10, 2008 Warden S.A. Holencik advised Ms. Rea that after reviewing the evidence, and considering what the appropriate penalty should be, it was his finding to terminate her services. Warden Holencik noted that in his evaluation of the record he had considered several relevant factors and offered the following rationale as to the action he decided to implement: "You were issued a notice which proposed that you be removed from your position for providing inaccurate information during the pre-employment process. In making my decision, I have given full consideration to the proposal, to your written reply of November 17, 2007, your oral response of December 13, 2007, and to the relevant evidence contained in the adverse action file, which has been made available to you.

After careful consideration, I find the charge sustained and fully supported by the evidence in the adverse action file. Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker. Your removal is in the interest of the efficiency of the service. It is my decision that you be removed from your position effective midnight January 10, 2008." (Joint Exhibit 5)

A grievance was filed on behalf of Ms. Rea on January 28, 2008 (Joint Exhibit 4). The parties proceeded to process the dispute but were not able to resolve their differences.

On February 28, 2008 the Union issued a notice of their intent to arbitrate. (Joint Exhibit 2)

POSITIONS OF THE PARTIES

EMPLOYER

The Grievant had applied for employment at the correctional facility and was considered for a position. Ms. Rea went through a screening process and the employer hired her based on the information that she provided. Subsequently, an in-depth background investigation was initiated through the Office of Personnel Management. It was during this process that the investigator discovered Ms. Rea had received discipline while serving in the military for not only providing alcohol to a minor, which she admitted to, but also that she had been charged with conspiracy and making a false official statement. That new information, if it had been disclosed during her pre-employment interview, would definitely have placed the Grievant outside the suitability guidelines for employment with the Bureau of Prisons.

The Employer has shown that the Grievant was aware of these charges, however she failed to disclose this information until after she commenced her employment. It is inconceivable that Ms. Rea would have simply “forgotten” about being investigated in the military, especially for such serious charges as conspiracy and making a false statement. During her pre-employment process she remembered to disclose the fact that she had been charged as a teenager with shoplifting in 1992 or 1993, yet during the same interview she could not remember a criminal investigation as an adult in 1996. When the Grievant was discharged she signed for and received her military records containing the charges and the findings of the Captain’s Mast, which were clearly reflected in her military record.

During her pre-employment interview Ms. Rea was advised that she was being put on notice to be truthful. Whatever her reasons were, she refrained from providing the whole truth and elected to omit relevant facts as noted in the Captain's Mast findings. The inevitable fact is that if she had come forward and admitted that she was found guilty of conspiracy and providing a false statement, in addition to her declaration that she was found guilty of providing alcohol to a minor, she would have been ineligible for employment as a Federal Law Enforcement Officer.

This is a very simple case in that the penalty imposed was only arrived at after Warden Holencik weighed the relevant factors and that his determination was found to be within the bounds of reasonableness. During the interview process the Grievant signed numerous certifications indicating her answers during the interview process were true, complete, correct, and made in good faith. She was notified of the fact that there could be consequences to face should she fail to provide true, complete and correct information, yet she failed to disclose the whole truth regarding the charges of her Captain's Mast. The removal of Ms. Rea from her position at the Federal facility was taken for just and sufficient cause, was not unreasonable, and in accordance with the terms of the Master Agreement. Therefore, the Employer asks the arbitrator to uphold the termination, which was for just cause and deny the grievance in its entirety.

GRIEVANT

The issue in this matter centers on whether the Grievant intentionally sought to deceive the Employer at the time she filled out her employment application. This serves as the basis for her termination in that she is charged with neglecting to provide accurate information during the pre-employment process.

The arbitration hearing record identifies that Ms. Rea made an innocent and unintended omission when she completed the pre-employment application. During the interview process she also neglected to mention a charge of conspiracy as well as the fact that in the course of the non-judicial hearing it was noted that she volunteered to correct her statement about not having knowledge of the minor drinking alcohol. However, it is clear from the record that in Ms. Rea's opinion, and to the best of her knowledge, the information she submitted to the Bureau of Prisons as well as her actions during the entire pre-employment process was correct and complete. She readily identified the fact that in 1996 she was disciplined for providing a minor with alcohol. For that admission, she was given discipline of 45 days of extra duty, which was issued by the Navy's Captain's Mast hearing. Based on her testimony, as well as that of other witnesses, it is clear that the whole emphasis and basis of discipline had to do with the minor and alcohol. It should be understood that the other charges of conspiracy and false official statement charges were not in the forefront. To accuse Ms. Rea of intentionally providing incorrect information during her pre-employment process, after a period of almost ten years, is simply unfair and it should not be the basis for terminating her services.

The arbitrator is also asked to consider the fact that Ms. Rea was not fired for being outside of the Bureau of Prisons Guidelines, as the guidelines are frankly irrelevant to her removal. The guidelines were never scrutinized for applicability and Ms. Rea's termination letter never mentioned her being outside of the Employer's hiring guidelines. They were never presented at the arbitration hearing, and Warden Holencik admitted he had not read all the guidelines and that he was unsure as to which provisions in those "so-called" guidelines were applicable to the Grievant. Moreover, the hiring guidelines had

nothing to do with her termination as she was solely terminated for “providing inaccurate information during the pre-employment process.”

