FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
WASHINGTON, DC

JEROME H. WOLFSON, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN

FEDERAL DETENTION CENTER MIAMI

And Issue: Adverse Action (B. Perez)

AFGE, COUNCIL OF PRISON LOCAL 33,
LOCAL 501

FMCS CASE NO. 07-51043

Liz Blackmon, Esquire, for Federal Detention Center Miami

Eric Young, for Local 501, AFGE

AWARD AND OPINION

This arbitration came on to be heard before the undersigned, with proper notice entitling the Employee/Grievant to a hearing. The initial hearing commenced in a timely fashion at 401 North Miami Avenue, Florida 33132 on February 22, 2007 at 9:00 a.m. The additional/ subsequent Hearing was held on February 26, 2007, also commencing at 9:00 a.m.

The parties stipulated to various exhibits which were properly marked. Objections were noted as concerns the evidence submitted and to certain testimony. Argument was had as to each objectionable item. The aforementioned exhibits were appropriately ruled upon. Those deemed admissible were accepted into evidence. The parties agreed and stipulated that jurisdiction was proper over both the parties and the subject matter along with notice, venue and that procedure had been properly followed entitling the Grievant

to the hearing. The parties further stipulated that this Arbitrator was properly sitting in this cause.

The Employer offered the position that the Grievant failed to provide accurate information on his employment application and that those inaccuracies compromise the integrity of the Grievant to the extent that he is deceitful, lacks credibility and is an individual that inmates may try to compromise. The Employers position includes that the Grievant utilized deception in obtaining his law enforcement position with the Employer herein and that his termination should be upheld.

The Grievant's arguments included that he did not receive the due process he is entitled to under the existing Collective Bargaining Agreement, the Employer did not follow applicable laws and that the Grievant's termination was not fair and equitable. The Grievant's position also included that a proper investigation was not done in his case and that the termination was not timely. The parties offered written opening statements, argued their positions during the Hearings and submitted written briefs and attachments after the close of the case.

Witnesses who testified included Loren Grayer, Warden for the Employer herein, Benny Perez, the Grievant, Lisa J. Wabiuga, Employee Service Manager, John Bucata, District Chief of Oakland Park Police Department (Broward Sheriffs Office) and Debora Moss Lopes, Employee Service Manager. Also testifying were Michael Hicks, Lieutenant, Charles Laugh correctional counselor and former union Vice President and Fannie Coles-Carr Employee Service Specialist.

FINDINGS OF FACT AND CONCLUSION

The findings of fact made in this cause are based upon the consideration of all the testimony and evidentiary exhibits along with my observations as concerns the demeanor

and credibility of all witnesses who have appeared before me. Any and all evidential conflicts have been weighed and resolved by me. Based upon the foregoing I make the following findings of fact:

1. The Arbitrator has jurisdiction of the parties and the subject matter.

2. The evidence submitted is accepted and included in the record. Any evidence excluded is noted in the transcript.

3. The stipulations entered into between the parties are accepted.

4. The Grievant has properly processed his appeal/grievance entitling him to his hearing and has submitted argument as concerns this cause along with all evidence and documentation he saw fit to submit. The Employer, The Federal Detention Center Miami has offered its case and has argued for upholding the action taken against the Grievant. The parties offered argument at various intervals during the cause and have submitted briefs/additional written arguments and attachments. All has been considered.

5. The Grievant, Benny Perez had been employed by the Broward County Sheriff's Office as a detention officer and as a child protection officer from approximately August of 1997 to June of 2002. He ran a private business for a time and gained employment with the State of Florida from August 2002 to October 2002 when he was hired by Homeland Security. He remained in that employment until October of 2003 when he received a transfer to the Federal Bureau of Prisons that he had applied for. The transfer process included an interview along with the completion of an application that was signed by the Grievant on March 5, 2003. The questions and answers that are of importance are as follows:

A. EMPLOYMENT HISTORY (at page 1)
1. Has the applicant been dismissed or resigned in lieu of dismissal from any job:
No

3. Has the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment?
No

D. DISHONEST CONDUCT, EXCESSIVE USE OF FORCE AND INTEGRITY (at page 6)

1. Has the applicant ever made intentional false statement or been involved in deception or fraud such as impersonation in examination, altering transcripts or other official records, falsifying reports/records including his/her BOP application?
No

II. APPLICANT SIGNATURE BLOCK (at page 13)

THIS STATEMENT MUST BE SIGNED BY THE APPLICANT

Read the following carefully before signing this statement. A false answer to any question on this form or portion thereof may be the grounds for not employing you, or for dismissing you after you begin to work, and may be punishable by fine of up to $ 10,000 or imprisonment of up to five years or both. All the information you give will be considered in reviewing your answers and is subject to investigation (18 USC Sec. 1001).

CERTIFICATION – I certify that all of the answers and statements made on this form are true, complete and correct to the best of my knowledge and belief, and are made in good faith.

