ARBITRATION DECISION

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL NO. 506	)	
	)	**FMCS Case No. 08-50626**
and	)	
DEPARTMENT OF JUSTICE, FEDERAL CORRECTIONAL COMPLEX COLEMAN, FLORIDA	)	

APPEARANCES:

FOR THE UNION:

J. Paul Davidson, Attorney - Representative.
Daniel Bethea, Advocate - Representative.
Samantha Carbone, Senior Officer - Witness.
Joey Polk, Senior Officer - Witness.

FOR THE AGENCY:

Jeffery M. Barnes, Labor Relations Specialist - Representative.
Clinton Smith, Captain - Witness.
Becky Hale, Employee Services Administrator - Witness.
Therisa Blue, Security Specialist - Witness.
Michael Garrett, Warden - Witness.

SUBJECT OF GRIEVANCE:

The discharge of Luis Rodriguez.

CONTRACT PROVISIONS INVOLVED:

Article 5; Article 6; and Article 30.

DATE OF HEARING: March 6, 2008.

DATE OF DECISION: July 19, 2008.

AWARD: The grievance is sustained.

ARBITRATOR: John S. West.

TABLE OF CONTENTS

GRIEVANCE

On October 18, 2007, Luis A. Rodriguez, a correctional officer at the Federal Correctional Complex (hereinafter "FCC," or the "Agency"), Coleman, Florida, and member of the American Federation of Government Employees, Local No. 506 (hereinafter "AFGE" or the "Union") filed a grievance contesting his discharge. The grievance reads as follows:

DATE: 10-18-07

REPLY TO
ATTN. OF: Rhys M. Dervan, Executive Vice President, Local 506

TO: David Honstead, Lead Employee Services Specialist

SUBJECT: Invocation of Arbitration

Per the Master Agreement, Federal Bureau of Prisons and Council of Prisons American Federation of Government Employees (hereinafter the "Master Agreement"), Article 32, the Union invokes its right to arbitration. Officer Luis Rodriguez was unjustly terminated from the Federal Bureau of Prisons, FCC Coleman. The action taken by the Agency was not Fair and Equitable nor was the termination for just and sufficient cause. The Agency was less than forthcoming in its assessment of the officers ability to work in the Bureau of Prisons. The Agency was not forthcoming in its representation of the issues surrounding the officer nor did it acknowledge the officer's voluntary statement to investigators or the investigator's failure to act on the information for more than 18 months.

The agency allowed the officer to work at two Federal Prisons and allowed the officer to transfer, at his own expense to FCC Coleman, FL. At the time the agency allowed the officer to move his back ground investigation had not been completed. The officer had

completed more than one year and was not on probation. FCC Coleman was experiencing a critical shortage of officers at that time.

Per the Master Agreement, Article 36, in regards to people being the most valuable resource of the Federal Bureau of Prisons; "This will be achieved in a manner that fosters good communications among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in daily routine or during extraordinary conditions. In the spirit of mutual cooperation, the Union an employer commit to these principles."

Per the Master Agreement, Preamble, "Moreover, the parties recognize that the administrations of an agreement depends on a good relationship. This relationship must be built on the ideals of mutual respect, trust and commitment to the mission and the employees who carry it out." Also in section D of the Preamble, ". . . recognize that 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."

Per the Master Agreement, Article 30, "The parties endorse progressive discipline designed primarily to correct and improve employee behavior . . ."

It is also clear that management did not follow their own policies of progressive discipline which is designed to correct and improve performance.

Management's failure to follow the policy that they endorse, "that people are the most important resource and that every reasonable consideration must be made . . . is only a policy on paper and is not acted upon by management."

The union requests by way of resolve the following actions:

A) The employee should be returned to work.
B) The employee should receive back pay for time lost.
C) The employee should receive contributions to his TSP fund that he did not receive while in termination status.

D) The employee should receive any differential pay that he could have earned.
E) Employee should receive annual leave and sick leave for the time he was in a non work status.
F) Employee should receive liquidated damages for the lost pay wages, social security benefits, health care and pension contributions that he was not paid.
G) Employee should have time he was discharged credited towards seniority, retirement, and promotion.
H) Should be made whole.
I) Any other appropriate relief as may be needed and requested at hearing.
J) Any other sanctions deemed necessary by the arbitrator.

