In the Matter of the Arbitration Between	)	
	)	
	)	
DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	
FCC COLEMAN, FLORIDA (Agency)	)	
	)	
AND	)	FMCS CASE NO. 09-58847
	)	
	)	ISSUE: Dwight McDonald -
AMERICAN FEDERATION OF	)	Termination
GOVERNMENT EMPLOYEES	)	
LOCAL 506 (Union)	)	
	)	

BEFORE: Barbara J. Wood, Arbitrator

FOR THE AGENCY: Chung-Hi H. Yoder, Attorney Advisor
U. S. Department of Justice
Federal Bureau of Prisons
320 First St., NW, Room 818 – LMR
Washington, DC 20534

FOR THE UNION: Kenneth Pike, Paralegal/Arbitration Specialist
Vice President
AFGE/Local 506
409 W. Hunt Avenue
Bushnell, Florida 33513

ALSO PRESENT FOR THE HEARING:

Daniel Bethea, Union Co-Counsel
David Honsted, Employee Services Specialist, Coleman
Kevin Rison, Employee Services Manager, Coleman
Traci Meany, Employee Services Specialist, Coleman
Peggy Gates, Security Specialist, Dallas, TX
Jorge L. Pastrana, Warden - Medium Security Facility
Ganson McManus, Deputy Captain
Clinton Smith, Captain
Dwight McDonald, Grievant

The hearing in the arbitration between Federal Bureau of Prisons, herein after referred to as Agency, and Council of Prison Locals, American Federation of Government Employees Local 506, herein after referred to as Union, was held on October 29, 2009, at the FCC Administration Building, 846 N. E. 54th Terrace, Coleman, Florida 33521. The Agency was represented by Chung-Hi H. Yoder, Attorney Advisor. The Union was represented by Kenneth Pike, Paralegal/Arbitration Specialist, Vice President, AFGE Local 506 and Daniel Bethea, Co-Counsel, AFGE 506. The Arbitrator was Barbara J. Wood. The Union and Agency stipulated that the grievance was properly before the Arbitrator. Testimony of witnesses was taken under oath. Representatives of the Agency and Union were provided full opportunity to present evidence, examine and cross-examine all witnesses. The arbitration hearing transcript was provided by Letha Wheeler & Associates. Post Hearing Briefs were prepared by the Union and Agency Representatives and submitted to the Arbitrator.

ISSUE

The parties agreed to stipulate to the following issue:

Whether the Grievant, Mr. Dwight McDonald, was discharged for just and sufficient cause and if not, what shall the remedy be? (JX10)

EXHIBITS

Joint Exhibits (JX):

JX1	Master Agreement (CBA) between Federal Bureau of Prisons and Council of Prisons, AFGE dated March 9, 1998 – March 8, 2001. The Master Agreement was still in effect as of the date pf the hearing.
JX2	Invocation to Arbitrate
JX3	4-22-2009 Proposal Letter
JX4	6-8-2009 Oral Response
JX5	7-13-2009 Decision Letter
JX6	7-10-2007 Summary Findings of the Pre-Employment Interview
JX7	11-3-2008 Interrogatories
JX8	USIS background investigation Pages 10, 16, 17 and 18
JX9	Receipt of and P3420.09 Standards of Conduct
JX10	Stipulated Issue

Agency Exhibits (AX):

AX1	7-5-07 Notice to Applicant
AX2	Optional Application for Federal Employment of 612
AX3	Declaration for Federal Employment
AX4	8-7-2007 Confirmation of Employment letter
AX5	7-11-2007 Conditional offer of employment letter

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Preamble

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

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

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

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

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

Article 30 §c & d Disciplinary and Adverse Actions

(c) The Parties endorse the concept of progressive discipline designed primarily to correct and improve employee behavior, except that the parties recognize that there are offenses so egregious as to warrant severe actions for the first offense up to and including removal.

(d) Recognizing that the circumstances and complexities of individual cases will vary, the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions.

Article 36

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

BACKGROUND AND FACTS

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

This case involves the Agency's removal of Grievant Dwight McDonald as a Correctional Officer. Grievant was hired by the Federal Bureau of Prisons at FCC Coleman on August 19, 2007 as a Federal Corrections Officer. Grievant was employed at FCC Coleman for approximately one year and eleven months until his removal on July 13, 2009. Grievant was removed from the federal services for providing inaccurate information during the pre-employment process.

POSITION OF THE AGENCY

ACCORDING TO THE AGENCY on July 10, 2007, during a pre-employment interview with the Agency, the Grievant was asked the following questions:

> 3. Has the applicant been disciplined (suspended, reprimanded, etc.) in former or current employment?
>
> 6. Has the applicant ever been involved in excessive use of force as a law enforcement official (i.e., military police, security personnel, police officer, or other similar enforcement position either in private employment or public service); conduct such as abuse of any person detained or confined in law enforcement's custody (i.e., military, private or public law enforcement) to include sexual contact (such as kissing, fondling, intercourse); or aiding and abetting any acts described in this questions. Note: Involvement includes any commission, allegation, and/or investigation irrespective of the results of the investigation and role of applicant (subject, witness, etc.) It also includes any adjudicative process (civil, criminal or administrative.)

The Grievant responded "no" to both questions. (JX6). When interviewed by the investigator for the United States Investigative Service ("USIS") four months later in November 2007, Grievant acknowledged that while employed with Lowell Corrections as a Correctional Officer in 2006, he was suspended for five days without pay in December 2006, after he was investigated for sexual contact with an inmate. (JX8) The USIS investigator contacted the Human Resources Clerk at Lowell Corrections. The clerk reported the Grievant was suspended from December 15 through December 21, 2006. The suspension arose from a complaint related to the Grievant's talking to female inmates at the duty station, providing personal information about himself to inmates at the window. The allegations of sexual misconduct were investigated, but no

evidence was found to support those allegations. The warden, Grievant's supervisor at Lowell Corrections, reported that Grievant was suspended for failing to obey specific instructions of a supervisor pertaining to interactions with female employees in December, 2006, and subsequently transferred to the Marion Corrections Institution in Ocala, a male facility. (JX8) In the instant case Grievant was issued interrogatories in order to address the discrepant information he provided. (JX7) Grievant admitted that he had been suspended for five days by Lowell Corrections in December 2006. Grievant stated therein, that he did "not recall ever being asked that question before the investigator asked that question on November 5. . ."