Signature (sign in ink) (signed) Date 3/5/3

While an employee at the Broward Sheriff's Office the Grievant was issued two Disciplinary Action Recommendations by Lt. John S. Bukata, his supervisor. On July 17. 2001 he was issued a written reprimand for initiating a self assigned investigation by utilizing his employers computer equipment in seeking information as concerns his wife's ex-husband. Same resulted from concern for his wife's safety from a stalking ex-husband. On August 20, 2001 the Grievant accepted the written reprimand. On May 16,

2002 Lt. Bukata issued an additional Disciplinary Action Recommendation to the Grievant which included charges of displaying/wearing a Broward Sheriff's Office badge. As a detention deputy he was not authorized to display any badge. He was advised that further display of the badge could result in disciplinary action. On June 27, 2002 the Grievant signed/acknowledged the charges. The disciplinary action ended at that point. He was not given discipline for either offense. He was aware of the final result of the July 17, 2001 reprimand. He was no longer employed by the Broward Sheriffs Office when the May 16, 2002 charges were finalized.

The Grievant's application/interview was completed on March 5, 2003. He commenced his employment with the Employer herein on approximately October 5, 2003 as a transfer from Homeland Security and satisfied the probationary requirements. He received pay raises and advanced in classification. On June 24, 2005 he received notice from the Employer that an investigation was or had commenced on the issue of his not including in his pre-employment application the prior disciplinary offenses of July 17, 2001 and May 16, 2002 that occurred while he was employed by the Broward Sheriffs Office. He was given the opportunity to respond to questions posed in writing. His response was that his review of his personal file did not include any disciplinary actions or documentation of any investigation when he reviewed it. He submitted his signed response on July 11, 2005. On October 25, 2006 the Grievant was notified that he was terminated from his employment effective midnight October 27, 2006.

6. Falsification of a pre-employment application is an area that is not without reported cases. Some Arbitrators are guided by a four part test, i.e.

1. Was the misrepresentation willful?
2. Was the misrepresentation material to the hiring?
3. Was it material to the employment at the time of the discharge?

> 4. Has the employer acted promptly and in good faith?
>
> See, Huntington Alloys, Inc. and United Steelworkers of America, 74 LA 176 (1980), Veterans Administration Medical Center and American Federation of Government Employees, 91 LA 588 (1988), Tiffany Metal Products Manufacturing Company and International Brotherhood of Teamsters, 56 LA 135 (1971).

Other Arbitrators are guided by a two part test, i.e.,

> 1. The applicant's failure must be willful or deliberate.
> 2. And the matter or matters involved in the question must be material.
>
> See, Firestone Tire and Rubber Company and United Rubber Worker's of America, AFL-CIO, 93 LA 381 (1989).

Both tests are considered herein as are the facts in the instant cause. Neither line of cases or proposed test(s) should be considered over the other. See; City of Miami and Local 1907, AFSCME, 107 LA 12 (1996).

7. The Grievant omitted and failed to include in his pre-employment application two instances where his prior employer recommended discipline. The events of July 17, 2001 and May 16, 2002 should have been recorded on his March 5, 2003 application. Even if his omission(s) were not willful, the information was of such a nature that the Employer was entitled to know of it. In the material instances noted above where the Grievant answered NO, he should have answered YES on his application. He acknowledged and signed/accepted a written reprimand for the offense of July 17, 2001. Even though he might have believed that the paper work for the May 16, 2002 occurrence was not finalized or did not exist, he was obliged to include it on March 5, 2003. His answers were not accurate. He omitted information from the employment application

that was material. His resignation from the Broward Sheriffs Office/ Oakland Park has not been proven to be other than voluntary.

Nevertheless, if the omission(s) of the subject matter of the Grievant's prior July 17, 2001 offense was material at the time he was hired, it was not at the time of his discharge. Of seven co-employees who were investigated for falsification between February 2004 and February 26, 2007, four of them received letters of reprimand, two remain under investigation and one resigned in lieu of termination. In three instances during said period of time individuals were not terminated for misuse of a government computer (factually similar to the July 17, 2001 offense the Grievant was eventually reprimanded for while in the employ of the Broward Sheriff Office). Others were not terminated for falsifying their gun range records. The Grievant's offense(s) of May 16, 2002 involved deception, is similar, and is included in the rational/findings above.

8. The procedure followed by the Employer remains an issue and is a factor to be considered. Of concern and of importance to this Arbitrator is the period of time that elapsed from when the Grievant received notice that an investigation was being conducted as concerns his falsification of the pre-employment application until he was terminated from his employment. From June 25, 2005 until October 25, 2006 is a period of (16) sixteen months. It is difficult to fathom any circumstance or fact pattern where a period of sixteen (16) months could be considered "promptly upon discovery" and satisfy the fourth factor as included in the case law supra, i.e. number 4. Arbitrator D.L. Howell has clearly stated what this Arbitrator finds as controlling in the instant cause:

> In delaying its action, the Agency has made it difficult for an arbitrator to sustain the discharge without feeling that he is party to practices not commonly accepted in sound industrial relations. As already discussed, with supporting cases cited, all of authority sustaining subsequent discharges for

> falsification on an application after the lapse of time requires the employer to act with reasonable promptness after discovering that a false statement has been made. See, Veterans Administration Medical Center and AFGE, 91 LA 588 (1988) (A 9 month delay was held not to be prompt).