It is respectfully requested that the arbitrator find that the grievance be sustained in its entirety and that the Grievant be made whole for all lost wages and benefits since her date of termination. Additionally, that her record is to be purged of the termination and that she be fully reinstated into her previous position as a Correctional Worker.

DISCUSSION AND OPINION

An assessment as to whether the Employer had just cause to terminate the services of Andrea Rea, a Federal Bureau of Prisons Correctional Worker employee, is dependent upon an affirmative finding to the question of whether she committed a willful act by failing to disclose, during her pre-employment interview in October 2005, all of the events and findings surrounding her involvement in a Captain's Mast (non-judicial) punishment in June 1996, while on active duty with the United States Navy. In September 2006, after the Grievant commenced her employment at the correctional facility, the Office of Personnel Management forwarded information to the Security and Background Investigative Section of the Bureau of Prisons. This information was directly related to Ms. Rea's involvement in an incident that resulted in her receiving commanding officers non-judicial punishment for violation of UCMJ Article 82 (Conspiracy), Article 107 (False Information Statement) and Article 134 (Providing Alcohol to a Minor). The punishment amounted to forfeiture of \$100.00 pay per month for two months, and forty-five days extra duty (Joint Exhibit 10).

Nova Kirby, who works as a security specialist with the Bureau of Prisons, was assigned the case. Ms. Kirby testified that after she received the report she noted that the information received wasn't consistent with the information given by Ms. Rea at her pre-employment interview. While under direct examination, Ms. Kirby testified that the information contained in the military record and making of a false official statement were outside of the guidelines of acceptability.

The arbitrator has reviewed the evidence, which included evaluating the testimony of all the witnesses particularly that of the Grievant, retired Chief Petty Officer Carlton Pederson as well as the direct and cross-examination of Warden Holenick. Based on the totality of the record it is the finding that the grievance of Ms. Rea has merit and is therefore sustained. The Employer has not persuaded the arbitrator that based on a preponderance of the evidence the Grievant committed malfeasance when she advised the Employer, during the interview process in 2005, that nine years before in 1996 she received punishment for violation of not only Article 134 but Articles 82 and 107. Particularly when the record identifies the fact that in November 1996, during the course of the events surrounding the Captain's Mast hearing, Ms. Rea corrected the statements that she had initially given the investigators in mid-1996. According to the record and her testimony Ms. Rea, on her own volition, reported to the Naval investigators and corrected her initial testimony about not knowing if the minor had had any alcoholic beverages to drink. Upon further reflection of the day in question, and after reviewing the incident and talking with fellow military personnel who had also been engaged in the New Year's Eve party, she reported to the investigators that she did know that the minor had consumed alcohol. Accordingly, that voluntary admission was viewed as an admission of submitting

false and/or inaccurate information. It is the considered opinion of this arbitrator that turning a positive effort made by Ms. Rea, which was intended to help clarify her previous declaration to the investigators, and construing it as not being forthright (providing inaccurate information during the pre-employment process) is simply unjust:

“ ... I was also accused of withholding evidence from the Naval Investigative Service (NIS) about the incident. When I was first interviewed regarding this incident I stated that I did not know if the minor drank. I later regretted not being totally honest, so I went back to the NIS and reported that I did know that the minor had drank alcohol that evening....” In reviewing all of the contents of the report issued by the Navy on November 29, 1996 the additional item noted is pertinent in that it was recorded:

Investigative Results: The record checks and interviews, as appropriate, were favorable and interviewers recommended subject for a position of trust, unless otherwise indicated” (Joint Exhibit 11). In addition to the above the Report of the Investigation recorded that: “everyone at the party had to go to Captain’s Mast and they were all punished for contributing to a minor;” There is also the comment made in the section of the report of Other Areas Discussed that: “Other than the information provided above, Webber answered only favorably regarding subject and he recommended Subject for a position of Trust (20 Nov 96).”

In the context of whether the Grievant should be prohibited from continuing in her gainful employment with the Bureau of Prisons, the action by the Employer is in direct conflict with the concept of just cause as utilized in the process of implementing discipline pursuant to the terms of a Collective Bargaining Agreement. The arbitrator certainly recognizes the concern that was raised by the Warden in his deliberation. when he

considered the information supplied to him relating to the allegation of the Grievant giving false information during her pre-employment interview. There is no dispute that credibility and honesty is the by-word of those engaged in law enforcement. It is critical that all personnel who seek employment in sensitive occupations, and want to maintain their employment status, be trustworthy and above reproach. However, the particular facts of this case warrant that there are situations that call for leaving the door open so that reasonable people not become unreasonable. The arbitrator has been persuaded by the evidence that an honest omission of an incident on the part of the Grievant, which had occurred almost a decade before she commenced her employment with the Correctional facility, should not be controlling.