At the hearing, Grievant testified he understood the need to be truthful and honest throughout the employment process. (AX1) Grievant testified he was informed throughout the pre-employment application process that he may be subject to discharge if he failed to provide complete, correct, and accurate information. (AX2, AX3) Grievant was informed he had an obligation to update the Agency with complete and accurate information in both his conditional and firm offers of employment. (AX4) (AX5) Grievant was on notice that it was an ongoing obligation which extended to any changes with regard to misconduct or investigations should they arise after the pre-employment interview. The Agency cites that during the hearing, when Grievant was asked by Agency Counsel whether he responded truthfully to the pre-employment interview question of whether he had ever been disciplined in former or current civilian employment, Grievant first answered, "No it was not the truth from my prior understand[ing]." Next, Grievant was asked if at the time he answered Question #3,

whether he believed his response was an accurate reflection of the truth. Grievant stated that at the time he responded to the question it was accurate and made in good faith. When asked the following question by the Union Representative, "Reflecting back now, would you say the answer was probably inaccurate?" Grievant responded: At the time it was truthful and honest to my good faith. But now that I know, looking back on that, it wasn't. It wasn't true. It was inaccurate now. . . Notably, during the course of the pre-employment interview, the Grievant failed to disclose his suspension from Lowell Corrections which occurred in 2006, but did disclosed that he had been terminated in July 2005 by a previous employer. (JX6)

Kevin Rison, the Employee Services Manager at FCC Coleman testified for the Agency at the hearing. He testified about the Agency's pre-employment process. He stated that all Agency employees are required to have a fully-adjudicated, successful background clearance as a condition of employment. According to the Agency the Office of Personnel Management ("OPM") granted the Agency authority to hire an applicant prior to the completion and adjudication of the background investigation. Applicants are advised before they begin working that continued employment with the Agency is conditioned upon the successful adjudication of their background investigations. Rison testified that the pre-employment integrity interview is conducted after the Agency verifies an applicant's qualifications and responses on the application. During the pre-employment interview, the applicant is asked a series of questions to determine if they are within the guidelines of acceptability for the Agency. If the applicant is unable to meet the guidelines, he would not be considered eligible to

continue with the interview processes. He noted that applicants are given notice of the obligation and duty to disclose from the inception and throughout the pre-employment process. (AX1-5) Rison also testified that had the Grievant disclosed his five day suspension at Lowell Corrections during the pre-employment interview, the Grievant would not have been considered within the Agency's guidelines of acceptability.

Peggy Gates was called as a witness by the Agency. She is employed by the Agency as a Security Specialist in Dallas, Texas. Gates is responsible for adjudicating and reviewing background investigations received from OPM and she verifies information provided by applicants during the pre-employment interview is consistent with that provided to the USIS investigator. Also, she is responsible for issuing written interrogatories to employees when there are discrepancies in the information they provide. The Agency points out that an employee is not required to respond to interrogatories as it is voluntary. Gates was responsible for reviewing the Grievant's background investigation. Gates testified that OPM had identified discrepant information provided by the Grievant, namely that he had received a five-day suspension at Lowell Corrections. Gates noted that her office received the Grievant's investigation from OPM some time in approximately January, 2008. She issued a notice of rights form along with the interrogatories to the Grievant in approximately November, 2008. She testified during the time period in question, her department was shorthanded and had received approximately 8,000 new cases. Gates also noted that it took the Grievant two months to return the interrogatories after they were issued to him.

Jorge Pastrana is CEO and Warden of the medium security and minimum security facilities within the complex was the deciding official. During his tenure with the Agency, he has served as a CEO for an approximate total of seven years. The Warden testified that the Grievant provided an oral response to the termination proposal. Warden testified he read each specification and then gave the Grievant an opportunity to respond. Grievant told the Warden he did not remember being asked Specification A and with regard to Specification B, stated 'he did not recall the part of the inmate accusation." Warden stated he did not find the Grievant's response to be credible. Warden testified he considered the Douglas factors in making his decision.

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

The Agency argues the penalty of removal was within the tolerable limits of reasonableness. Warden Pastrana testified that he considered the Douglas factors in making his decision. He testified that he considered that nature and seriousness of the charge of providing inaccurate information during the pre-employment process. The Warden testified that as law enforcement officer, the Grievant was held to a higher standard of conduct. . He testified that as law enforcement officers, correctional officers have arrest authority on institution grounds. He explained that because correctional officers have to respond to assaults on staff, assaults on inmates, inmate disturbances, they have to fully and accurately report what is witnessed, and there is a possibility they may have to testify on behalf of the Agency. He stated that the Grievant's provision of inaccurate information in the past would affect the credibility of Grievant should he be called to testify. The Warden also testified that though Grievant had performed in an acceptable manner, and had no previous disciplinary record, his provision of inaccurate information, destroyed the confidence of Grievant's supervisors in Grievant's ability to perform his job. He stated, "It destroys the confidence that he's going to do the right thing and that he's going to provide accurate information regarding any incidents that may happen in his role as correctional officer." The Warden testified that the penalty of removal for the charge was consistent that imposed on others for the same type of misconduct and it was consistent with Agency's table of penalties. The Warden stated that he believed that the Grievant was not able to be rehabilitated. Due to the seriousness of the charge and the Grievant's response, the Warden concluded that alternative sanctions would not be effective. More significantly, in response to the

Union's question of whether "it is impossible for any potential employee to either forget or not recall something in their past. Also, in response to the Union's inquiry as to why the Warden didn't consider a lesser penalty other than removal, the Warden testified:

> By the seriousness of the charges, I mean, I weighed all that because he would not have been hired if he had provided that information. And then, you know, how are we going to have confidence that he was going to continue doing well or he was going to ensure that even as a Correctional Officer that he was going to provide the information that is needed when he witnessed that he's not going to disclose or withhold information especially when we are dealing with the life of inmates and we are dealing with the life of staff.