On March 6, 2008, a hearing was held. During the hearing herein, the issue of whether or not the "Guidelines of Acceptability for Employment" (hereinafter the Guidelines) played a part in Rodriguez's termination. The Agency was directed to turn over the applicable portions by March 13, 2008. On April 14, 2008, the Union moved for an *in cameria* inspection, as the Agency refused to turn over the Guidelines. On April 17, 2008, an order was issued directing the Agency to produce the Guidelines for an *in cameria* inspection by April 25, 2008. The Agency was warned that an adverse inference would likely be drawn if the Guidelines were not produced. The Guidelines were not produced.

BACKGROUND

On August 9, 2004, Rodriguez, while working as a correctional officer of the McCrane Correctional Facility, was suspended for one day for not obtaining the necessary leave prior to taking a vacation. According to Rodriguez at the hearing herein, his immediate supervisor told him he would be approved Rodriguez then went back to work. However, when Rodriguez returned, he could not locate his supervisor, and he left it in his supervisor's box. Rodriguez than went on vacation. According to Rodriguez, the Captain apparently took the request and disapproved it, after Rodriguez had left for Puerto Rico. According to Rodriguez, when he returned, he accepted a one-day suspension, not wanting to get his immediate supervisor in trouble, and was later able to make up the day.

On March 20, 2005, Rodriguez signed a Pre-employment Interview Notice. That notice, submitted at the hearing herein, specified that "It is very important that you be truthful and honest in the interview" and "Failure to disclose facts of concealment of information sought is often more serious in the employment process than the disclosing of possible derogatory information."

On March 21, 2005, Rodriguez took part in a pre-employment interview for the job of Correctional Officer with the Federal Correctional Complex at Williamsburg, South Carolina. Rodriguez was asked "Has the applicant been counseled, warned, reprimanded or disciplined for absence, tardiness, or leave abuse?" to which Rodriquez answered "No." Rodriguez signed a statement certifying as follows:

> 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.** [Emphasis in original.]

In the month of September or October 2005, Rodriguez, during a discussion with his wife, who was also a correctional officer and who was going through the interview process, remembered receiving a one-day suspension. Rodriguez reported the suspension to a United States Investigative Service (hereinafter "USIS") background investigator and explained the inaccurate information.

On January 26, 2006, Rodriguez was interviewed by a USIS background investigator and he again explained the one day suspension. Sometime in June 2006, Security Specialist Therisa Blue learned of the inaccurate information and sent out interrogatories in November 2006.

On November 6, 2006, Rodriguez responded to a set of written interrogatories in which he explained, "During my initial interview I stated no to the question of ever being disciplined, not intentionally, but once I had my interview with [the] USIS investigator I remembered and advised my investigator of the disciplined actions in question."

On February 15, 2007, Rodriguez's transfer request to FCC Coleman was approved. Rodriguez moved to Florida, and, on April 15, 2007, reported to work.

On July 17, 2007, Rodriguez received a letter which reads as follows:

> In accordance with ARTICLE 7, Section j, of the Master Agreement, dated March 9, 1998 - March 8, 2001, this memorandum serves as notification to the Union that the following decision has been made regarding a bargaining unit employee:
>
> Charge: Providing Inaccurate Information During the Pre-Employment Process
>
> Proposal: Removal

On August 6, 2007, Rodriguez received a copy of his disciplinary packed and provided a written response.

On August 7, 2007, Rodriguez met with Warden Michael W. Garrett and explained what had happened. On September 24, 2007, Garrett sent a letter to Rodriguez discharging him. Rodriguez signed the letter, acknowledging he received it.

During the hearing herein, the Union presented evidence that both Rodriguez's wife, Senior Officer Samantha Carbone, and Senior Officer Joey Polk had forgotten information concerning their background and/or previous discipline but remained employed by the Agency.

Additionally, Disciplinary/Adverse Action Logs were submitted by the Union at the hearing herein, which established employees received various levels of discipline short of discharge for providing inaccurate or the false information.

