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April 25 2014

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Federal Bureau of Prisons)	
)	
Employer)	Arb. File No. 2136
)	
)	Grievant Kenneth Johnson
AND)	
)	Hearing Date December 11, 12, 2013
)	
Council of Prisons Locals (AFL-CIO))	FMCS No. 13-00784
AFGE, Local 915)	
Leavenworth, Kansas)	

Bill

Hearing 2 days		\$ 2600.00
Review, Consideration, writing 5 days		6500.00
Travel time		1300.00
Expenses		
Air Fare	\$ 295.80	
Hotel	132.41	
Parking	43.80	
Cab	31.75	
Food	88.44	592.20

\$ 10992.20*

*Payable by Union \$ 5496.10
*Payable by Employer \$ 5496.10

IN ARBITRATION

U.S. Department of Justice)	Grievant: Kenneth Johnson
Federal Bureau of Prisons)	
United States Penitentiary)	
Leavenworth, Kansas)	FMCS No. 13-00784
)	
AND)	File No. 2136
)	
Council of Prison Locals (AFL-CIO))	
AFGE, Local 919)	Hearing Date: December 11-12, 2013
United States Penitentiary)	
Leavenworth, Kansas)	

APPEARANCES

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Date of Award: April 25, 2014

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ISSUE

Was Grievant given a seven day suspension for just and sufficient cause? If not, what should be the remedy?

FACTS

Grievant was issued a seven day suspension for conduct which the Federal Bureau of Prisons (BOP) believed warranted discipline.

The first misconduct was misuse of a government credit card. The second misconduct that the BOP objected to was Grievant's alleged submission of a false resume for a different position.

Grievant had a government credit card that was issued to him to be used for travel purposes. He reported to his superiors that he had inadvertently charged a personal item in the amount of \$11.67. He stated that his personal credit card and his government credit card were very similar and he had made a mistake. He had no other similar instances of misuse. He

also stated that he had paid the charge. The BOP response was that it had procedures in place that would have disclosed this so that Grievant was only advising the BOP of what it would have discovered in any event.

The other complaint of the BOP was that Grievant had submitted a false resume' in seeking a different job. Grievant was a Sports Specialist at the United States Penitentiary, Leavenworth, Kansas. He desired to become a Drug Treatment Specialist in the psychology department at the Prison at Leavenworth. In March of 2012, he applied for a position as a Drug Treatment Specialist. Part of the application process was to submit a resume'. He did so. The resume' included the following statement:

I am currently volunteering my time to the Drug Treatment Program. For approximately 7 hrs. a week from 3/11 to 12/11. I participated in "Team" meetings with other Drug Treatment Specialists, I have participated in and conducted the Residential Treatment Program psychosocial interviews, and I have participated in the 60 day reviews of several inmates who are in the program. I have also been trained on the BOP method of developing substance abuse treatment plans for offenders or individuals in a drug treatment program, and the use of the psychology data system. Persons verifying experience: Stephanie Hamilton, DTS.

On receipt of this information, supervision expressed doubts that Grievant had the experience with psychosocial interviews that he claimed. Further, supervision had doubts that he had volunteered time in the Drug Treatment Program for 10 months, 7 hours of volunteer time a week.

An affidavit was obtained from Ms. Hamilton by supervision which did not support Grievant's statements. Grievant also gave supervision his affidavit which did correspond to his resume'.

Ms. Hamilton did not testify and no evidence was introduced as to why she was not produced as a witness or any explanation given that she may not have been available.

The BOP had as a witness Dr. Brenda Benson who became the Drug Treatment Program Coordinator in June 2011. Before that she had been a staff psychologist. She testified that had Grievant volunteered in her program for 7 hours a week, everyone would have known it. Dr. Benson stated she recalled Grievant observing on only two occasions. She stated he was definitely not there 7 hours a week. She later testified that Grievant may have attended several sessions at the drug treatment program at the satellite camp, but this was limited in scope and duration. This was testified to by Mr. Timothy Hubbert, a Drug Treatment Specialist at the satellite camp. He thought Grievant was there probably three times. Ms. Hamilton stated in her affidavit that she did not know of any instances that Grievant had volunteered in the Drug Treatment Program at the United States Prison at Leavenworth.

Drug treatment specialist Hubbert testified Grievant came out to a satellite camp about three times. He sat in on the groups. Another witness, Drug Treatment Specialist Dan Hansen, stated he never observed Grievant at any Team Meetings inside the main institution. There was no additional testimony about Grievant attending or participating in any additional sessions at the satellite camp.

The weekly treatment team logs, which show everyone present at a particular Team Meeting, did not show Grievant in attendance.

Dr. Brenda Benson explained it would have been inappropriate for anyone who is not a Treatment Team Member to attend a Team Meeting. Drug Treatment Specialist Hubbert similarly testified that Grievant never attended a Team Meeting.

Grievant stated that he participated in and conducted the Residential Drug Treatment Program psychosocial interviews. Human Resources Manager Michelle Cottingham testified that participating does not give the specialized experience required for a qualification determination. Participation is merely being present. The statement indicating he was conducting a meeting indicates performance.