The Agency insists the Grievant's testimony throughout the hearing reinforces the Warden's credibility determination. Grievant's responses to questions were contradictory and inconsistent. Grievant's own admission is that he provided inaccurate information during the employment process and the Union failed to dispute the charge and the specifications.

The Agency argues their removal of Grievant complied with due process. During the hearing, the Union moved to suppress Specification B of the proposal letter on the basis that Grievant had not been issued interrogatories for that specification. The Agency views the Union's allegation as either a constitutional due process error or, alternatively a harmful procedural error. The Agency did not violate the Grievant's due process rights. "[T]he Due Process Clause provides that certain substantive rights-life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures" as the right "is conferred not by legislative grace, but by constitutional

guarantee." Cleveland Bd. of Educ. v. Loudermill, et. al., 470 U.S. 532, 541 (1985). In Loudermill, the Supreme Court held that prior to terminating an employee, all the process that is due is a "pretermination opportunity to respond, coupled with post-termination administrative procedures . . ." Id. The Agency's termination of the Grievant complies with established due process. Prior to the issuance of a decision, the Grievant was offered an opportunity to respond, both orally and in writing, to present evidence for consideration, and to review what was relied upon in making the proposal. (JX3) In the instant matter, Grievant provided an oral response to the deciding official with Union Representative Pike. (JX4) The Agency insists they did not violate the Grievant's due process rights.

The Agency argues the Union has failed to meet its burden of proving harmful procedural error. Harmful procedural error is an affirmative defense and is defined as "error by the Agency in the application of its procedures that is likely to have caused the Agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is on the appellant [Grievant] to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights." 5 C.F.R. 1201.56 (c) (3) (2009). Harmful error cannot be presumed. Hidalgo v. Dep't of Justice, 93 M.S.P.R. 645, 653 (M.S.P.B. 2005).

The Union moved to suppress Specification B, contending their motion should be granted based on the Agency's failure to provide the Grievant with interrogatories for the underlying misconduct for the specification. Essentially, the Union's argument is that there was harmful procedural error in the instant action. The Union has failed to

meet its burden of proving harmful procedural error. In the instant matter, the Warden testified that he would not have hired the Grievant had Grievant provided accurate information during the pre-employment process. The Warden testified that even assuming that there was a violation of policy, rule or regulations he would have made the decision to terminate the Grievant based on the charge. The maintains that the Union has failed to meet its burden of proving that in the absence or cure of the error, the Warden would have likely reached a different decision than the instant one.

The Agency argues that the Union contends the Agency's disposition of both the investigation and the imposition of the penalty was untimely, in violation of Article 30 of the parties CBA. In adverse actions, such as the instant one, an allegation of untimely disposition is an allegation of harmful procedural error. Also, in reviewing an adverse action in which the Grievant has alleged a violation of a collective bargaining agreement, the arbitrator should determine whether harmful procedural error occurred. See, e.g., Pleasant v. Dep't Housing and Urban Dev., 98 M.S.P.R. 602, 608 (M.S.P.B. 2005), Pinegar v. Federal Election Comm'n, 105 M.S.P.R. 677, 697 (M.S.P.B. 2007). The Agency insists they did not violate the terms of the CBA. Here, Article 30 of the parties' CBA unambiguously states that the parties recognize investigations may be lengthy based on the circumstances and complexities of the case. (JX1) Therefore, no time frame requirement is therein defined for either the completion of the investigation or the adjudication of any warranted discipline. An arbitrator may not ignore the plain language of a collective bargaining agreement. See United Paperworks Int'l v. Misco, 484 U.S. 29, 38 (1987). A finding by the Arbitrator that there is fixed time requirement

for disposition of the investigation and/or the disposition of discipline would be tantamount to the Arbitrator's modification of the parties' bargained for agreement in violation of Article 31, Section h. There was no violation of policy with regard to the timeliness issue. There was ample testimony by Peggy Gates that her office had received approximately 8,000 cases to review. Moreover, the Union failed to show how the alleged lack of timely disposition was harmful to the Grievant, i.e., how it substantially harmed or prejudiced his rights. Applying the applicable regulatory harmful error analysis here, Warden Pastrana clearly indicated that even assuming there was a violation of Agency rule or regulation, he would have made the decision to terminate the Grievant given the Grievant's provision of inaccurate information during the pre-employment process. The Union has failed to meet its burden of proving that in the absence or cure of the error, the Warden would have likely reached a different decision than the instant one.

According to the Agency the Union has failed to prove the equitable defense of laches. To the extent the Union's allegation of untimely disposition of the Grievant's investigation and imposition of the penalty is aimed at raising the equitable defense of laches, it still has failed to meet its burden of proof. To establish this defense, the Grievant must show unreasonable delay and that he was materially prejudiced by the delay. Hidalgo, 93 M.S.P.R. at 654 (emphasis added). In the instant matter, Gates testified her department received approximately 8,000 files for review and her office was short-staffed. In light of this explanation, the time it took for the agency to issue a decision in this matter was reasonable. Further, even if the fact-finder were to deem the

alleged delay unreasonable, the Union still has not met its burden of proof showing that the Grievant was materially prejudiced by the delay. If anything, it was the Grievant who was benefitted during the disposition of this matter in that he was gainfully employed and received pay and benefits throughout the entire period. Had the Grievant provided accurate information during the pre-employment process, he would not have been hired at all.