The Employer did not act promptly.

9. Accordingly, the Grievant/Employee did commit a wrong on March 5, 2003 when he submitted a falsified pre-employment application to the Employer herein. Those misrepresentation(s) were material at the time he submitted the application. The delay(s) of the Employer is a factor. A period of well over 2 years elapsed until the Employer notified the Grievant that an investigation was being conducted on the issue of his falsifying his pre-employment application (March 5, 2003 to June 24, 2005), i.e. 28 months. An additional period of over a year elapsed from the time he was notified of said investigation until he was notified of his termination (June 24, 2005 to October 27, 2006), i.e. 16 months. From the time the Grievant falsified his pre-employment application, (March 5, 2003) a period of 44 months elapsed until he was terminated (October 27, 2006). The process, protocol and procedure followed by the Employer herein are unacceptable and warrants a reversal of the Grievant's termination. It also results in the conclusion that the omissions were not material at the time of termination.

Based on the aforementioned extended period(s) of time, along with the various/several co-employees who were not terminated for falsification of gun range records and misuse of government computers during that time period, it is the finding of this Arbitrator that the misrepresentation(s) of the Grievant on his pre-employment application were not material to the Employer at the time of his termination.

10. Although the grievance herein must be granted and the termination reversed for the reasoning and findings noted above, this Award and Opinion in no manner seeks

to excuse the actions of the Grievant. The findings herein do not allow for the issuance of a lesser form of discipline such as a substantial suspension. The Employer's actions/behavior prohibits such action by this Arbitrator. The delay of management has resulted in the termination being reversed. That some delay prohibits this Arbitrator from issuing any lesser form of discipline.

11. The Employer's argument/proposition that the Grievant may be subject to being compromised by inmates is rejected. Also rejected is the argument that the Grievant's actions as noted herein will impede and contaminate his ability to testify under oath in a court of law is rejected. The Employer may merely include him in its group of excused individuals who have misused computers, and falsified records from the gun range. The Grievant's actions did not affect the Employer's ability to manage its business nor does it interfere with the function of management any more than the actions of the other, individuals who falsified records, misused computers, and were not terminated.

12. This Award and Opinion shall be included in all of the Grievant's personal/employment file(s) in the same manner as the falsification documentation is maintained in the files and records of the seven employees who were investigated for falsification between February 2004 and February 26, 2007 and those who misused government computers during the same period of time.

13. In accordance with Article 32 Section d. of the Collective Bargaining Agreement between the parties, the Arbitrator's fees and expenses shall be paid equally by the Employer and the Union.

WHEREFORE IN ACCORDANCE WITH ARTICLE 32 OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE FEDERAL BUREAU OF PRISONS AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS C-33, LOCAL 501, IT IS THE ORDER OF THE UNDERSIGNED THAT:

I. The Grievant omitted information from his pre-employment application on March 5, 2003 that was not material at the time he was terminated effective October 27, 2006.

II. The Employer delayed until 28 months after completion of the pre-employment application to notify the Grievant that he was being investigated, and an additional 16 months to terminate him, i.e. 44 months from the initial application. The Employers actions were not sufficiently prompt so as to terminate the Grievant.

III. The misrepresentations of the Grievant were rendered immaterial at the time of termination based on the Employer's delay as described in detail herein and the Employer's retention and actions as concerns the other co-employers who falsified gun range records and utilized government computers improperly during material time periods.

IV. The Employer's argument/proposition that the Grievant is subject to being compromised and be unable to testify in court is rejected for the reasons stated above.

V. This Award and Opinion shall be included in any of the Grievant's personal/employment file(s) in the same manner as the falsification documentation is maintained in the files and records of the seven employees who were investigated for falsification between February 2004 and February 26, 2007 and those who misused government computers.

VI. Terminating the Grievant in the instant case in no manner promoted the efficiency of the U.S. Department of Justice, Federal Bureau of Prisons for the reasons stated herein and considering the manner that other individuals who misused government computers and falsified gun range records were treated and not terminated.

VII. The disciplinary action taken against the petitioner/grievant of termination is hereby reversed. The actions taken against relying on any and all regulations, general orders, policies, procedures, statutes and rules that were utilized are specifically reversed for the reasons stated above. The Petitioner/Employee should not have been terminated. He should be made whole as concerns any and all salary, emoluments and benefit losses.

VIII. In accordance with Article 32 Section d. of the Collective Bargaining Agreement between the parties, the Arbitrator fees and expenses shall be paid equally by the Employer and the Union.

DONE AND ORDERED
April 26, 2007
Miami, Florida

JEROME H. WOLFSON
ARBITRATOR
FMCS