By all accounts, Rodriguez is a good employee who had received "outstanding and exceeding" marks in 2007 and received an "extra mile" award.in 2006 for helping to translate during the two plus years he was a correctional officer.

POSITION OF THE AGENCY

The Agency contends that the discharge is supported by a preponderance of the evidence. The Agency argues that since Rodriguez chose to pursue the grievance through arbitration, as opposed to filing an appeal with the Merit System Probation Board (hereinafter the "MSPB") that the same burden applies. The Agency contends that the removal of Rodriguez is dictated by 5 U.S.C. § 7512 and § 7513. The Agency argues that it must prove as follows:

> (1) the employee committed the act of misconduct for which the employee was disciplined; (2) the discipline is for such cause as will promote the efficiency of the service (i.e. nexus), and (3) the assessed penalty was appropriate. *National Association of Government Employees, and Department of Veterans Affairs*, 40 FLRA 504, 512 (April 30, 1991).

The Master Agreement, Article 30, Sections a and c, are cited and read as follows:

> ARTICLE 30 - DISCIPLINARY AND ADVERSE ACTIONS
>
> Section a. The provisions of this article apply to disciplinary and adverse actions which will be taken only for just and sufficient cause and to promote the efficiency of the service, and nexus will apply.
>
> 1. In exceptional circumstances, the President, Council of Prison Locals, may immediately request that the appropriate Regional Director or designated official consider a stay of a removal or suspension in excess of fourteen (14) days until a decision is rendered by an arbitrator under Article 32, or an initial decision of the

Merit Systems Protection Board is issued. Such requests must be made prior to the effective date of the contested action. Stay of actions will not apply to:

a. probationary actions; or

b. actions taken under 5 USC 7513, where there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed.

* * * * *

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

The Agency argues that this was an offense so egregious as to warrant discharge.

The Agency points out that Rodriguez knew he had to have a clean background when he was hired and that problems in his background would result in his discharge.

It is the Agency's position that it properly disciplined Rodriguez for misconduct by providing inaccurate information. The Agency argues that the rule for providing accurate information exists; Rodriguez was aware of that rule; Rodriguez provided inaccurate information; therefore, the Agency's action was appropriate.

The Agency contends it did not treat Rodriguez disparately and that although the Union asserted disparate treatment, it failed to prove it. McGowan v. City of

Eufala, 472 F.3d 736 (2006) is cited by the Agency in support of its position that Carbone and Polk's situations were reviewed by different deciding officials from Rodriguez. The Agency argues that the Union must show that the charges and circumstances surrounding the charged behavior are substantially similar. The Agency also argues that the Union failed to prove the penalty was unreasonable, given the circumstances.

The Agency contends that the Douglas Factors were considered prior to the discipline, as set out in Douglas v. Veterans Administration, 5 M.S.P.B. 313 (1981). The Agency argues that Rodriguez's omission was done by intent and done for gain. It is the Agency's position that Garrett used sound management discretion.

The Agency argues that the penalty should be upheld and was in the interest of the efficiency of the service, was reasonable and beyond the bounds of the maximum reasonable penalty.

The Agency requests that the grievance be denied.

POSITION OF THE UNION

The Union argues that the Agency's position that Rodriguez intentionally misled and deceived them, coupled with the fact that, shortly after the pre-employment, he gave them the correct information is paradoxical. The Union also argues that the Agency waited an unreasonable amount of time to pursue Rodriguez's removal because the Agency became aware of the inaccurate information in June 2006 but failed to send out interrogatories until November 2006.

The Union argues that the Agency violated Rodriguez's due process rights because it failed to turn over the "Guidelines of Acceptability for Employment." The Union points out that references were made to the guidelines; in the Agency's opening statement at the hearing herein; in Captain Clinton Smith's letter, submitted as Joint Exhibit 9 at the hearing herein; Therisa Blue's memorandum submitted as Agency Exhibit 1 at the hearing herein; and the testimony of several witnesses at the hearing herein. It is the Union's position that this arbitrator should draw an adverse inference and find that the grievant was improperly removed from his position of Correctional Officer because the Agency failed to submit evidence that Mr. Rodriguez's conduct exceeded the "Guidelines of Acceptability for Employment."