The Union requests as a remedy punitive damages for pain and suffering pursuant to 5 U.S.C. § 5596. However, the statute cited does not authorize punitive or compensatory damages. As noted in the foregoing, the Arbitrator is held to the same standards as the Board in adverse actions. There "is no basis in rule, law, or regulation for an award of punitive damages in cases before the Board." Therefore, there is no legal basis for the Arbitrator to award such a remedy, in the event the Agency is found liable, nor has the Arbitrator been expressly granted the authority to do so under the parties' CBA. Although individuals filing claims of discrimination under the Civil Rights Act or disability discrimination claims under the Rehabilitation Act may be entitled to compensatory damages for monetary and non-monetary losses to include emotional pain and suffering, the Grievant has made no such claims. Therefore, even if the Arbitrator were to sustain the grievance, the Grievant would not be entitled to such a remedy.

In conclusion, pursuant to 5 U.S.C. § 7106 and Article 5 of the CBA, Agency managers have the right and responsibility to use discipline to control the conduct of employees. While the Agency must have just and sufficient cause for taking the

disciplinary action, the record amply demonstrates there was just and sufficient cause to remove the Grievant and that his removal was in the interest of the efficiency of the service. In addition, the Union did not meet its burden of proof with respect to the issues it raised in its grievance. Based upon the foregoing, the Agency respectfully requests the Union's grievance be denied.

POSITION OF THE UNION

ACCORDING TO THE UNION the CBA provides the standard for disciplinary actions against employee bargaining unit members. Disciplinary and adverse actions will be taken only for just and sufficient cause and to promote the efficiency of the service. A removal is considered an adverse action under the CBA. Progressive discipline is endorsed by the parties. The parties endorse the concept of progressive discipline 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 time offense up to and including removal. The CBA does not define what are considered offenses so egregious.

The Grievant was hired by the Agency on August 19, 2007. After the date of hire and the usual pre-employment process, the Agency sent the background paperwork, also in accordance with its typical procedures, to the Office of Personnel Management (OPM), which began a thorough background investigation. OPM can decide to retain jurisdiction, and initiate action to remove the employee if it determines that an applicant

would not be suitable or eligible for federal employment because of their background investigation, or they can decide to take no action against the employee by not retaining jurisdiction over the matter. In this case, OPM did not retain jurisdiction. All of the information was reviewed and OPM issued a determination that it did not find him ineligible or not suitable. Typically, if a particular employee is still on probation when such hiring issues arise, the Warden has discretion to terminate or not terminate the employee. After the probationary period ends, and when the employee has served at least a one year period of employment, the Warden then has the authority, as the deciding official, to suspend, reprimand, or impose other sanctions, up to and including termination of federal employment. Probation lasts one year, after which the employee is considered "career conditional." At the time of his termination, Grievant was not a probationary employee.

The Union argues Grievant was willfully and wrongfully terminated from his position with the Agency (BOP at FCC Coleman), after having been employed by the Agency for approximately one year and eleven months with an "acceptable" to "exceeds" work record and no history of any prior disciplinary action or misconduct. This arbitration challenges the termination of a federal career conditional employee. The burden of persuasion is with the Agency. The Agency must prove, by a preponderance of the evidence; (1) the misconduct charged; (2) the connection between the misconduct and the efficiency of the Service; and (3) that the penalty is appropriate. *AFGE Local 922 and Fed. Bureau of Prisons*, FMCS No. 04-4133, 23 (Dunham Massey, undated). *See* 5 U.S.C. §7701 (c) (1) (B). The Union maintains the

Arbitrator should dismiss the Agency's charge, because the Agency has not met its burden of showing that the adverse action was for just and sufficient cause. The Arbitrator should award reinstatement of Grievant with full pay and benefits or modify the penalty. Under both the CBA and statute, the Agency may remove a non-probationary employee only for just and sufficient cause. The CBA makes clear that disciplinary and adverse actions will be taken only for just and sufficient cause and to promote the efficiency of the service. A removal is considered an adverse action under the CBA. *See* 5 U.S.C. § 7513(a) (disciplinary action is "only for such cause as will promote the efficiency of the service.") Review of a disciplinary action of the Agency is decided under the law of the Merit System Protection Board (MSPB). *AFGE Local 922*, FMCS 04-04133.22.

The Union argues Grievant did not commit conduct to justify discharge. The charge that is the subject of this Arbitration is providing inaccurate information and not the more serious charge of falsification of official documents. Falsification requires proof of intent. *Naekel v. Dep't of Transp.*, 782 F.2d 975, 977 (Fed. Cir. 1986). *See Dogar v. Dep't of Defense*, 95 M.S.P.R. 52, 55-56 (2203) (on falsification charge, agency must prove the employee knowingly supplied incorrect information, with the intent to defraud the agency), *aff'd*, 128 F. App'x 156 (Fed. Cir. 2005); *see also Walker v. Dep't of Army*, Appeal No. 01820420, 1982 WL 531817, *13 (E.E.O.C. Office of Fed. Operations Apr. 30, 1982) (falsification carries the connotation of actively and knowingly falsifying with intent to misrepresent or deceive). Proof of falsity of statement, without evidence of intent, is insufficient to sustain a charge of falsification. In the instant case,

though the Grievant was not charged with the more serious charge of "Falsifying Official Documents", Grievant was treated as if he had.

According to the Union the Agency violated Grievant's due process when it failed to impose discipline within a reasonable time. In the instant case, though the Grievant was not charged with the more serious charge of 'Falsifying Official Documents', The Grievant was treated, in this case, as if he did. Comments in the letter of termination dated July 13, 2009, from Warden Jorge L. Pastrana would lead to an assumption that Grievant 'willfully and knowingly' supplied incorrect information, with the intent to defraud, misrepresent or deceive the Agency and, which is more like a charge of Falsifying Official Documents than simply giving inaccurate information. (JX5) The Union insists if the Warden did not provide a written decision and the specified reasons therefore "at the earliest practicable date," the Agency's decision must be set aside. *See Id.* in Veteran Admin. Med. Cir, Houston, Tex., 91 LA 588 (1988), the employer discharged an employee nine months after it had learned that the employee had given false information on his application. This delay caused the arbitrator to reduce this discharge to a suspension. *Id* Similarly, Article 30, Section D of the CBA states, "the parties endorse the concept of timely disposition of investigations and disciplinary/adverse actions." In the present case, Grievant was subject to a pre-employment interview on July 7, 2007. Per the Agency's "Summary of Findings of the Pre-Employment Interview", he responded "No" to the following questions:

> Question 3: "Has the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment?" (Specification A)

Question 6: "Has the applicant ever been involved in excessive use of force as a law enforcement official?" (Specification B)

As previously stated, Grievant was hired on August 19, 2007. During the subsequent background investigation of November 5, 2007 through November 13, 2007, conducted by the United States Investigative Services (USIS), OPM, it was discovered that Grievant was employed at Lowell Corrections as a corrections officer from March, 2006 to December, 2006. Grievant was suspended for five (5) days without pay after an investigation wherein he was accused of inappropriate contact with a female inmate. (JX8) It was not until November 3, 2008, almost one year later, that the Grievant received interrogatories in which he was specifically asked about having been suspended and to which he responded in the affirmative. (JX7) In answering his interrogatories of November 3, 2008, he stated, "I do not recall ever being asked that question before the investigator asked that question on November 5 [2007]. When he asked that question, I was straight forward and honest about the situation. [There was] no intent to hide that information."

Grievant successfully met his probationary period sometime on or around August 19, 2008. Grievant was removed from federal employment on July 13, 2009 one year and eleven months after he was initially hired and eleven months after he had met probation. The supposed discrepancies claimed by the Agency were discovered, at least by November 13, 2007, when the background investigation was completed by the USIS agent and only three months after Grievant had been hired by the Agency. OPM decided not to retain jurisdiction in this case. Grievant responded to the interrogatories on November 3, 2008, almost one year after the USIS first discovered the

aforementioned information, and after his probationary period had, in fact, already ended. The Union points out the Grievant was then removed from federal employment on July 13, 2009, another eight months later, barely one month shy of two years service. The Union asserts that it is hard to believe the Agency would not have been aware of the discrepancies, as reported in the USIS investigation of November 13, 2007, long before Grievant met his probationary period and, at which time, they would have been well within their rights to terminate his employment for simply failing to meet probation. In this case, the Agency waited until Grievant had been employed almost two years before using a background issue to terminate him and then, they used a lesser charge of providing inaccurate information to justify the severe penalty.

The Union argues as it concerns the Agency's culpability regarding time frames. It is clear to the Union from Security Specialist Peggy Gaines' testimony that she most likely received the background information sometime in or around December, 2007 or January, 2008. Certainly, and it could be presumed that, she should have been aware of the discrepancies found in the initial USIS background investigation sometime soon thereafter, yet Grievant did not receive interrogatories to answer until November, 2008. It must be asked, had the discrepancy been so egregious that it would be used in July, 2009, as justification to terminate him from employment, why wasn't he removed long before July, 2009 and during his probationary period when the Agency should have been aware of the discrepancy? The excuse given of being 'short of staff' is simply unacceptable and should weigh heavily in the Arbitrators decision. Further, an Agency's promotion of an employee or allowing him to perform his duties for an

extended period of time after learning of his misconduct indicates that his overall work record outweighs the seriousness of the offense. *Hovanec v. Dept. of the Interior*, 67 MSPR 340, 95 FMSR 5156 (MSPB 1995). In the instant case, it is apparent that the seriousness of the charge did not justify removal. If the Agency were truly concerned about Grievant and believed the inaccurate information was that serious, the Agency would have removed Grievant much sooner and during his probationary period. The Agency's delay in this matter, alone, is grounds for this Court to set aside Grievant's removal.

The Union insists the Agency has failed to meet its burden of proof on the charge and specification(s) for which Grievant was terminated. Therefore, Grievant's termination must be reversed or mitigated. Article 30 of the CBA provides that adverse actions, such as removal, can only be taken; (1) for just and sufficient cause and (2) to promote the efficiency of the service. Moreover, Article 30 states that "nexus will apply." 5 U.S.C. § 121 (e)(2) indicates that cases involving review of a disciplinary action imposed by the Agency, such as in the case here, are to be decided applying Merit System Protection Board ("MSPB") law. Under MSPB law, the Agency is permitted to take adverse action "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). 5 C.F.R. § 731.2101 provide that "an applicant, appointee, or an employee may be denied federal employment or removed from a position only when the action will protect the integrity or promote the efficiency of the service." 5 U.S.C. § 7701 (c) states that, "the decision of the agency shall be sustained only if the agency's decision. . . *is supported by a preponderance of the evidence*." The MSPB's regulation

for this federal statute, 5 C.F.R. § 1201.56, reiterates this rule, and defines "preponderance of the evidence" as "[t]he 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." Thus, to sustain its adverse action in this case, the Agency must prove by a preponderance of the evidence: (1) the misconduct charged, i.e., that Grievant provided inaccurate information; (2) the nexus, or connection, between the misconduct and removing Grievant to promote the efficiency of the service; and (3) the penalty imposed is the appropriate level of discipline, which is to say that the discipline was reasonable under the circumstances.

According to the Union Grievant did not willfully or intentionally withhold information to deceive. The Agency has not proven by a preponderance of the evidence that Grievant intended to deceive the Agency. In his oral interview with Warden Pastrana on June 8, 2009, Grievant attempted to explain those discrepancies as found in his background investigation. As it regarded Specification A, Grievant stated that during the pre-employment interview, he simply did not recall being asked that particular question that would have prompted him to say anything about the five day suspension. Grievant further stated that, when the USIS investigator specifically asked him about the prior suspension, Grievant did admit to being suspended for five days without pay while employed with Lowell Corrections Institute. Grievant said he was not trying to hide or conceal anything and by no means would he try to withhold information. As it regards Specification B, Grievant stated that, he did not recall that question being asked in regards to the incident in question, however, he understood the question to

