

In the Matter of Arbitration)
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 between)
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 Council of Prison Locals)
 American Federation of)
 Government Employees)
)
 and)
)
 Federal Bureau of Prisons)
 -----)

Before: GEORGE R. SHEA, Jr.

Appearances:

For: Council of Prison Locals
 AFGE (Union) Lilliam (Liza) Mendoza - Toro

For: Federal Bureau of Prisons:
 (Employer) John T. Lemaster

Location of Hearing: Bennettsville, SC
 Dates of Hearing: November 5 & 30, 2009
 Date of Post Hearing Submissions: January 22, 2010
 Date of Award: February 8, 2010
 Contract Year: 2004
 Type of Grievance: Discipline

AWARD SUMMARY

The Arbitrator finds that the Employer did not have just cause to issue the Grievant, G. Godbey, the Letter of Removal dated July 10, 2009. The Arbitrator awards the Grievant reinstatement to his previous employment with the FBOP and restoration of all emoluments associated with his job, including, without limitation, back pay interests, benefits and seniority.

George R. Shea, Jr.

OPINION

STATEMENT OF PROCEEDINGS:

The Union, in accordance with the Parties' Collective Bargaining Agreement [Agreement], appealed the above captioned matter to arbitration. (J-#2, Tab 2)¹ The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held a hearing on and at the previously referred to dates and location. The Parties' representatives appeared. The Arbitrator provided the Parties with a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

The Employer called G. Godbey and D. Drew, as its witnesses. The Union called J. Troutman and E. Young, as its witnesses. The witnesses' testimony was transcribed and each Party and the Arbitrator was provided a copy of the resulting transcripts. The Parties communicated their post hearing submissions to the Arbitrator on January 22, 2010.

BACKGROUND:

The Employer, in the person of Captain G. Del Re, issued G. Godbey [Grievant] a "Letter of Proposed Removal" dated February 23, 2009. The letter set forth eight factual specifications or charges upon

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1. Reference to Joint Exhibits will be (J-#-)
Reference to Employer Exhibits will be (Er-#-)
Reference to Union Exhibits will be (U-#-)
Reference to Transcripts will be (Tr Vol- page -)

which the Employer relied to support the proposed discipline. (J-#2, Tab 5)

The Employer, in the person of D. Drew, Warden (Disciplining Official /Warden), issued the Grievant a Letter of Removal dated July 10, 2009. The Removal was based on the general charge that the Grievant "provided inaccurate information during the pre-employment process".

ISSUE:

The Parties agreed to the following statement of the issue before the Arbitrator:

Did the Employer have just cause to issue the Grievant, G. Godbey, the Letter of Removal dated July 10, 2009? If not, what shall be the appropriate remedy?

FACTS:

The events regarding this matter were described in the varying testimony of the Parties' witnesses and in the documentary evidence offered by the Parties. Based upon his review of that evidence, including his personal observation of the witnesses during their testimony, the Arbitrator determines the preponderance of that evidence supports the following findings of fact.

Grievant:

G. Godbey, [Grievant] at times relevant to this matter, was a resident of the state of North Carolina, married and the father of one son. He received an Associate degree from South Piedmont Community College on or about July 1, 2001. During the period commencing in October 1999 and ending in October, 2006, the Grievant was employed by the North Carolina Department of Corrections (July 2004 - October 2006); Melee Bros. Masonry (January 1, 2004 - March 2004); CMH Flooring (June 2003 - August

2003); Triangle Brick (January 2003 - June 2003); Hanson Brick (March 2002 - January 2003; Dunn Manufacturing (May 2001 - November 2001).

At the time the Employer issued the contested discipline, the Grievant was a full time employee of the Federal Bureau of Prisons [FBOP] and assigned to the Bennettsville, SC Federal Prison. His FBOP employment record included positive performance evaluations and the receipt of at least one promotion and two step increases. His FBOP disciplinary record did not contain any evidence that he had received any disciplinary action during his FBOP employment.

Grievant's Application for Bureau of Prisons Employment - Pre-employment Process

General:

The "Questionnaire for Public Trust Position" completed by the Grievant contained the following language:

"Statements on this form and any attachments to it, are true, complete and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both..."
(J-#2, Tab 8, page 9)

The "Declaration for Federal Employment" completed by the Grievant contained the following language:

"I certify that to the best of my knowledge and belief all the information on and attached to this Declaration for Federal Employment including any attached application material is true, correct, complete, and made in good faith. I understand that a false or fraudulent answer to any question or item or any part of this declaration or its attachments may be grounds

for not hiring me or for firing me after I begin work, or may be punishable by fine or imprisonment..." (J-#2, Tab 8, page 14)

October 3-5, 2006

The Grievant completed and signed a Questionnaire for Public Trust Position, a Declaration for Federal Employment and a Supplemental Questionnaire for Selected Positions. (J-#2, Tab 8)