Warden Maye stated that "conducted" means actually participating, such as interviewing inmates and signing off on the form that you actually conducted the interview. This is doing the work of the interview. Grievant would not have been considered qualified to do that.

On cross examination, Grievant admitted that he did not conduct the psychosocial interview and that the notes that he took were for his own benefit. He was trying to learn how to do such an interview, but he did not conduct one.

Dan Hansen, a Drug Treatment Specialist, testified that he never observed Grievant attending or conducting a psychosocial interview. It would not have been appropriate for a non-treatment staff member such as Grievant to conduct a psychosocial interview. Mr. Hansen further testified that he had never seen anyone who was not a member of the treatment team involved as an observer, participant or leader in a psychosocial interview.

The same testimony was given by Timothy Hubbert, also a Drug Treatment Specialist.

POSITION OF THE PARTIES

POSITION OF THE AGENCY FEDERAL BUREAU OF PRISONS

The position of the BOP is that as a general proposition its investigation of Grievant's misconduct was fair and objective. It interviewed all parties who had any knowledge of the misconduct of Grievant, gave everyone an opportunity to give information. It also gave the Union the right to have a representative present during Grievant's interview.

In general, the investigation was fair and objective.

As to the misuse of the government credit card, there is no question about that, as Grievant admitted that he did not use the card in a manner that was permissible.

He sought consideration for his inappropriate use by claiming that he disclosed it to the Agency. While this is true, Agency procedures would have uncovered the misuse of the credit card in any event. So Grievant simply disclosed what would have been found out in any event.

As to his resume', the BOP states that it was clearly misleading. Grievant stated in his resume' that he "participated in and conducted the Residential Drug Treatment Program (RDTP) psychosocial interviews." However, it was clear from Human Resource Manager Michelle Cottingham that Grievant at best was merely attending or present. He did not conduct the interview. He was not capable of conducting such an interview.

Warden Maye testified that the term "conducting" means someone was actually doing the work and signed forms that he had actually led the work. This would not have been possible by Grievant.

Ms. Stephanie Hamilton indicated that Grievant may have observed her conducting two RDTP psychosocial interviews, but he never conducted them by himself. Again, this shows the distinction between observing and conducting, which distinction is significant.

That Grievant did not conduct a psychosocial interview was supported by every witness who testified on the subject. For instance, Dr. Brenda Benson, the Drug Treatment Program Coordinator, at USP Leavenworth, testified that while Grievant may have observed a psychosocial interview, he could not have conducted one. She explained that he would have had to have written down all of the information, asked all the questions, and typed up a document in the psychological data system. He could not have done this.

Grievant stated that he was at a psychosocial interview when Ms. Hamilton asked questions on a form. Grievant said that he participated and took notes, but he admitted that the notes were for his own use and not to be used by the BOP. Dan Hansen and Timothy Hubbert, both DTS, testified similarly that Grievant never attended or conducted a psychosocial interview.

While Grievant may have had inappropriately been allowed to attend a psychosocial interview, there is no possibility that a non-treatment staff member like Grievant could have conducted an interview. He did not write down the information provided by the inmate. Did not ask questions. Did not complete the official documents and did not enter any information into the psychological data system.

Grievant indicated he participated in the "60 day reviews of several inmates who were in the program." No witness supported that statement. DTS Dan Hansen stated he never saw Grievant participating in a 60 day review.

Even Stephanie Hamilton stated in her sworn statement that Grievant never conducted a 60 day progress interview on inmates.

Dr. Benson stated her concerns with having an outside non-treatment person at a psychosocial interview because it would change the dynamics of the interview.

Grievant acknowledged that he never took part in any formal training program with respect to the Drug Treatment Program, though he may have discussed the program with Ms. Hamilton.

Grievant introduced in evidence a BOP training record, but it should be noted that nothing in this training record indicated he received any of the training necessary for psychosocial interviewing.

The BOP points out that Grievant indicated that Stephanie Hamilton could verify his experience. While Grievant called several Drug Treatment Specialists to testify to that, he never called the one person, "Stephanie Hamilton," who could verify his experience. The result was all that was available from Ms. Hamilton was a sworn affidavit obtained during the course of the investigation. In this affidavit, Ms. Hamilton failed to verify any of the matters discussed in Grievant's resume'. She even went so far as to affirmatively deny much of his experience.

The BOP made the following statement, page 17 of its brief, "Ms. Hamilton's absence from the hearing as a witness for the Union was striking."

It is clear from the evidence that the Grievant submitted an inaccurate and misleading resume'. The seven day suspension was proper. Warden Maye considered all the relevant factors that were needed to support discipline and ruled accordingly. As a result, the suspension of Grievant for seven days should be upheld.

In one instance of a complaint of inaccurate information, an eight day suspension was reduced to a letter of reprimand.

In another instance of inaccurate information submitted during an investigation, a proposed one day suspension was reduced also to a letter of reprimand.

Here, the letter and inaccurate information charge was ultimately set at a seven day suspension. Hardly consistent with other instances.