mean had he ever used of excessive force. Grievant stated he did not realize that the question was asked in regards to his being investigated for inmate allegations. Grievant stated that he was not involved with an inmate. These were false allegations made by a female inmate. This female inmate came forth with 2-3 different lies that were shown to be untrue. This was during his probationary period. Grievant stated that he was suspended instead of being fired. (Although they could have fired him due to the false allegations, he was given a suspension rather than termination). The allegations were found to be untrue. Grievant did not recall the use of force question being asked in regards to allegations of an inmate, therefore, he answered the question honestly as he understood it. In Grievant's mind, he had not ever used 'excessive force' and as the term would be defined. (JX4) The Union contends it would have been simply inane for the Grievant to purposely and willfully, withholds important information regarding his background when he well knew that an extensive background investigation would ensue once he was initially hired for federal employment and any information he declined to reveal would, no doubt, be discovered. Grievant had previously worked in a position of public trust as a corrections officer and had been thru the background investigations process before. The Agency cannot simply allege false statements, and that is exactly what the Agency is alluding to here, it must prove their falsity. If the Agency's proof does not establish that a statement is false, the Agency cannot prevail on the charge. *See Seigla v. Smithsonian Inst.*, 62 MSPR 55, 58-59 (1994). Moreover, proof of falsification of documents also requires the Agency to establish that Grievant:

(1) knowingly supplied inaccurate information to the Agency: and

(2) did so with intent to deceive or mislead the Agency. *See Forma v. Department of Justice, 57 MSPR 97 (1993)*. Also, *Raymond v. Department of the Army*, 34 MSPR 476 (1987).

The Agency spent much time, and in an attempt to show Grievant intentionally withheld information, producing various documents signed by Grievant. The Union insists that again, the Agency did not prove, by providing these particular documents, that Grievant had provided 'false or fraudulent' information. There must be proof of an element of intent. The Union can only presume that the Agency is attempting to make a case before the Arbitrator that, by the Grievant's having merely signed these documents, it somehow proves that he willfully and knowingly provided inaccurate information and should have known better. Grievant's signature proves nothing of the kind. The disclosure clause also states, . . . to the best of my knowledge and belief, all of the information on and attached to this application is true, correct, complete, and made in good faith." Grievant testified that he did, in fact, provide information to the best of his knowledge and belief and in good faith. These documents entered by the Agency do not, in and of themselves, prove otherwise.

At issue in this case is the pre-employment interview and specifically, Question Number 3 of the pre-employment interview form. The Agency alleges that the Grievant intentionally deceived the Agency on Question 3 of the form by answering "No" instead of "Yes" to this question. During the pre-employment interview, Grievant answered "Yes" to Question Number 1: "Has the applicant been dismissed or resigned in lieu of dismissal from any job?" He freely admitted that he had been 'dismissed' from a

previous job, Mark 4 Automotive, in July of 2005. It seems absurd that Grievant would freely admit to a 'dismissal' from a previous employment, but not disclose a simple suspension in Question 3. Especially when Grievant knew that a thorough background investigation would ensue upon being hired with the Agency and this information would most likely be discovered.

The Union argues the evidence does not support the penalty of removal. Grievant's removal was inappropriate and unreasonable when considering his employment record, length of service and flawless disciplinary record. As indicated, the penalty imposed must be the appropriate level of discipline, which is to say that the discipline was reasonable under the circumstances. Within this analysis, an employee's employment record, including the quality of the performance evaluations, the disciplinary record, and the length of service, should be considered in assessing appropriate discipline. *Pine Ridge Coal Co.*, 111 LA 568, 571 (Feldman, 1998). Also, *Hawaiian Airlines, Inc.*, 110 LA 631, 634 (Najita, 1998). Also, *Health Plus, Inc.*, 110 LA 618, 620 (Duff, 1998). Also, *Mason & Hanger Corp.*, 109 LA 957, 965 (Jennings, 1998). Also, *Kimberly -Clark*, 107 LA 554, 560 (Byars, 1996). In the instant case, Grievant had not only been a loyal officer for almost two (2) years for the institution, he received successful and exceeds evaluations during that time. Grievant successfully met his probationary period of one (1) year. As required by arbitral authority, the Agency must consider, among other things, the employee's past disciplinary record. *Douglas v. Veterans Administration*, 5 MSPR 208 (1981). A clean record continues to be viewed in the employee's favor. *Nabisco, Inc.*, 109 LA 547, 553 (Hayford, 1997). Also, *Arvin*

Industries, 109 LA 539, 546 (Keenan, 1997). Here, Grievant had never been disciplined or reprimanded while working for the Agency. The Union contends it is also clear from Warden Pastrana's testimony that he did not truly consider all other mitigating factors as found in the Douglas ruling, rather, he reviewed that documentation in front of him and made his decision based on it. The Union argues it would appear from Pastrana's own testimony that he may very well have made a cursory review of the *Douglas* factors, but they obviously didn't play a large role in his final decision as he emphatically states that he did not even consider numbers 10 and 12 of the factors. Further, nowhere in Pastrana's testimony can there be a statement cited proving that Grievant intentionally provided inaccurate information in order to knowingly mislead the Agency. His was riddled with pure bias, opinion and speculation. Even if the Arbitrator finds that the Agency has met its burden of proving that the Grievant committed the action with which he was charged of providing inaccurate information, the Arbitrator must further find that the Agency has failed to show that the extreme penalty of removal was appropriate. The Union argues a career employee may be terminated only pursuant to the CBA and the *Douglas* factors. It is uncontroverted that the deciding official must also consider the *Douglas* factors when deciding whether to remove an employee from service. *See Cameron v. Dep't of Justice*, 100 M.S. P. R. 477, 482-83 (2005), *pet. for review dismissed*, 128 F.App'x 156 (Fed. Cir. 2006). The *Douglas* factors, now uniformly accepted, are derived from MSPB decision in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 5 M.S.P.B. 313 (1981). The MSPB considered appeals by career employees who challenged the penalty of removal as too severe. *Id.*, 5 M.S.P.R. at

284, 5 M.S.P.B. at 313-14. Observing that "an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction" id, at 297, 5 M.S.P.B. at 325, the Board held that in reviewing an Agency's penalty, it must adhere to Supreme Court precedent, id. at 301-02, 5 M.S.P.B. at 328-29. It then honed the body of the case law and administrative decisions and derived a 12-point list of factors "relevant for consideration in determining the appropriateness of a penalty". Id. at 305, M.S.P.B. at 331. *Id.* at 305-06, 5 M.S.P.B. at 332. See Dogar, 95 M.S.P.B. at 56 (the MSPB must consider the employee's plausible explanation as part of the totality of the circumstances). When the Arbitrator or Board reviews an agency's imposed penalty, it may determine whether the penalty is disproportionate to the charges, clearly excessive, arbitrary, capricious, or unreasonable. *Stein v. United States Postal Serv.*, 57 M.S.P.R. 434, 441 (1993).