Secondly, is the fact that after the Grievant was honorably discharged from the military service she commenced a career in civilian life where she was employed in occupations with companies engaged in security sensitive operations. Ms. Rea's employment with the Boeing Corporation, as well as Raytheon Systems, should certainly have some measure of value that would serve to tip the scale in her favor. After having received an honorable discharge from the armed services it is incredulous that the Grievant would not be given recognition for the subsequent years that she spent working in highly classified sensitive positions, where her credibility and competency have been identified. Those characteristics cannot and should not be washed away all because of a single notation in an investigative report written nine or more years ago. The identified report, which was brought forward and used as the determining factor for severing the Grievant's employment relationship with the Bureau does not, in the considered opinion

of the arbitrator rise to the level where it would conclusively establish that Ms. Rea failed to provide accurate information during her pre-employment process in 2005.

The third factor the arbitrator has considered in his deliberation as to whether there was just cause to terminate the Grievant is simply recognizing the quality of Ms. Rea's work history at Victorville. The Performance Log (Union Exhibit 1) identified that her work performance while at the facility meets or exceeds the Employer's standards for acceptable performance over the course of her employment with the Bureau of Prisons.

Finally, there was credible testimony on the part of retired Chief Pederson, who was a material witness as to the events surrounding the Captain's Mast non-judicial hearing in 1996. His testimony supported the Grievant's contention that it was an honest omission, as the focus was on an under-age military member receiving alcohol. He also testified that when he was in attendance at the non-judicial hearing he did not recall that there was any reference to the charge of conspiracy or providing a false official statement at the Captain's Mast. While under cross-examination he responded to several questions as to his knowledge of the conspiracy and false statement allegations, and conceded that his knowledge was limited in that respect. His response to the question asked by the Employer's advocate that Ms. Rea could still have been charged with conspiracy and false statement without his being aware of those allegations was in the affirmative. However, the Chief's response was tempered by his understanding that as a participant at the Captain's Mast hearing the only charge the Grievant was found to be accused of, and the one for which the discipline was imposed, was providing alcohol to a minor (Transcript, pages 95-100).

In reviewing the record the arbitrator is persuaded that it would not be unreasonable to accept Ms. Rea's explanation that when she completed her pre-employment application she did not recall the conspiracy and false statement aspects subsequently noted in the applicable report. Both Rea and Chief Pederson, while testifying under oath, were of the understanding that the concentration was directly related to the contention of the minor in that she was raped (which was determined to be unfounded) and that the other participants, including the Grievant, provided alcoholic beverages to the underage sailor. The degree of punishment determined was based on the minor being provided alcoholic drinks at the New Year's Eve party. The entire focus of the investigation some nine years later was the assertion that the Grievant should have read her military record, which made reference to conspiracy and false statement. Frankly, it appears that is the only material basis utilized as their case in chief to reach a conclusion that the Grievant was guilty of providing inaccurate information during the pre-employment process.

The Employer, in contending the Grievant basically was willfully dishonest, is making the nexus between the two events (1996 and 2005) that led to their action of imposing corporal punishment. To reiterate, it is clear to the arbitrator that the conspiracy and false statement contentions that were brought forth were not the focus of the punishment issued against Ms. Rea. As argued by the Union, and emphasized by Ms. Rea and Chief Pederson in their testimony, it is reasonable to accept their contention that not listing on the pre-employment application either the "conspiracy" or "false statement" items was nothing more than an honest omission. This omission however does not infer that the issues were not noted in the investigative report. Rather, the question at issue in this matter is that it was the intent by Ms. Rea to willfully deceive the Employer when she

completed her pre-employment application and that was not established by a preponderance of the evidence. What it does signify is that the focus of the Captain's Mast combined with the nine years between the military non-judicial hearing and the completion of her pre-employment application mitigates the charge of which she was terminated for in 2007.

In conclusion, it is the finding of the arbitrator that the decision of terminating the Grievant's employment status based on the allegation of providing inaccurate information during the pre-employment process is not sustained. The Employer has not persuaded the arbitrator that the finding by the Bureau of Prisons and their decision to sever the Grievant's employment at the correctional facility was for just cause. The Grievant's completion of the pre-employment application as well as the subsequent answers she had given to the Employer throughout the investigation, including the testimony of retired Chief Pederson at her appeal hearing, were persuasive. The arbitrator has also considered the Union's argument, as noted in their post-hearing brief that in any eventuality the certification block should have protected her from termination. Therefore, for all the reasons noted above the arbitrator's ruling in this matter is that the grievance has merit and is therefore sustained.

DECISION

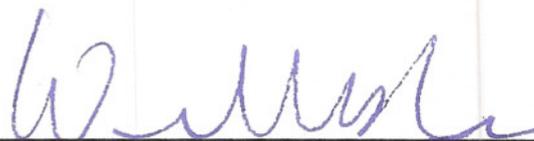
The grievance is sustained

AWARD

Ms. Rea is to be made whole for all lost wages and benefits since the date of her termination, less any income received from gainful employment. At the request of the Grievant, her record is to be purged of the termination and that she be fully reinstated into her previous position as a Material Handler Supervisor.

Dated:

January 21, 2009



William E. Riker, Arbitrator