In short, the Union contends that the Agency did not prove its charge that Grievant violated the Collective Bargaining Agreement. The Union requests the Arbitrator set aside the Agency's disciplinary action and make the employee whole.

POSITION OF THE ARBITRATOR

I will first deal with the question of the misuse of the government credit card.

I think it clear that this was an inadvertent misuse of the credit card. It was for a minor amount and occurred only once. Standing alone, a reasonable discipline would have been an oral reprimand to be more careful.

Grievant had even notified the BOP of his misuse. The BOP dismisses this by saying it would have discovered his misuse in any event. I think this ignores the fact that Grievant was not relying on any procedures to discover his actions. It showed his frame of mind concerning the credit card. I think his disclosure was much more significant than the BOP gave him credit.

The really serious charge is the one concerning the resume'.

The Union has a number of complaints concerning the BOP handling of the investigation of the charge of an inaccurate resume'. The first charge is that the investigator in questioning

the Grievant did so in a perfunctory manner. The investigator has to draw a fine line between an investigation that is too aggressive and indicated bias and one that was not aggressive enough. I think if he had erred at all, it would be in the less aggressive questioning. Grievant had a right to express himself and could have supplied any details which he felt the investigator was not getting. On the whole, I think that complaint is not sufficient to invalidate the investigation.

The Union's next complaint, was with the questioning of Stephanie Hamilton. The Union argued that in questioning her the inference was if she did not answer as the investigator thought she should, she herself might be subject to some form of discipline. I do not think that the investigator's questions from what evidence I have was that blatantly coercive. The nature of questioning is to some degree always coercive. I do not think that the coercion here was sufficient to invalidate the investigation.

Another complaint of the Union was that in the Union's estimation, the BOP received a resume' of some 8 or 9 pages and complained on one of maybe two sentences in the whole document. In short, the Union was complaining that the BOP was being petty and nitpicking. The claim that the BOP objected to was that Grievant had *conducted* (emphasis added) a psychosocial interview. This is a very serious claim. To question it is far from petty. It claims an expertise and experience that Grievant did not have. He in effect admitted that he did not conduct the psychosocial interview.

A critical witness was Stephanie Hamilton. Both sides claimed her as supportive of their position. Grievant claimed her support by verbal testimony and the BOP, by affidavit. Curiously, neither called her as a witness.

POSITION OF THE UNION

The Union's first argument is that the BOP investigation was not conducted fairly and objectively. The investigator in questioning Ms. Hamilton kept implying that if she had allowed Grievant to participate and conduct psychosocial interview, this would have been improper and possibly subject her to some penalty.

Additionally, it is clear, that the investigator's questioning of Mr. Johnson was inadequate. He did not do much more than superficial questioning. In general, his questioning was nothing but superficial.

The only material witness testifying on behalf of the BOP was Ms. Benson. Her testimony was contradicted by two witnesses that the Grievant/Union produced. They both testified that they were informed by Ms. Benson that Grievant would be volunteering his time and shadowing Ms. Hamilton to learn about the Drug Treatment Specialist position.

The Agency never called as a witness Ms. Hamilton. It could have.

Since the Agency had the burden of proof, it should have called Ms. Hamilton if it felt that she could deny Grievant's assertions concerning her involvement. Grievant testified that Ms. Hamilton even critiqued his resume' before he submitted it. This was never refuted.

Warden Maye stated that Grievant's resume' was significantly overstated, and yet he complained of only one sentence in a resume' nine pages in length recounting extensive experience and education. This single sentence hardly supports the warden's claim.

The Union also raised the question that the degree of discipline was not administered reasonably. Article 30 states that the discipline is to be progressive and corrective. The Union stated that comparing this discipline to others calls into question this discipline.

The BOP criticized the Union/Grievant for not doing so. However, the burden of proof to support a disciplinary action lies with the employer. The Union/Grievant has no obligation to do anything but sit back and wait for the employer, with the burden of proof, to prove its case. The obligation to produce Stephanie Hamilton therefore resided with the BOP. It bore the risk of failure to produce her, or at least explain her absence. The Union/Grievant was under no obligation to do either.

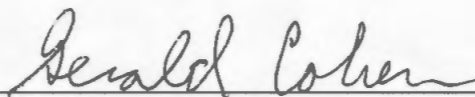
After review and consideration of the evidence and other testimony, it is my conclusion that the BOP produced sufficient evidence to sustain its position. I therefore find that the grievance on its merits should be denied.

However, the Union/Grievant raised another point which must be considered. Though it did not label its position with the usual term, it claimed disparate treatment. The Union/Grievant pointed out that on two separate occasions, the question of providing inaccurate information to the BOP by an officer arose. In each instance, a lesser penalty was imposed than here. This, the Union/Grievant claimed, was disparate treatment. I believe the Union/Grievant to be correct.

The discipline will be reduced to a one day suspension and a letter of reprimand. The Grievant is to be made whole for time lost.

The costs are assessed equally.

April 25, 2014


Gerald Cohen, Arbitrator