The Union contends that the Agency violated Rodriguez's due process rights when it failed to impose discipline within a reasonable time after it learned of the inaccurate information as provided by Rodriguez. Several treatise, as well as Article 30, Section d, of the Master Agreement is cited, which reads as follows:

> Section 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.
>
> 1. When an investigation takes place on an employee's alleged misconduct, any disciplinary or adverse action arising from the investigation will not be proposed until the investigation has been completed and reviewed by the Chief Executive Officer or designee; and
>
> 2. employees who are the subject of an investigation where no disciplinary or adverse action will be proposed will be notified of this decision within seven (7) working days after the review of the investigation by the Chief Executive Officer or designee. This period of time may be adjusted to account for periods of leave.

The Union argues that the Agency waited two years, six months, and five days after his pre-employment interview to impose discipline. The Union contends that the Agency waited one year, three months and twenty-four days after Blue was advised, in June of 2006, of the inaccurate information. The Union argues that the Agency failed to present any valid reason for such a delay.

The Union contends that the Agency failed to meet its burden of proof, 5 C.F.R. § 1201.56 is cited by the Union which 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."

The Union goes on to argue that in order to sustain their burden of proof, the Agency must establish by a preponderance of the evidence as follows:

> (1) the misconduct charged, i.e., that Mr. Rodriguez provided inaccurate information; (2) the nexus, or connection, between the misconduct and removing Mr. Rodriguez 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.

The Union contends that the Agency did not prove by a preponderance of the evidence that Rodriguez intended to deceive the Agency. The Union argues that the Agency cannot simply allege false statements; it must prove them. Seigla v. Smithsonian Inst., 62 M.S.P.R. 55, 58-59 (1994), is cited by the Union, in addition to several other cases. It is the Union's position that if Rodriguez's true intentions were to deceive the Agency, he would not have voluntarily approached the investigator in September or October of 2005 and informed her of the inaccurate information.

The Union argues that the language difference and Rodriguez's lack of English may have played a part in the inaccurate statement. The Union points out that Warden Pugh, a warden at McRue, sent an email to Employee Service Administrator Becky Hale, which reads as follows:

> Becky, Mr. Rodriguez indicated that during an interview, he stated that he received a "suspension." Actually, he confused suspension with "administrative leave." He is a fine officer. I believe he has good integrity, and performs his job in a professional manner. While I do not like losing staff like him, I know that the BOP offers more career opportunities . . .

The Union contends that Rodriguez's removal was inappropriate and unreasonable when considering his outstanding employment record, length of service, and flawless disciplinary record. The Union points out that Rodriguez was never disciplined while he worked for the Agency.

The Union argues that the Agency acted in an unfair and inequitable manner when it discharged Rodriguez. Article 6, Section b(2), of the Master Agreement is cited by the Union and reads as follows:

> ARTICLE 6 - RIGHTS OF THE EMPLOYEE
>
> * * * * *
>
> Section b. The parties agree that there will be no more 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;

The Union contends it was unfair to have Rodriguez move to Florida without having informed him of the Agency's position concerning the inaccurate information.

The Union argues that it was clear, from the testimony at the hearing herein, that Garrett did not consider the Disciplinary Log, which listed employees with similar charges, as required by the Douglas factors.

The Union contends that the Agency acted in bad faith by refusing to turn over evidence. The Union requests attorney fees and that the Agency bear the costs of their arbitration. Additionally, the Union requests that Rodriguez be awarded back pay with interest; reinstatement of all seniority rights, and other emoluments in connection with his job.

DISCUSSION

The burden of proof necessary to meet the standard for just cause in this matter, a preponderance of the evidence, is not in dispute. Further, the fact that Rodriguez provided inaccurate information is not in dispute. What is in dispute is Rodriguez's inaccurate statement, whether such is sufficient to meet just cause for his termination, and whether the termination is fair and equitable.

The question becomes whether Rodriguez's inaccurate statement was based on intent or neglect. If he, in fact, attempted to intentionally deceive the Agency, as opposed to having neglected to tell the Agency about the one-day suspension, such a factor would obviously impact his credibility and would be a factor in determining an appropriate penalty.