During the interview with J Rabbass, on October 4, 2006, the Grievant responded negatively to the following questions "Has the applicant ever made intentional false statements or been involved in a deception or fraud such as impersonation in examination, altering transcripts or other official records, falsifying reports records including his/her DOP application?" (J-#2, Tab 8, page 20) and "Has the applicant ever committed a misdemeanor or felony?" (J-#2, Tab 8, page 24)

Report of Investigation by U.S. Office of Personnel Management:

November 23, 2006 - March 20, 2007

During this time period, the Office of Personnel Management [OPM] conducted a background investigation of the Grievant. The resulting report indicated the following: (J-#2, Tab 9)

September 24, 2003: The Grievant was charged with operating a vehicle with fictitious, cancelled or revoked registration card and that the charge was dismissed by the court and no fines or fees were assessed against the Grievant.

November 15, 2006: The Grievant was charged with speeding at 51 MPH in a 35 MPH zone, a misdemeanor offence.

January 2003: The Grievant voluntarily terminated his employment with Hanson Brick, after being written up twice for absences.

November 2001: The Grievant's employment at Dunn Manufacturing was terminated by the employer.

Bureau of Prisons Investigation:

September 6, 2007 - October 10, 2007:

The Security and Background Investigation Section of the FBOP, in the person of Security Specialist S. Kruse, conducted an investigation of the Grievant which included the issuance of written interrogatories to him. (J-#2, Tabs 10-11)

POSITIONS OF THE PARTIES:

Federal Bureau of Prisons [Employer]

The Employer argued that the Arbitrator must review the contested removal of the Grievant using the same standards applied by the Merit Systems Protection Board. Extrapolating from this premise, the Employer further argued that, even if the Employer committed certain procedural errors when making its decision to remove the Grievant from his employment with the FBOP, the Union must establish that such errors were harmful errors depriving the Grievant of some contractual or legal right or benefit. The Employer contended that the Union failed to establish this affirmative defense.

In addition, the Employer argued that in the circumstances of this case, where the charges precipitating the contested discipline have been factually established, the Arbitrator is limited to reviewing the Employer's action only to determine if the Agency considered all of the relevant factors and exercised management discretion within tolerable limits.

The Employer maintained that it established the factual basis of the charges upon which the contested discipline was based; in that, the Grievant admitted to each of the charges during his testimony at the hearing before the Arbitrator. The Employer further maintained

that it afforded the Grievant all the procedural rights and protections required by statute or the just cause standard during its investigation of the charges and its deliberative process culminating in the contested discipline.

Based upon these factual assertions, contractual and legal contentions, the Employer requested the Arbitrator deny the Union's grievance in this matter and sustain the Employer's removal of the Grievant from its employment.

Council of Prison Unions, AFGE [Union]

The Union argued that the Employer did not have just and sufficient cause to impose the contested discipline upon the Grievant for the following reasons:

1. The removal of the Grievant should be overturned pursuant to the Collateral Estoppel Doctrine; in that, the issues raised in this matter had been resolved in previous arbitrations awards;
2. The delay in the adverse action taken by the Agency precludes the removal of the Grievant;
3. The Agency failed to follow its own policies in regards to notifying the Office of Internal Affairs which resulted in the violation of the due process rights of the Grievant, a non probationary employee;
4. The Agency committed harmful errors in the application of its own procedures;
5. The actions of the Agency were contrary to the mandates of MSPB law; in that, the Agency did not consider factors outlined by MSPB in Douglas vs. Veterans Administration when making the decision to impose the contested discipline;
6. The punishment was not reasonable or consistent with past and present discipline given out at FCI Bennettsville.

Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator find the Employer's removal of the Grievant from his FBOP employment not for just cause and in violation of the Agreement and requested the Arbitrator award the Grievant reinstatement to his previous employment with the FBOP with restoration of all emoluments associated with his job, including, without limitation, back pay interests, benefits and seniority.

DISCUSSION:

The evidentiary record of this matter contains direct evidence that some of the Grievant's responses at issue in this matter were not complete. The record is devoid of sufficient direct evidence to support a finding that the Grievant's alleged improper responses were anything other than his best memory, knowledge or belief and made in good faith. The lack of such direct evidence is not unusual in cases involving an individual's state of mind when performing an act or making a statement.

Arbitrators, including this Arbitrator, have held that in such cases, the parties may rely on circumstantial evidence to support their factual assertions in arbitration; however, to have probative worth the circumstantial evidence offered must show, with a fair degree of probability, the facts for which it is offered as proof. The probative value of the circumstantial evidence is diminished, when two or more inferences may be drawn from the evidence. The Arbitrator determines that the circumstantial evidence relied upon by the Employer in this matter generally does not meet that standard of probability.