In the suspension letter dated April 22, 2009, it states, "It is imperative that our employees exhibit the integrity that we attempt to instill in our inmate population. Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker. Your actions demonstrate that you are not one to whom the care, custody, and correction of federal criminal offenders may be entrusted. Although not implicitly stated, the Agency makes it clear in this statement that, the actions of Grievant were, in fact, so 'egregious' that progressive discipline was not even applicable and removal was the only option available to the deciding official. Pastrana's testimony seems to confirm this opinion. The term 'egregious' is defined as an adjective meaning, "Extremely or

Remarkably Bad; Flagrant". *Black's Law Dictionary* (8th Ed. 2004). Clearly, the Grievant's acts did not fit that standard. Although the definition of 'egregious' is not defined in the CBA or the Agency's table of Penalties, it is referenced and explained in a number of decisions by the Merit Systems Protection Board. Rarely is there a charge which by itself is so egregious as to outweigh consideration of the *Douglas* factors. In *Sisemoore v. Department of the Army*, 113 MSPR 560 (1982), the Agency removed an employee after he brandished a weapon toward a federal investigator that visited his home to verify if he was sick as he claimed to have been. In reversing the decision of the presiding judge, who accepted that because of the egregious nature of the charge, once it was established there was no need to consider the *Douglas* factors. The Board disagreed with the decision of the Agency and the presiding judge stating that, "[i]n *Douglas v. Veterans Administration*, 5 MSPB 313, 332-33, we noted that not all of the factors which are generally recognized as relevant would be pertinent in every case. However, the nature and seriousness of the offense is but one of the factors which should be considered and weighed in determining the reasonableness. Thus, although the nature of the offense may be so serious as to outweigh the other factors, it does not follow that the other factors can be ignored. Id. 332-33. Accordingly, because the presiding official erred in his analysis, we hereby GRANT the petition for review to consider the appropriateness of the penalty." The MSPB Board made similar rulings in *Theresa P. Lindsay v. Department of Justice*, Docket # DC07528010319, (November 25, 1981) in which the federal employee was charged with failure to participate in an official investigation and falsification of information. In reversing the decision to remove

the employee, the Board found that the *Douglas* factors were not considered by the presiding judge. A true analysis of the *Douglas* factors in the present proceedings shows the penalty to be unreasonable and excessive.

The Grievant's performance evaluations had been consistently satisfactory and exceeds. His evaluating supervisor commented, "He responds to emergency situations, takes charge, and directs inmates as indicated", "When dealing with inmates, Officer McDonald maintains a professional manner", and "Officer McDonald utilized excellent verbal skills when de-escalating situations involving inmates who are distressed". This would indicate that Grievant had recognized skills and credibility in his interactions with inmates. Further, OPM did not take disciplinary action in this case, which they certainly could have. The Agency had ample opportunity to take decisive action during Grievant's probationary period if they felt his actions were so egregious and in the best interest of the Agency yet, they waited until well after his probationary period to terminate him. Further, he was well liked and respected by both his peers and supervisors and this issue, in no way, destroyed his credibility and effectiveness as a Correctional Officer or a Federal Law Enforcement Officer as the Agency claims. Upon review of his evaluations prepared by that Lieutenant who directly supervised Grievant, was quite the contrary. The Agency simply could not show how removal from his position as a federal employee, and after almost two years of employment, was in the interest of the efficiency of the service.

The Union cites that Arbitrators have ruled favorably for Grievant's in other similar cases. During the Union's opening comments, two (2) recent cases were cited

that are similar in nature to the current case in review and both occurred at FCC Coleman. They are reiterated here for the Arbitrators consideration. In FMCS *Case No. 06-51953*, an employee had been terminated for providing inaccurate information. This employee had completed the one year period of probation and had been employed for three (3) years prior to removal. In that Arbitrators Opinion & Award, he stated, "The Grievant completed the probationary period after one year. After three years, i.e. after February 24, 2995, he became a career employee. It was not until some six months later before his employment was terminated. It seems inexcusable that the Agency waited so long before discharging him."

In FMCS Case No. 08-50626, an employee had been terminated for providing inaccurate information. This employee had also completed the one year period of probation and had been employed for a number of years prior to removal. Additionally, the Agency had allowed the employee to transfer, at the employee's expense, from another facility to Coleman. In that Arbitrators Opinion & Award, he stated, "The penalty assessed against. . . is not appropriate in light of the fact that the Agency *failed to establish intent." He further stated, "This inaccurate statement is insufficient just cause to discharge. . ."* In this case, the employee was fully reinstated into federal employment and made whole.

Grievant in this case in fact was charged with providing inaccurate information and summarily terminated well after completing his one year probationary period and being employed with the Agency for almost two (2) years. Further, he consistently rated as successful and exceeds in his performance evaluations. He had no disciplinary

record while a federal employee. He was liked and respected by both his supervisors and peers. He had given the Agency no reasons to view him as untrustworthy or non-credible while employed.