The facts surrounding the suspension nor the fact that he was allowed to make up the time he was on suspension was disputed. Whether or not Rodriguez intentionally gave inaccurate information, it is beyond dispute that he contacted the Agency at least a year before the Agency approved his transfer request and explained the inaccurate information. The Agency's position must seemingly be that Rodriguez intentionally gave inaccurate information in order to gain employment with the Agency is contradicted by the

fact that, over a year after he rectified the situation, the Agency offered him employment.

In order to meet their burden of proof, the Agency must establish by a preponderance of the evidence that Rodriguez provided inaccurate information in bad faith. In National Association of Employees, and Department of Veterans Affairs, 40 FLRA 504, 512 (April 30, 1991) the Federal Labor Relations Authority (hereinafter "FLRA") held that the Agency must establish the following to meet its burden of proof:

> (1) the employee committed the act of misconduct for which the employee was disciplined; (2) the discipline is for "such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a); and (3) the assessed penalty is appropriate.

When alleging a falsification, the Agency must do more than simply make the allegation. In Seigla v. Smithsonian Inst., 62 M.S.P.R. 55, at 58 (April 14, 1994):

> In order to sustain a charge of falsification, an agency must prove by preponderant evidence that an employee knowingly supplied incorrect information with the specific intent to mislead or defraud the agency. See *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986) [86 FMSR 7005].

It is equally, if not more likely, that Rodriguez was confused about the status of his leave/suspension and the undisputed fact that he was allowed to make the time up.

Again, the incorrect information was voluntarily rectified by Rodriguez well before the Agency offered him a position. It cannot be found that he acted in bad faith. Intent cannot simply be imputed.

While there is a nexus between discipline for a false statement and the efficiency of correctional officer, such is not the case with an inaccurate statement that is later rectified before being caught by the Agency. Clearly, however, the Agency has a need, if not an obligation, to ensure their officers maintain a high level of integrity in light of the fact that they fill out reports and are often required to testify under oath against inmates.

The penalty assessed against Rodriguez is not appropriate in light of the fact that the Agency failed to establish any intent. The punishment Rodriguez received does not appear to be commensurate with an inaccurate statement that was rectified before the Agency made its decision to hire him. Moreover, the punishment of discharge for an inaccuracy in an application does not appear to be applied in an even-handed manner. Unrefuted evidence was submitted by the Union that employees, including Rodriguez's wife, had given inaccurate information but were not discharged from their employment. Other instances of inaccurate and even false statements in which the individual was not discharged were presented by the Union.[1]

By all accounts, Rodriguez is a very good employee. An adverse inference must be drawn by the Agency's failure to turn over the Guidelines of Acceptability for Employment." The Agency's witness made numerous references to these guidelines during the hearing herein, contending that Rodriguez fell outside the guidelines and was not suitable for employment. However, the Agency's refusal to turn over those guidelines rendered Rodriguez incapable of defending himself from such allegations.

Rodriguez did everything he could to correct the inaccurate statement well before the Agency employed him. Unfortunately, the Agency apparently sat on the information and offered him a position. It would appear that the Agency made a decision based on the guidelines which it has refused to produce seeking instead to rely on a corrected inaccurate statement. This inaccurate statement is insufficient just cause to discharge Rodriguez.

CONCLUSION

Rodriguez is to be immediately returned to employment with backpay. Rodriguez is to be placed in the same status he would have been in had he remained employed. All backpay is to be offset by any monies he received from employment following his discharge. The Union's request for attorney fees, and to have the entire cost of the arbitration borne by the Agency are denied. Jurisdiction is maintained in order to assist the parties in resolving the matter assuming such becomes necessary.

By my hand this 19th day of 2008,

John S. West

Endnote

1. The Agency cites McGowan v. City of Eufala, 472 F.3d 736 (2006), in which the Tenth Circuit, United States Court of Appeals dealt with an allegation of disparate treatment from a jailer who failed to monitor a prisoner on suicide watch and who compared herself to the booking officer. The Court found that, while they both reported to the same supervisor, their jobs, duties, or obligations as far as watching the inmate were different and that they could be treated differently. The court did review the criteria that should be used for allegations of disparate treatment; however, the case is not on point.