The Parties' Collective Bargaining Agreement [Agreement] authorizes the Employer, through its Chief Executive Officer, to impose discipline only when it has "just and sufficient cause". (J-#1, Articles 5 and 30) The Agreement establishes a two step administrative

procedure for the issuance of a Letter of Removal to an employee. (J-#1, Article 30, Section e) The procedure requires the Employer to issue a Proposed Letter of Removal and the Chief Executive Officer or Disciplining Officer [Disciplining Officer], upon her/his concurrence with the Proposed Letter of Removal, to issue a subsequent Letter of Removal. (J-#1, Article 30, Sections d and e)²

In accordance with this procedure, Captain G. Del Re issued the Proposed Letter of Removal (PLOR) to the Grievant. (J-#2, Tab 5) The letter set forth eight specifications of alleged misconduct by the Grievant by way of providing inaccurate or incomplete information (a) when he responded to questions during his Pre-Employment Interview (b) in his Declaration For Public Employment and (c) in the Questionnaire for Public Trust Position. DelRe recommended the Grievant's removal from his Federal Bureau of Prisons [FBOP] employment.

The Disciplining Officer, Warden D. Drew, upon her review of the PLOR, the Grievant's disciplinary file and private interviews of the Grievant's second and third level supervisors, issued the formal Letter of Removal to the Grievant. (J-#2, Tab 3) The Letter of Removal generally charged the Grievant with providing inaccurate information to the Employer during the Pre-Employment Process.

The Employer argued that it only had to establish that the Grievant provided incorrect or incomplete information on the various documents he completed during the Pre-Employment Process to meet its burden of proof and to establish that it had just cause to issue the contested discipline to the Grievant. The Arbitrator cannot agree.

² The Agreement, Article 30, Section d.1 requires that the Chief Executive Officer review the PLOR prior to its issuance to the employee. This procedure was not followed when the Employer issued the PLOR to the Grievant. See TR, Vol 2, page 75

The just cause standard, which is incorporated into the Agreement, requires the Employer to demonstrate that its disciplinary action was imposed after an objective pre-discipline investigation which resulted in the proof of the charges upon which the discipline was based.³ The Employer must also establish that the administered discipline was consistent with the charged offense and the employee's past employment record.⁴ Finally, the Employer must establish that its discipline was imposed in accordance with procedures required by the Agreement and the just cause standard.

The various forms and questionnaires used by the Employer in the Pre-Employment Process require the Grievant to respond to the questions posed in those documents to the best of his knowledge and belief and in good faith. The Employer must establish that the Grievant failed to meet these standards when he provided the information at issue in this matter.

³ The scope of these Charges is determined by an examination of both the Letter of Proposed Removal and the Letter of Removal. (J-#2, Tabs 4 & 5)

⁴ The Agreement does not mandate that an employee be removed from FBOP employment upon proof that he/she provided incomplete or inaccurate information during the Pre-Employment Process. Conversely, the documents completed by the Grievant indicated that he may be disciplined or terminated, if he provides inaccurate information. In addition, the Warden is authorized to request a waiver of any discipline upon proof of such an offense. See also Report of Inspector General, October 2006 Review of the Federal Bureau of Prisons' Disciplinary System. J-#2, Tab 7.

The Arbitrator finds that the Grievant's response at issue in Specifications A and G was consistent with his knowledge and belief at the time of his response and reflected his belief as to the underlying cause of his dismissal. The Arbitrator determines that the Grievant's responses at issue in Specification D were consistent with his knowledge and belief at the time of his response and that his response reflected a reasonable interpretation of the events involved.⁵ The Arbitrator, therefore, finds that the Employer failed to establish the factual foundation of Specifications A, D, and G, as set forth in the Proposed Letter of Removal. The Arbitrator further determines that the Employer failed to establish the allegation set forth in the Letter of Removal that the Grievant failed to account for "periods of time" in his background.

The Arbitrator further determines that the Employer only established that the Grievant failed to disclose that his employment with Dunn manufacturing was terminated by the that employer in November 2001 and failed to disclose that he had been counseled or

⁵ The Employer failed to establish that the Grievant failed to properly respond to the inquiries of whether he made intentional false statement or had 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, when he omitted that he was charged with but not found guilty of misusing registration plates on one of his vehicles.

warned regarding absences twice during his employment at Hanson Brick.⁶

The just cause standard also requires the Employer, in the person of the Disciplining Officer, to conduct a fair and impartial investigation of the charges upon which the discipline is based.

⁶ These two factual occurrences are the basis for the Specifications B, C, E, F and H related to the Grievant responses to questions during his Pre-Employment Interview and his completion of the Questionnaire for Public Trust Positions and Declaration for Federal Employment..