In conclusion, the procedures employed by the Agency in terminating Grievant from his employment violated his due process rights. The Agency should have been aware of the inaccurate information, and as charged, well before Grievant's probationary period was completed, and at the very least within the first four to five months of his probationary period. The background investigation was completed by the USIS on November 13, 2007 and this information submitted to the Agency. There is no reasonable excuse for the Agency to claim they were not aware made aware of the claimed inaccurate information sometime early in Grievant's probationary period. The Grievant was not even asked to clarify the discrepancy, via interrogatories, until a year after the background investigation was completed and the Agency should have been aware. To wait until Grievant was employed for almost two years to remove him from federal employment and based on a background issue is simply egregious and cannot be justified. Grievant's removal certainly was not in the efficiency of the service. The Agency included a sub-part or Specification (Specification B) to the original charge of providing inaccurate information. This particular Specification was never addressed in the USIS investigation nor do the records, provided to the Union by the Agency, reflect that he was ever asked to clarify this Specification via interrogatories. It can only be assumed this Specification was included later and in order to further justify Grievant's removal. The Union would argue that the Arbitrator must set this Specification aside as

there is no indication anywhere that this was an issue until it showed up in the proposal letter as Specification B. Grievant was considered a good worker, trustworthy and credible by his supervisors and peers. He had satisfactory and exceed evaluations and had a clean disciplinary record. The Agency could not prove that Grievant intentionally and with malfeasance attempted to conceal misconduct or mislead the Agency by willfully and knowingly providing inaccurate information. Thus, reversal of the Agency's decision to terminate his employment is required in this case.

For the reasons set forth herein, the Union respectfully requests that the discharge of Grievant not be sustained, and that it be set aside; that he be awarded full back pay with interest and in accordance with 5 U.S.C. § 5596 (b) (2); reinstatement of all seniority rights and other emoluments in connection with his job; that the Grievant's annual leave shall be restored and credited in accordance with 5 U.S.C. § 5596 (b) (1) (B); that he be awarded compensatory and punitive damages (to be decided) for pain and suffering, of both Grievant and his family, due to the unreasonable removal from employment and the undue stress it has placed on him and his family, both emotionally, physically, and financially; that the Agency bear the cost of this action; and for any and all other just and proper relief as determined by the Arbitrator.

ARBITRATOR'S DISCUSSION

The representatives of the Company and the Union are commended for their skill and perseverance in presentation of their cases. Reference citations provided in their briefs were appropriate and helpful to the Arbitrator. The Arbitrator has reviewed all of the

evidence, the Arbitrator's copious notes from testimony and various witnesses and the Company's and Union's excellent briefs including applicable case citations.

The Arbitrator recognizes Agency must establish a high standard of honesty and trustworthiness for its Correctional Officers. Further, the parties have agreed to recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be reasonably assisted, to develop their potential as Bureau of Prisons employees to the fullest extent practicable.

The Agency spent much effort discussing the content of the discipline from a previous employer which is not the issue in this case. The issue is whether the Grievant, Mr. Dwight McDonald, was discharged for just and sufficient cause and if not, what shall the remedy be?

It is clear that the Grievant did provide inaccurate information on Question 3, during a pre-employment interview when the Grievant responded "no" when asked has the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment. In 2006, the Lowell Correctional facility suspended the Grievant for five days without pay during his probationary period. The Grievant did volunteer this information when directly questioned by USIS. The excuse given for the lengthy delay in USIS's investigation and response of being "short of staff" is unacceptable. It is difficult to believe the Grievant willfully and intentionally withheld the five day suspension information to deceive the Agency while on the other hand the Grievant was forthright admitting a discharge from another employer. The Grievant did testify that at the time, he responded to the question accurately and in good faith.

The Arbitrator is concerned that throughout the elaborate and lengthy pre-employment and investigative processes, the Agency was unable to identify any questionable discrepancies that would allow a person to become employed and remain employed at the Agency for one year and eleven months. The probationary period is one year, after which time the Grievant was considered a career conditional employee. At the time of discharge, Grievant was not a probationary employee. While employed by the Agency, Grievant received "acceptable" to "exceeds" performance evaluations and no history of any prior discipline or misconduct. The Agency was unable to provide evidence or testimony to convince the Arbitrator that the Grievant's conduct or performance had any negative impact on the efficiency of the Service.

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

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

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

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

evaluating the reasonableness of the proposed discipline: **1.** The nature and seriousness of the offense, and its relation to grievant' duties, position, and responsibilities, including whether the offense was intentional and technical or inadvertent, or was committed maliciously, or was frequently repeated; **2.** The employee's job level and type of employment, including supervisory or fiduciary role, contact with the public, and prominence of the position; **3**. The employee's past disciplinary record; **4.** The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers; and dependability; **5.** The effect of the offense upon grievant's ability to perform at a satisfactory level and its effect upon supervisor's confidence and grievant's ability to perform assigned duties; **6.** Consistency of the penalty with those imposed upon other employees for the same or similar offenses; **7.** Consistency of the penalty with the applicable agency table of penalties; **8.** The notoriety of the offense or its impact upon the reputation of the City; **9.** The clarity with which the employee was on notice of any rules that was violated in committing the offense, or had been warned about the conduct in question; **10.** Potential for employee's rehabilitation; **11**. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and **12.** The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by grievant or others.

In the instant case, after review of the guidelines in *Douglas*, consideration of the evidence and testimony the Arbitrator finds the Agency failed to properly consider the

Douglas factors. It appears to the Arbitrator there was not any meaningful review of the *Douglas* factors before deciding to discharge the Grievant. In such situations, the Arbitrator possesses the authority to reverse or modify the adverse action.

The Arbitrator concludes that the degree of discipline was not reasonably related to the nature of the offense or the employee's past record. Given another opportunity, with the continued support of management, the Grievant could be of more value to the Agency for years to come.

THE AWARD

The Arbitrator finds the Grievant, Mr. Dwight McDonald, was discharged without just and sufficient cause. The discharge of the Grievant is not sustained. Effective immediately, the Grievant shall be reinstated to his former position as Correctional Officer with seniority; annual leave shall be restored and credited; make him whole for back pay and benefits. From back pay due the Grievant, the Agency may deduct any Unemployment Compensation paid as a result of the Grievant's termination and any interim wages earned during the discharge period.

Barbara J. Wood, Arbitrator

January 22, 2010