In the instant matter, the Warden relied upon reports resulting from the investigations conducted by U.S. Office of Personnel Management and the Security and Background Investigation Section of the Federal Bureau of Prisons and the Specifications set forth in the Proposed Letter of Removal. (J-#2, Tabs 5, 9 and 11)⁷ These reports and the Proposed Letter of Removal are patently inadequate; in that, (a) the OPM report fails to identify the persons conducting the investigations, (b) both reports and the Stipulations fail to identify the persons making the statements allegedly inconsistent with the Grievant's responses during the Pre-Employment Process and (c) the reports and the Specifications do not contain documentary evidence which establishes that the Grievant was terminated from his employment with Dunn Manufacturing or CMH Flooring for reasons other than those attributed to the actions by the Grievant.⁸

⁷ See TR, Vol 2 pages 39-44 and 69-70.

⁸ See Transcript Vol 2, page 105 and pages 142-145

The Arbitrator does not hold that the Disciplining Officer, when making her decision to remove the Grievant from his FBOP employment, must conduct a de novo investigation of the charges upon which that Removal will be based. The Arbitrator does hold that the Disciplining Officer must ensure that the investigations of others and the resulting reports and Specifications upon which she will rely when making her decision to discipline are complete and non-bias and that such reports and Specifications, which must be given to the Grievant, adequately provide him with notice and information regarding the evidence in those reports which would enable him to meaningfully defend against the charge that the statements set forth in those documents are in conflict with his statements during the Pre-Employment Process.⁹

The Arbitrator consequently finds that the Employer, by relying on these inadequate reports and Specifications, failed to provide the Grievant with the due process protections afforded him by the Agreement and the incorporated just cause standard and thereby violated the Agreement.

The Employer argued that its removal of the Grievant from his FBOP employment must be upheld; in that, the Disciplining Supervisor made her decision to discipline after she evaluated the evidence in conjunction with the required standards of review and found the proposed discipline reasonable.¹⁰ The prescribe factors include the following:

- 1) seriousness of offense
- 2) employees job

⁹ See J-#1, Article 30, Section (e) 1. and Article 6, Section (b) 6 and TR, Voi 2, page 70

¹⁰ Douglas vs. Veterans Affairs 5 MSPR 280(1981) 81 FMSR 7037

- 3) prior discipline
- 4) past work record
- 5) trust factor
- 6) table of penalties
- 7) notoriety of offense
- 8) prior notice
- 9) rehabilitation potential
- 10) mitigating circumstances
- 11) alternative sanctions

The Arbitrator determines that the Disciplining Official did not (a) properly investigate the impact of the Grievant's alleged offense on his ability to retain the confidence of his supervisors ¹¹(b) adequately investigate the Grievant's employment record ¹² or (c) apply the stated standards of performance set forth in the Employer's evaluation instruments. Rather she substituted her subjective and non-disclosed evaluation standards when she judged the Grievant's work-record when she determined the severity of discipline to be imposed in this matter. The Arbitrator, consequently, determines that the evidence does not support the Employer's assertion that the Disciplining Official's decision was arrived at after an application of the "Douglas Factors".

The Employer asserted that the Grievant's offenses were serious and struck at the core of the Agency's mission. This assertion is inconsistent with (a) the notices provided to the Grievant regarding the disciplinary repercussions of providing incorrect or incomplete information during the Pre-Employment Process (b) the Employer's decision not to exercise its right to reassign the Grievant pursuant

¹¹ See Tr, Vol 2 page 85-86 See and compare Transcript Vol 2 pages 3-14 and page 45 See also J-#1 Article 14, section c.

¹² See Tr, Vol 2 page 86

to Article 30 section G of the Agreement and (c) the Grievant's continued active employment up until the day he was issued the Letter of Removal in assignments which authorized his use deadly force.¹³

In summary, the Arbitrator finds that the Employer did not have just cause to issue the contested Removal to the Grievant by reason of its' failure (a) to conduct a proper pre-discipline investigation of the charges (b) to disclose adequate information regarding the basis of the Removal to the Grievant in violation of Agreement (c) to prove the factual basis of all of the charges (d) to properly investigate the impact of the proven charges upon the confidence of the Grievant's supervisor in his performance, as required by the "Douglas" standards, (e) to adequately review, the Grievant's work performance, when determining the discipline to be imposed upon the Grievant, as required by the "Douglas" standards.

The Arbitrator, based upon these findings, determines that a proper disposition of this matter does not require him to address or resolve the Parties' conflicting contentions regarding the timeliness of the investigation of the charges, or the applicability of the Kenney, October 2006 memorandum to this matter. (J-#2, Tab 6) The Arbitrator determines the Union's request that the Arbitrator award attorney fees and cost to the Union is inconsistent with Article 32, Section c., consequently, that request is denied.

Based upon the findings and reasoning set forth in this Opinion, the Arbitrator makes the attached Award.

¹³ See Tr, Vol 2, page 90